

<b>Sentencing Council meeting:</b>	<b>18 December 2020</b>
<b>Paper number:</b>	<b>SC(20)DEC06 – “What next for the Sentencing Council?” consultation</b>
<b>Lead officials:</b>	<b>OSC Vision group</b>

## **ISSUE**

1.1 The key issues to have emerged from the “What Next for The Sentencing Council?” consultation responses in the area of guideline development and revision.

## **RECOMMENDATION**

2.1 That the Council considers the issues raised and provides indicative responses to the questions posed; we will then review responses to all questions at the end of the process in order to balance priorities against resources.

## **CONSIDERATION**

3.1 As outlined in the November meeting, 36 responses were received from a range of individuals and organisations. The consultation asked 23 questions across six broad areas, one of which related to developing and revising sentencing guidelines.

3.2 Although in some areas it is more straightforward to feedback responses in relation to general themes, for this area, respondees did tend to answer direct questions. This paper therefore largely sets out responses question by question.

3.3 As also outlined at the previous Council meeting, final decisions can be made only once the Council has discussed all consultation responses, across all areas. As noted in the consultation document, the Council’s overall resources are small and so a decision to take forward one area may impact on progress in another. It is also important that any future workplan does not make any concrete public commitments in such a way as to limit our flexibility to respond to any wider or more urgent issues (for example any legislative changes that impact on guidelines and the Council’s work, such as changes necessitated by the Sentencing White Paper).

3.4 Therefore, whilst it would be helpful to have indicative views on questions as we progress through the different areas, we will need to consider these in the round, along with the Council's views on the other topics on which we consulted, at the final stage (currently scheduled for our March and April meetings).

### **Consultation responses**

#### **The criteria for prioritising development of guidelines and the policy for making changes to guidelines**

3.5 Two questions were asked in this section. The first related to respondents' views on suggested criteria for prioritising development or review of guidelines.

**What are your views on the suggested criteria for prioritising the development or review of guidelines? Please suggest any additional criteria that you think should be considered or criteria you think should be removed.**

3.6 The suggested criteria were as follows:

1. The Lord Chancellor or the Court of Appeal formally requests the review of sentencing for a particular offence, category of offence or category of offender, and the production or revision of a guideline.
2. A substantial body of interested parties request a guideline to be issued or revised for a particular area of sentencing and there is evidence to suggest that a guideline would have a significant impact on sentencing.
3. Existing guideline(s) have become significantly out of date, or new guidelines may be required because of new legislation, amendments to legislation or other external factors.
4. Evidence indicates that existing guideline(s) have had a problematic, unintended impact on sentencing severity.
5. Evidence indicates that there is currently inconsistency in the sentencing of an offence or group of offences

3.7 Fifteen respondents provided comments in relation to this question. Around half of those who responded felt the criteria overall were generally acceptable and appropriate.

However, there were also various comments (including from those who were generally in support of the criteria) about how they could be refined or changed.

3.8 Regarding the first 3 criteria, there were comments about the basis on which calls for new guidelines might be made, as well as what constituted a “substantial body of interested parties”.

*The inclusion of the attorney general [sic] or appeal court as a source of information ignores the limited number of cases they will actually consider and the tendency to be the most serious and which will affect the least proportion of the general public. Similarly, the second criteria then uses ‘substantial body of interested parties’ as a defining point, but what does that mean? Who will decide what constitutes substantial? As the criteria stands, it could be the case that one case from the appeal court attracts more attention than a number of lower but reoccurring cases that affects considerably more people. I would remove the first two criteria and add to the remaining three criteria ‘where concerns are raised by interested parties’ - **Greater Manchester Magistrates***

*[Some] criteria suggested...should not be used because they are open to bias or are open to subjective interpretation...(i.e. The Lord Chancellor or the Court of Appeal formally requests the review of sentencing for a particular offence, category of offence or category of offender, and the production or revision of a guideline; a substantial body of interested parties request a guideline to be issued or revised for a particular area of sentencing and there is evidence to suggest that a guideline would have a significant impact on sentencing; existing guideline(s) have become significantly out of date, or new guidelines may be required because of new legislation, amendments to legislation or other external factors) - **Mandeep Dhani, academic***

*The second point could be rephrased for clarity, as it is not clear whether it references a body that represents a substantial group of interested parties or a substantial number of different groups. It is important not to set this criteria as an unnecessarily high bar. For example, if a significant number of magistrates raise concerns about a particular guideline, this would be a clear indication that the Council should consider reviewing that guideline - **Magistrates Association***

What does a "substantial body" in this context mean? This needs clarification. Could it be one or a small group of organisations that for example represent many thousands, tens or hundreds of thousands or millions of members? - **Member of the public**

3.9 The Insolvency Service, whilst agreeing with the criteria, suggested adding the wording '*a body with particular expertise in or a remit to address the specific category of offending requests the development or review of guidelines, supported by evidence of inconsistency, or on the basis of other good reason to develop or review the guidelines*'. Professor Ashworth also pointed out that if the Council engages more with BAME groups, this may result in more requests from 'interested parties' for the revision of a guideline.

