

Sentencing Council meeting:
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SC(23)JAN06 - Theft

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1 ISSUE

1.1 To update the Council on the further work that has been carried out post the publication of the evaluation of the definitive guideline in 2019.

2 RECOMMENDATION

2.1 At today's Council meeting the Council are asked:

- To note the results of the further work that has been carried out following the initial evaluation in 2019
- To indicate what course of action, if any, it wishes to take after considering the results of this further work

3 CONSIDERATION

Definitive Theft Guideline

3.1 The definitive guideline was published in October 2015 and came into force in February 2016, and is comprised of guidelines for: shop theft, handling stolen goods, abstracting electricity, going equipped, making off without payment and general theft (for all s.1 Theft act offences except shop theft). The resource assessment stated that the approach taken with the new guideline was not intended to change the average severity of sentencing, but to ensure consistency of approach to sentencing of theft offences.

3.2 The [evaluation of the guidelines](#) was published in February 2019. For all theft offences, it was found that sentencing increased beyond the upper boundary of what might have been expected at some point in the year after the guideline was introduced. However, for most offences there was no clear-cut evidence that the guideline caused the uplift. For example, for some offences the increase happened some months after the guideline was introduced, rather than immediately, as would normally be expected if the guideline caused the uplift. For two low volume offences (abstracting electricity and going equipped for theft or burglary) there did appear to be an increase in sentencing severity as a result of the guideline.

3.3 The evaluation found that the effect of the guideline on sentencing severity varied by individual offence. When considering the overall theft picture, sentence severity did exceed the upper limit of where it was expected sentencing would be had the guideline not been introduced but only by a very small amount: less than one severity score point from a scale of 1-100. To put this into context, a community order has a severity score of around 15 and a SSO of around 31. Additionally, the trend then returned to the expected sentencing severity region by the end of 2017 for all theft offences combined.

3.4 For shop theft, sentencing severity increased beyond what would be expected by a small amount, six months after the introduction of the guideline. This was driven by small increases in the use of immediate custody (23 to 25 per cent) and suspended sentence orders (SSOs) (10 to 12 per cent) between July 2016 and August 2016. Sentencing severity was higher than expected had the guideline not been introduced. Whilst sentencing severity fluctuated in and out of the expected levels until the end of 2017 there was a drop at the end of the period back into the expected region. This meant that sentencing severity returned to around the same level as it had been before the sudden increase. Further analysis using data collected through the magistrates' courts data collection exercise in 2015/16 suggested that the increase in severity could be related to previous convictions and value of goods being more influential post-guideline, however this does not explain why this increase was delayed by six months.

3.5 It was concluded that it did not seem likely that the increase in severity was caused by an external change that affected sentencing severity more widely, as we did not see a similar shift in severity at this point across comparable offences. Because the shift was particular to the offence of shop theft, the increase may have been related to the introduction of the guideline, given there were no other known factors which may have impacted this offence alone.

3.6 Given that the overall trend returned to the sentencing severity region only at the end of 2017 the Council at the time of the evaluation decided to continue to monitor the trend over time before deciding on whether or not to revisit the guideline. Accordingly the A&R team have kept the guidelines, and in particular the offence of shop theft under review and now the latest sentencing data for shop theft is being presented to the Council for consideration.

3.7 The A&R team have considered the latest sentencing data from the Court Proceedings Database (CPD) covering the calendar year 2021. This analysis included updating volumes, sentence outcomes, average custodial sentence lengths (ACSL) and custodial sentence distributions for shop theft. Since the guideline came into force in June

2016, the number of offenders sentenced each year for this offence has continued to decrease steadily each year; in 2015 around 62,300 offenders were sentenced, which has decreased to 17,800 in 2021.

3.8 There have been some small shifts in the proportions of sentencing outcomes since the guideline came into force, most notably a reduction in the proportion of offenders receiving a discharge from 25 per cent in 2015 to 16 per cent in 2021. The proportion of offenders receiving immediate custody has remained relatively stable, however the ACSL (mean) has continued to increase. This had been decreasing before the guideline came into force but since 2015 has increased each year and in 2021 was 2.1 months, a 30 per cent increase from 1.7 months in 2015. This increase is driven by a reduction in the proportion of offenders receiving an immediate custodial sentence of up to one month, and an increase in the proportion of those receiving sentences between two and six months.

3.9 It should be noted that while some of these trends have been observed to occur from 2016 onwards, we cannot say for sure that the guideline is the cause of these changes. Regression analysis conducted for the evaluation showed that where an offender had a lot of previous convictions (20+) this was most strongly associated with a change in sentencing severity out of all factors. It was theorised this could be because the [information on previous convictions](#) had more of an effect on sentencer behaviour in the new guideline than previously. This guidance states:

‘Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the time that has elapsed since the conviction

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 previous 2008 theft guideline stated:

‘Any recent previous convictions for theft and dishonesty offences will need to be taken into account in sentencing. Where an offender demonstrates a level of ‘persistent’ or ‘seriously persistent’ offending, the community and custody thresholds may be crossed even though the other characteristics of the offence would otherwise warrant a lesser sentence’.

The difference being that the wording in the new guideline stated that previous convictions may justify an upward adjustment, including outside the category range. We are not aware of any other changes in relation to the weighting of previous convictions during this period.

3.10 However, these impacts were only seen six months after the guideline came into force, which is contrary to the immediate effect normally seen when a guideline is seen to have changed sentencing practice. It has not been possible to conduct any further regression analysis yet, although the data collection between January- June this year does include the offence of shop theft, which may offer us the ability to conduct further analysis.

3.11 Given that the findings from the further monitoring of the guideline show a continuation of the trend seen in the initial evaluation, regarding the increase in ACSL and sentencing severity for shop theft, beyond what was anticipated, there are a number of courses of action for the Council now to consider.

Option one

3.12 As the reasons for the increasing sentence severity seen in shop theft are still not clear, the Council may wish to wait for the results of the ongoing data collection (which includes the offence of shop theft) to be analysed before deciding whether or not any work to revise the guideline should be undertaken. However, it cannot be guaranteed that this further set of data will provide any clearer explanation for why sentence severity increased in 2016 and continues to increase beyond what was anticipated. There is also a question of the priority to be afforded to the analysis of data from the data collection, given the available resource in the team.

3.13 There are other guidelines that have had no evaluation conducted on them, such as domestic abuse, and data that has been collected and yet to be analysed from previous collections, such as criminal damage. It may be difficult to justify prioritising any further Theft work over and above these guidelines given the relatively small increase and given that Criminal Damage and Domestic Abuse offences continue to have some degree of topicality and, to date, no evaluation has yet been carried out on them at all. Therefore, unless Council felt so strongly that this work