3.10 The Prison Reform Trust went further, suggesting that criterion 2 was altogether insufficient and could have unintended consequences: "*The inclusion of this criteria as it stands, for instance, could risk the Council's workplan being hijacked by populist interests, if a tabloid newspaper got behind a campaign to change sentencing guidelines in a particular area*".

3.11 They recommended a more wholesale revision/ expansion of this criterion to: *A substantial body of interested parties request a guideline to be issued or revised for a particular area of sentencing, and there is evidence to suggest that this would lead to a significant improvement in sentencing in this area, which:*

- *helps to deliver on the statutory purposes of sentencing, while retaining an appropriate balance between those purposes; and/or*
- *helps to improve outcomes, including addressing any disproportionate outcomes, for people with protected characteristics.*

3.12 An expansion along the line of their last bullet point above would align with the wider work the Council is committed to undertaking in the area of equality and diversity and that was discussed at the November Council meeting.

3.13 On the fourth criterion - evidence indicates that existing guideline(s) have had a problematic, unintended impact on sentencing severity – several people addressed this. Diverse Cymru said it was important that impacts on sentence severity and consistency specifically included identifying and addressing existing and potential inequalities.

3.14 The Prison Reform Trust (PRT) stated that they welcomed this criterion, citing assault and burglary as a good example of revising guidelines when unintended impacts

have been found. However, they felt that the criterion needed to be refined in order for it to be a more effective inclusion in considerations. This would include reconsidering the definition of a “problematic, unintended impact on sentence severity” - in their opinion:

- increases in severity may be problematic even if intended;
- the definition of “problematic” should include concerns about proportionality and impact on available resources and be broadened to include the wording “problematic and/or unintended”; and,
- there should be clarification around what is meant by “unintended”.

3.15 This links for PRT around what we regard as a measure of “success” and the way in which we interpret our evaluation findings. Citing the burglary evaluation, they flag that this found an upward trend in sentence severity prior to introduction of the guideline and consequently concluded that the continuing increase after introduction of the guidance was in line with anticipated results.

3.16 However, in support of a point made by Professor Sir Anthony Bottoms in his review of the Council<sup>1</sup>, they feel that any pre-guideline increases in sentencing severity that continue after implementation of a guideline should be regarded as an unanticipated outcome. Transform Justice raised a similar point: that guidelines should be urgently reviewed if there is an indication that they have led to an unanticipated increase in the severity of sentences – including where they have failed to stabilise a preceding upward trend.

3.17 Transform Justice also commented that guidelines should be adjusted in response to various changes that may occur (the sense being that some changes may lead to a more adverse experience of custody than originally anticipated when the sentence was handed down). They cited amongst these as changes in the law which increase the proportion of a sentence served in custody, when the overall punitive weight of a sentence increases (e.g. when mandatory post release supervision was introduced for sentences under 12 months), and when issues such as Covid-19 may lead to more overcrowding in prisons.

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<sup>1</sup> The Prison Reform Trust: “As Anthony Bottoms highlights, however, “This judgement is open to question. It can be argued, to the contrary, that the purpose of a guideline is to set sentencing levels, and if there is a pre-existing upward trend for the particular offence, and the guideline recommends (broadly) the existing sentencing levels, then the intention of the guideline is to stabilise the upward trend. Accordingly, it is recommended that when conducting impact assessments, if there is a pre-existing upward trend and sentence severity continues to rise after the implementation of a guideline, the Council should in future treat this as an unanticipated, and not an anticipated, increase in the sentence level.”

3.18 More generally, Mandeep Dhimi from Middlesex University felt that the main criteria on which the Council chooses to develop or revise a guideline should be empirical evidence – not only in relation to the criteria already included, but also in relation to the reasons for departures from guidelines, evidence on the most effective format for guidelines, and ‘what works’ in terms of achieving the aims of sentencing. Another academic – Professor Nicky Padfield – felt that guidelines for more common and more serious offences should probably be prioritised over others.

3.19 Some of these issues link to other areas that the Council is considering more broadly. For example, at the February meeting we plan to discuss the way in which our evaluation of impacts may be enhanced and the responses in relation to comments on effectiveness of sentencing issues (which may include what the Council “intends” to achieve with its guidelines) will be covered in January. These further discussions will need to consider the types of issues raised by PRT and Transform Justice. The Council has already discussed the need to develop our work in the area of groups with protected characteristics, something raised by Diverse Cymru.

3.20 For this reason, we suggest that the Council commits to reviewing the criteria on which guidelines are selected for development and revision, but to do this once all areas of its work have been considered as part of vision discussions.

***Question 1: Does the Council agree that the criteria on which guidelines should be developed and/or revised should be reconsidered? Does the Council agree to consider this separately after all vision discussions have concluded?***

**The policy for making minor changes to guidelines**

3.21 Question 9 of the consultation asked about the process of making more minor changes to guidelines.

**Should the Council expand the policy for making changes to existing guidelines (short of a full revision)? Please suggest what situations should be covered by such a policy**

3.22 The Council's [policy](#) for making limited modifications to guidelines is published on the website and covers:

- clarifications or corrections to substantive errors or omissions;
- amendments made to reflect changes in legislation; and,
- updates to information or terminology in a guideline.

3.23 Depending on the scale and nature of the changes, the policy sets out whether the Council will consult on these changes. Examples of more substantive changes in the past include the addition of references to the Equal Treatment Bench Book in all guidelines (consulted on as part of the expanded explanations), updates to reflect the introduction of the Sentencing Code (not consulted on), and miscellaneous changes to the MCSG (consulted on).

3.24 The consultation asked whether the current policy could be extended further, in particular to cover situations where interested parties make a case to improve an existing guideline short of a full revision. Only a small number of respondents submitted an answer to this question. Of those that did, there was a mixed reaction to the idea of expanding the policy for making changes to existing guidelines.

3.25 Those in support felt this could be an efficient way of making changes: for example, Diverse Cymru felt that such an approach could address identified inequalities more quickly and Avon and Somerset Bench said that such changes would be useful in circumstances where sentencers put forward ideas to help improve the usability of a guideline.

3.26 The Sentencing Academy also strongly supported the proposal as amendments could be easily and efficiently incorporated into online guidance and highlighted for sentencers. However, they said it would be important that such rapid review is limited to matters on which the Council has concluded there is unlikely to be a wide array of views.

3.27 Others had wider concerns about expansion of the policy. The Magistrates Association, whilst welcoming the flexibility of the current situation, expressed concern about an expansion of this beyond “small non-substantive changes”. They said the full public consultation process is an important part of the way the Council works: it links to public confidence in the legitimacy of the guidelines and ensures all stakeholder views can be considered.

3.28 The PRT were also concerned about any loosening of the criteria and the risk that substantive changes to guidelines could be made based on the views of a particular interested party without going through the formal development process (that includes assessment of resource implications and consultation). If the Council did choose to loosen the criteria, it was felt that there would need to be *“clear criteria to judge the merits of each case, including criteria for what types of changes would and wouldn’t be permitted as part of a more limited review....any form of limited review should still include a [resource] assessment and a process of consultation”*.

3.29 This was also a concern from Greater Manchester Magistrates who reiterated its point made in relation to the earlier question around the difference between acting on an issue raised by Ministers or the Court of Appeal versus those raised via magistrates with experience of *“a more repetitive problem”*. They felt that it *“is not necessarily the case that the policy should be expanded in scope, but more about what level of concern will trigger the response and at what point will that be deemed ‘substantial’?”*.

3.30 The Justices’ Clerks’ Society gave qualified support to the idea, saying that they agreed there should be a policy for making changes to existing guidelines which fall short of a full revision. However, they believed that this should be restricted to where there has been an acknowledged difficulty with an aspect of a guideline and an interested party makes a case to improve an existing guideline.

3.31 Finally, two respondents (one magistrate and one academic) made the point that the issue did not warrant further attention.

3.32 Given that it is already implicit in the current policy that changes could be made on the basis of information that is raised by external parties (for example if an error or omission was flagged), a more explicit reference may not in practice change matters. However, it would need to be clear that the policy is limited to more minor changes and that any changes made may be subject to consultation; this may necessitate a small review of the current wording of the policy to ensure this messaging is as clear and explicit as possible.

3.33 Anything more substantive – even if short of revision of a full guideline/ suite of guidelines – might be better considered as part of the criteria for developing/revising guidelines discussed above (the digitisation of the guidelines making it much easier now to make such changes). These criteria already contain references to including calls from interested parties (albeit this part may be amended).



3.34 This means that the changes envisaged by Diverse Cymru (updates as a result of identified inequalities) may need to be considered as part of the wider criteria. It would, however, mean that the concerns of bodies such as the PRT would be unfounded: by dealing with more substantive changes through the alternative route, this would ensure that these were accompanied with a resource assessment and consultation.

***Question 2: Does the Council agree to include more explicit reference to calls from interested parties in the policy for making more minor changes to guidelines and to review the current wording of the policy to ensure that it is clear that these may be subject to public consultation?***

### **Guideline areas to prioritise**

3.35 The consultation asked two questions about which offence specific and overarching guidelines the Council should develop or revise. This supplements previous suggestions raised in meetings with Council members and several stakeholders prior to issuing the consultation.<sup>2</sup>

**Is there a guideline for a particular offence or set of offences that the Council should develop or revise as a priority? Please give reasons.**

**Is there a guideline for a particular overarching issue that the Council should prioritise? Please give reasons and explain how best you think this could be addressed.**

### ***Suggestions for new offence specific guidelines***

3.36 The table below shows the responses on this and indicates that there was no real consensus regarding which new offence specific guidelines the Council should develop. The rationale for suggestions also varied: some people felt a guideline was needed because an offence was common, others because an offence was uncommon (and thus unfamiliar to sentencers), whilst others were clearly making suggestions specific to their particular area of interest/ expertise.

3.37 The table indicates that several respondents flagged areas for development that the Council has already issued – either definitively or in consultation form – including rape and

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<sup>2</sup> We conducted discussions with individual Council members, as well as with several stakeholders in 2019.

sexual assault, assault on emergency workers and modern slavery. Guidelines on causing death by dangerous driving and drug driving are due to start early in 2021. See Annex A for information on the Council's current guideline workplan.

3.38 The remaining areas have previously been discussed by the Council and in 2018 were included on a long list of areas for future consideration. Some areas (e.g. blackmail and wildlife offences had also been raised in the early vision discussions prior to the consultation exercise). See Annex B for those areas flagged for potential future consideration in 2018.

	<b>Offence- specific guideline suggestions</b>	<b>Respondent/s</b>
<b>Guidelines already underway/ issued</b>	Assaults on emergency workers <sup>3</sup>	Three magistrates and one member of the public
	Modern slavery <sup>4</sup>	Dr Carly Lightowlers
	Rape and sexual assault	Not stated
	Disclosing private sexual images	Magistrates Association
<b>Guidelines due to start imminently</b>	Causing death by dangerous driving	Professor Andrew Ashworth
	Drug driving	HMCTS
<b>Guidelines discussed and listed for future consideration</b>	Kidnapping/ false imprisonment	Member of the public
	Blackmail	Member of the public
	Forgery/ counterfeiting	Member of the public
	Prison offences	Member of the public
	Wildlife offences	Member of the public
	Data protection offences	Information Commissioners Office
	Hacking of information	Magistrates Association

3.39 The next set of suggestions cover those areas that have not previously been considered by the Council. As can be seen, all suggestions were raised by one person/ organisation only.

<b>Further offence specific guideline suggestions</b>	<b>Respondent</b>
Determining the minimum sentence for murder	Sentencing Academy
Failing to keep/preserve books and misconduct in the course of winding up; restrictions on re-use of company name	Insolvency Service

<sup>3</sup> One respondent also felt there was an overlap between assaults and emergency workers and possession of a bladed articles/ offensive weapon which can cause confusion. No further information was given however to clarify precisely what this was referring to.

<sup>4</sup> A magistrate also raised a very specific aspect that could potentially be covered in guidelines: "*immigrant workers working as slaves can often be involved in criminality as part of the control being exercised yet there is no reference to either of these in any guideline and the guidelines should highlight and promote thought on these issues*".

Offences relating to failing to provide services for guide dog users	Magistrate
New sexual offences (e.g. 'sexting' and 'upskirting')	Magistrates Association

3.40 The Sentencing Academy felt that a guideline for the minimum sentence for murder was consistent with the guideline that has already been issued on manslaughter and that the structure of Schedule 21 (containing categories based on seriousness and aggravating and mitigating factors) could easily be adapted to a Council guideline. The need for such a guideline was also raised by a previous Council member who regarded Schedule 21 as not 'workable'. The Academy did acknowledge that difficulties would exist with the creating of this type of guideline, but felt that it was still within the Council's remit to produce one:

*Whilst we appreciate that this perhaps presents some difficulty given the extent of Parliament's intervention into this area of sentencing, there are a large number of steps that sentencing judges must go through when determining the minimum term for murder once the appropriate Schedule 21 starting point has been identified and it is with these subsequent steps that further guidance might assist. It is to be noted that Schedule 21 itself states that 'Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order' and therefore significant discretion is left to sentencing judges to weigh the non-starting point aggravating and mitigating factors. Ensuring a consistent approach to these subsequent steps falls within the SC's remit – **Sentencing Academy***

3.41 The Insolvency Service's suggestion was flagging a specific area where they felt more help was needed: whilst acknowledging the value of the Fraud guideline and General guideline, they felt that there were offences for which more help could be provided.

*The first set of offences...is failing to keep or preserve the books and records of a company...These offences are not analogous to any other offences for which there is a guideline and can properly be described as "niche" for the purposes of sentencing. It is our experience that sentencers ask to be directed to any guidelines that may exist, and that there is very little either in the way of guidance or case law to help them. It would be of great assistance for sentencing guidelines to be published in relation to these offences - **Insolvency Service***

3.42 For similar reasons they called for a guideline on restriction on the re-use of company names. The Magistrates' Association also felt the Fraud guideline should be updated more

in the area of online fraud (although they did not specify in what way the Fraud guidelines were inadequate for dealing with sentencing online fraud).

3.43 A magistrate also commented on offences relating to failing to provide services for guide dog users. It is not clear what, if any, criminal offences are relevant to this issue.

*Offences against guide dogs. Magistrates are making appalling decisions in relation to how taxi drivers and others behave towards guide dogs and owners to such an extent that many local authorities fail to take cases to court as it is a foregone conclusion that nothing will happen to the accused and no true punishment will be given because the concept of how a blind person is treated is so alien to the magistrates they cannot comprehend the fear, distress and alarm caused to such a blind person. Having little or no understanding of disability and equality they make bad decision - **Magistrate***

3.44 Finally, the Magistrates Association suggested guidelines for new sexual offences, for example 'sexting' and 'upskirting'. 'Sexting' is not an offence as such, but the Council is currently developing a guideline for sexual communication with a child.

### **Overarching guidelines**

3.45 In terms of overarching guidelines, there was much more consensus around this and a relatively large amount of comments<sup>5</sup>. As already discussed at the November Council meeting, the most frequently called for guideline/ guidance (highlighted in five submissions) related to **sentencing female offenders**, something that had also been raised several times in the early meetings on the vision. Those who raised it as part of the consultation noted the evidence on sentencing outcomes for this group and some of the specific issues they may face during periods of imprisonment (which linked for some to effectiveness of sentencing, to be discussed at a later meeting). Several felt strongly enough to outline these issues in some detail.

3.46 Some also suggested there would be value in producing a guideline on **sentencing young adults** and/ or further guidance on the issue of age and maturity.

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<sup>5</sup> Two respondents did, however, criticise overarching principles guidelines. One member of the public felt this work should not be prioritised as she had never seen them referenced in court. A magistrate said that they are the weakest of all the guidelines and in his experience, rarely used.

*Proactively explore improvements to sentencing of women offenders. It is already well established that prison has especially poor outcomes for women....as they are often the primary carers of children, their imprisonment has an exceptionally harmful impact on families...It must surely be timely for the Sentencing Council to undertake further analysis of options such as the greater use of women's centres, to tackle complex needs and support rehabilitation - **Catholic Church***

*As part of the wholesale review to prevent disparity and alongside addressing issues of racial disparity, the Sentencing Council should prioritise how it can ensure a distinct approach is taken at sentence to young adults and to women. Whilst the Howard League welcomes the expanded explanation of 'age and/or maturity' it does not go far enough to ensure young adults are not discriminated against at sentence. The arguments for a distinct approach to women at sentence are overwhelming - **Howard League***

*The Council should produce guidelines on the distinctive approach to the sentencing of women, young adults, and older offenders. In respect of women, Lord Phillips (who chaired the Sentencing Guidelines Council) has made it clear that he wished it had prepared a comprehensive set of gender specific guidelines. The current chair has said that "our guidelines are drafted in a way which is intended to be neutral as to the sex and ethnicity of an offender". This seems at odds with the position taken by the Council in 2010 when it considered its equalities obligations and agreed that cultural factors need to be considered in the development of guidelines. Transform Justice agrees with the Council's 2010 position – **Transform Justice***

*PRT is a member of the Transition to Adulthood (T2A) Alliance and shares its view that there should be a separate overarching guideline for sentencing young adults up to age of 25. Evidence suggests that the 20 to 25-year-old age group are most likely to desist from offending. Therefore, developing a guideline in this area would go some way to meeting Anthony Bottoms recommendation to more closely match guidelines to the process of desistance - **Prison Reform Trust***

3.47 The need for a guideline for female offenders (and/or sole or primary carers) and young adults has already been noted by the Council and were included as longer-term considerations in a paper presented to the Council in November 2018. Information on age and/or lack of maturity has now been provided as part of the expanded explanations (these have yet to be evaluated). The Council discussed the need to develop guidelines on

sentencing female offenders and young adults at the November meeting and agreed in principle that these should be future considerations, subject to other commitments that emerge from the consultation.

3.48 Two respondents – Transform Justice and the Prison Reform Trust –felt there should be **guidance on the purposes of sentencing**. Transform Justice pointed to the General guideline which says that courts need to consider which of the five statutory purposes of sentencing it is seeking to achieve through sentence. They flag that in the case of more than one being relevant, there is no guidance about how courts should go about selecting the purpose for a particular case.

3.49 These comments reflect one of the recommendations made as part of the Council’s independent review conducted by Professor Sir Anthony Bottoms - that the Council should consider whether a guideline or less formal guidance should be developed on s142(1) of the Criminal Justice Act 2003 (this also links to issues of effectiveness in sentencing, to be discussed in a later Council meeting).

3.50 Two respondents also felt that the **totality guideline** should be revisited. The Sentencing Academy cited the fact that a number of academics have criticised this guideline for providing insufficient/ minimal guidance for courts and Professor Andrew Ashworth stated that:

*it is arguable that simply to state that the total sentence should be ‘just and proportionate’ does not amount to a guideline on totality, since it gives no clue as to the process by which the court should find its way to a total sentence that meets this test. Many cases (in the Crown Court, probably the majority) involve multiple offences, thus requiring the court to deal with the question of totality. This, in turn, has a considerable effect on the overall sentence – notably, in the Crown Court, the length of prison sentences. Assessing the total sentence is a vital issue, both for the offender and for the use of imprisonment, and the Council ought to return to this topic*

3.51 Other suggestions for overarching guidelines/ guidance were raised by just one respondent each:

- **Sole and primary carers:** The Prison Reform Trust felt there was a need for clear guidance to the court at the outset regarding its duty to investigate caring responsibilities of defendants and to take these into account in sentencing decisions.

- Sentencing procedure and the standard of proof for relevant sentencing factors:** The Sentencing Academy cited an article in the Criminal Law Review by Martin Wasik and Andrew Ashworth that highlighted the need for a guideline on sentencing procedure and practice: *“When referring to an offence specific guideline, a sentencing judge will be making a number of decisions at every step of the sentencing process that will ultimately determine the final sentence. It is conceivable that in some cases these decisions may have as much influence over the sentence as a decision by a jury to convict a defendant of a lesser or more serious offence. The case law on this area is vast and includes decisions dating back many decades. This is an area which would benefit from SC guidance”*.
- Guidance on Victim Personal Statements:** The Sentencing Academy raised this as an area where more guidance was needed for sentencers who are less experienced in sentencing: *“there may be occasions when the VPS suggests that a particular disposal such as immediate imprisonment would inflict undue hardship for the victim. If this occurs, the VPS provides insight into the impact of the potential sentence as well as the offence. How much weight should this information carry? At present, sentencing guidance takes the form of a judgment from the Court of Appeal, and a practice direction which is relatively brief.... guidance from the Court of Appeal is now rather dated, and produced at a time when VPSs were used less frequently than at present”*.
- Assessing dangerousness:** The Sentencing Academy flagged this as an area where there are some important and complex areas to tackle<sup>6</sup>. Whilst acknowledging that release arrangements are not entirely determined by the sentencing exercise, it commented that the sentence that flows from a finding of dangerousness will have a significant impact on the sentence served and thus the degree of public protection; it linked this to public confidence in this area: *“it is essential that these decisions are made in a consistent and transparent manner and a guideline along the lines of the Imposition guideline may assist sentencers in this exercise”*.

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<sup>6</sup> This had also been suggested in early discussions with the MoJ.

- **Guidance on the use of location monitoring:** The Magistrates Association called for this given that it is a new option available to sentencers.
- **Sentencing older defendants:** Transform Justice raised this, but offered no information on their rationale for suggesting it.
- **Protective/ preventative orders:** the member of the public calling for this felt that guidance is generally lacking in this area, particularly in terms of the drafting of the orders. In their view, this could lead to difficulties at a later stage when “*almost unenforceable*” orders are breached; they called for a simplification of the regime and a joint project between the Council and the Law Commission.
- **Substance laws and sentencing:** the magistrate who raised this said: *‘All the substance laws and sentences need review. There’s no substance worse than alcohol and it’s legal. We can’t go on like this.’* There is already an aggravating factor and expanded explanation relating to intoxication.
- **The custody threshold:** Transform Justice stated that the Council argues that the vast variation in offence types/ factors affecting seriousness means it is not possible to provide one general definition of this. However, it feels that courts should be given further guidance to discourage them from imposing unnecessary custodial sentences.
- **Aggravating and mitigating factors:** Transform Justice suggested that there is a need for more guidance on the weight given to various factors. It also cites that fact that there are more aggravating than mitigating factors and some overlap between (something also raised in the Bottoms’ report).
- **Intoxication:** Dr Carly Lightowlers suggested that the Council should consider clarifying how the guidance in relation to intoxication ought to be applied in practice and include a clear explanation as to why alcohol or drug intoxication constitutes an aggravating factor.
- **Guidance on “totting up”:** The Council will recall that this guidance has recently been updated and is now in force.



3.52 Some of these areas have already been considered by the Council as a potential longer-term consideration (see Annex B). There are also already expanded explanations in various areas – for example, for the mitigating factor of ‘sole or primary carer for dependent relatives’ and to a limited extent on the use of victim personal statements in court. In addition, whilst older offenders are not specially cited, the mitigating factor ‘Physical disability or serious medical condition requiring urgent, intensive or long-term treatment’ and the associated expanded explanation may be relevant to older offenders. A later step in guidelines covers dangerousness, but does not give guidance on how the statutory test should be applied.

3.53 The Council could, however, consider enhancing the current guidance in this area – either separately or as part work that may emerge from a future evaluation of the expanded explanations.

### **Summary**

3.54 The above indicates that there were many varied calls for the Council to produce new or revised guidelines/ guidance. Some of these have already been completed, and some are due to start.

3.55 Setting these aside, as well as any suggestions that are unconnected with sentencing, this leaves the following areas for consideration:

<b>Guideline area</b>	<b>Guideline area</b>
Kidnapping/ false imprisonment	Female offenders
Blackmail	Young adults
Forgery/counterfeiting	Older offenders
Prison offences	Sole and primary carers
Wildlife offences	Totality
Data protection offences	Victim Personal Statements
Determining the minimum sentence for murder	Assessing dangerousness
New sexual offences (e.g. ‘sexting’ and ‘upskirting’)	Aggravating and mitigating factors
Failing to keep/preserve books and misconduct in the course of winding up; restrictions on re-use of company name	Intoxication
The approach to the custody threshold	Substance laws and sentencing
Sentencing procedure and the standard of proof	Protective/preventative orders
The purposes of sentencing	The use of location monitoring

3.56 It will not be possible to prioritise this entire list in the meeting. The more medium and longer term priorities for guideline development and revision will also be influenced by the overall resources of the Council which will be affected by other work that may emerge as a result of the vision consultation.

3.57 It should also be noted that guidelines take an average of around two years to develop and additional areas of work may arise as a result of evaluation evidence. Given that the Council already has a full workplan for the foreseeable future, it will only be possible at this stage to add on a small number of additional areas.

3.58 As outlined earlier, we will also need to retain flexibility within the Council's workplan to respond to any wider or more urgent issues (for example any legislative changes that impact on guidelines and the Council's work).

3.59 We would therefore recommend that at this stage we select three areas to explore for further consideration. If the Council agrees to this, we could undertake some preliminary scoping work over the next few months to ascertain what would be possible in the relevant area and to provide some options. The Council would then be able to consider these areas more fully and in relation to other commitments it wishes to make.

3.60 Undertaking to explore these areas further would not mean committing to developing or revising any individual guideline. It would, however, demonstrate the Council's commitment to considering these areas in more detail and if work was not eventually taken forward, it would provide a full justification for this decision.

3.61 The areas we would recommend exploring at this stage are:

- An overarching guideline on sentencing female offenders;
- An evaluation of the General guideline and the expanded explanations; and,
- An evaluation and potential revision of the Totality guideline.

***An overarching guideline on sentencing female offenders***

3.62 An overarching guideline on sentencing female offenders has been raised consistently over recent years. As outlined earlier, this was discussed by the Council in November 2018 and included in a list of potential areas for future development. At that point it had been noted that the issue of sentencing female offenders was topical and that Council member Sarah Munroe had given evidence to the All-Party Parliamentary Group for women

in the penal system. It was also raised as part of discussions with Council members and stakeholders prior to launching the consultation and was the most commonly called for guideline from consultation respondents.

### ***An evaluation of the General guideline and expanded explanations***

3.63 Several areas raised in the consultation are already covered through the General guideline and expanded explanations. For these, an evaluation would help to examine how they are being used and interpreted and whether any changes or enhancements are needed. Whilst we plan to include the expanded explanations as an area to review as part of the Preventing Discrimination project, a more general evaluation is yet to be scheduled. We could therefore put some thought into how we might go about a more general evaluation and what information/ methodologies we could draw upon.

### ***An evaluation and potential revision of the Totality guideline***

3.64 Whilst the totality guideline was only raised twice in the consultation, it is an area that is regularly flagged by academics, in particular Professor Andrew Ashworth. A revision of the guideline was also recommended in the Bottoms' Review.

3.65 Totality was one of the first guidelines produced by the Council and is one of the guidelines that the Council must produce as part its statutory duties. It is now quite outdated which recently made it problematic to update in response to the Sentencing Code. The Bottoms' Review stated that:

*By contrast with previous convictions, there is a complete lack of empirical data on the court's use of the totality principle: no research has ever been conducted on this topic in England and Wales. There is even some uncertainty about the frequency with which 'multiple offence sentencing' (MOS) occurs...the Consultation document issued in preparation for the Council's 2012 totality guideline stated that about 24 per cent of cases (presumably including summary cases) came into this category, but an earlier statistical study of Crown Court sentencing found that 62 per cent of persons sentenced in that Court were convicted of two or more offences. This older Crown Court figure is roughly comparable with the proportion of MOS cases in studies of higher criminal courts in other jurisdictions; if it also reflects the contemporary situation in the Crown Court in England and Wales, then the issues around totality are not a minor matter.*

*Given the Council's statutory duty in this area and concerns that have been raised since the guideline's implementation, then some consideration of how we might evaluate or revise the guideline would be beneficial.*

***Question 3: Does the Council agree that in the first instance officials should investigate 1) scoping an overarching guideline on sentencing women, 2) evaluating the General guideline and expanded explanations, and 3) evaluating the Totality guideline?***

#### **RISKS AND IMPACT**

4.1 It will not be possible to take on board all suggestions put forward as part of this section of the consultation – either because the justification for them is not strong enough or because resources do not permit this. It will be important to prioritise further guideline work on the basis of robust criteria and to provide a full justification for choices in the consultation response document.

## Sentencing Council Guideline Work Plan – 2020 to 2021\*

<b>Guideline</b>	<b>Next Council Meeting</b>	<b>Consultation period</b>	<b>Publish definitive guideline</b>	<b>Definitive guideline in force<sup>1</sup></b>
Revision of SC assault and SGC attempted murder guidelines	January 2021	16 April 2020 – 15 September 2020	May/ Jun 2021	TBC
Drug Offences: revision of SC guideline	December 2020	15 January 2020 – 7 May 2020	January 2021	1 April 2021
Firearms offences	N/A	9 Oct 2019 – 9 January 2020	December 2020	1 January 2021
Firearms importation offence	February 2021	TBC	TBC	TBC
What next for the Sentencing Council (Vision)	December 2020	10 March 2020 – 9 September 2020	TBC	TBC
Modern Slavery	March 2021	October 2020 – December 2021	June 2021	1 July 2021
Sexual Offences (partial revision)	December 2020	April 2021 – June 2021	TBC	TBC
Terrorism: revision of SC guideline	March 2021	22 October 2019 – 3 December 2019	TBC	TBC
Trademark offences	January 2021	July – October 2020	April 2021	1 July 2021

<b>Guideline</b>	<b>Next Council Meeting</b>	<b>Consultation period</b>	<b>Publish definitive guideline</b>	<b>Definitive guideline in force<sup>1</sup></b>
Burglary: revision of SC guideline	December 2020	May 2021 to July 2021	December 2021	January 2022
Perverting the course of justice etc	TBC	TBC	TBC	TBC
Motoring offences <sup>2</sup>	TBC	TBC	TBC	TBC
Immigration	TBC	TBC	TBC	TBC
Cybercrime	TBC	TBC	TBC	TBC

<sup>1</sup> In most instances we aim to bring definitive guidelines into force quarterly, on 1 January, 1 April, 1 July and 1 October

<sup>2</sup> Timetable provisional dependent on legislative change following Government review of offences

**Guidelines for consideration on future work plans** (last updated 19/11/2018)

Title	Size of project	Existing guideline	Active external lobbying?	Brief reason for doing	Priority Order	Required to meet 2020 ambition?
<b>MEDIUM TERM</b>						
Vehicle licence/ registration fraud,  Vehicle Excise and Registration Act 1994, s.44	small			40 cases in 2016. This was previously a much higher volume offence (859 cases in 2006). Possibly rarely prosecuted now 'tax discs' are not issued.  Do as standalone or possibly not at all?	6	
Aggravated vehicle-taking (damage to property or vehicle)  Aggravated vehicle-taking (dangerous driving or accident causing injury)	Standalone – small or part of larger g/l			1070 adult cases in 2016 (311 youth). Volumes for adults fairly stable.  666 adult cases in 2016 (161 youth). Volumes have been dropping (1789 adult and 1173 youth in 2006)  Links to dangerous driving	10	

Title	Size of project	Existing guideline	Active external lobbying?	Brief reason for doing	Priority Order	Required to meet 2020 ambition?
				Should we do these two as standalone or wait for driving offences guideline?		
Dangerous Driving	Standalone –small or part of larger g/l			3361 cases in 2015 Do as part of death and injury by driving?	10	
Causing death & injury by driving	large	SGC	Yes	Required to meet ambition to replace all SGC guidelines. Awaiting changes to legislation. Will need to evaluate post-election. Best guess is that a future Government may still announce an intention to legislate but timescales highly unpredictable. Possibly incorporate other e/w driving offences	10 or as soon as settled	YES
<b>LONG TERM</b>						
SC guidelines for possible revision	Medium	Yes	No	Possible guidelines would be Sex, Theft, Fraud – though no issues have been found with these as yet.		
Cyber Crime - hacking	medium	NONE	No	Council has identified this as area where guidance would be useful. 37 adult cases in 2015 + 3 youths 53 adult cases in 2016 + 4 youths HHJ Deborah Taylor at Southwark says that guidance would be useful, but she highlights the youth and mental health/ learning disabilities of offenders as area courts need help with. Still awaiting response from HHJ Topolski. (now received) Police data suggests that ‘cyber’ is factor in many different types of crime from blackmail to obscene publications.		NO
Fire regulation offences	small	None	Yes repeated requests from	Was considered as part of H&S and we have told stakeholders that we will do it at some stage.		



Title	Size of project	Existing guideline	Active external lobbying?	Brief reason for doing	Priority Order	Required to meet 2020 ambition?
			London Fire brigade	London Fire Brigade estimates that there have been 500 prosecutions in the period 2009-2016. They are keen to work with us on this		
Wildlife	medium	NONE	Yes – WWF provided detailed report.	Low volumes. Possibility of legislative changes? Would provide help & improve consistency in area that courts do not see often. <a href="http://www.lawcom.gov.uk/wp-content/uploads/2015/11/lc362_wildlife_vol-1.pdf">http://www.lawcom.gov.uk/wp-content/uploads/2015/11/lc362_wildlife_vol-1.pdf</a>		NO
Planning Offences	Medium?	NONE	Yes	Analogous to environmental or H&S; difficult regulatory offences 624 cases in 2016		NO
Landlord, HMO offences	Medium?	NONE	Yes	As above – serious issue in some large cities. 160 cases in 2016		NO
Data Protection offences	Small?	NONE	Yes in 2010 from MoJ	To improve consistency 26 cases in 2015		NO
'Old age' ( <i>overarching principles</i> )	Small?	NONE	No	Increasingly an issue with aging prison population especially as a result of historic sex offences - CACD has given guidance in this area		NO
Prisoner offences ( <i>overarching principles</i> )	Large if includes offence specific	NONE	Yes	There are offences specific to serving prisoners, but the requests we have had centre more on ensuring that consecutive sentences are passed to deter offending by serving offenders.		NO
Sentencing women and/or sentencing sole or primary carers ( <i>o/p</i> )	Small?	NONE	Yes – including PRT but maybe not a stand-alone guideline	Topical issue – Sarah gave evidence to the all party parliamentary group for women in the penal system. Ties in with imposition. Ashworth suggests this is a gap. Potentially could be covered as part of seriousness?		NO
Offences against	Small-medium	NONE	No	Analogous to some child cruelty offences.		NO

<b>Title</b>	<b>Size of project</b>	<b>Existing guideline</b>	<b>Active external lobbying?</b>	<b>Brief reason for doing</b>	<b>Priority Order</b>	<b>Required to meet 2020 ambition?</b>
vulnerable adults						
Totality / TIC	medium	YES - SC	No	The Bottoms report suggests that there is inconsistent application of the current guideline and more research is needed		NO (current guideline is in force)
FGM	medium	NONE	No	Expectations raised by including FGM in child cruelty.		NO
Child abduction	small	None But there is CACD guidance	No but Ashworth mentions it in CLR article	CACD felt it necessary to give some guidance to sentencers – so should the Council produce a guideline?		No
Sentencing young adults	small	None – some case law	No – Ashworth mentions it in his article	All guidelines currently have ‘age or lack of maturity’ as a mitigating factor. Perhaps we could amplify this guidance?		No
Blackmail	small	None	No	Serious offence with links to other types of offending (fraud, cyber, intimidatory)		No
Kidnap and false imprisonment	small	None	NO	Serious offences 136 cases in 2016– could also include child abduction (about 100 cases per year). See R v RH and LA [2016] EWCA Crim 1754 re child abduction		NO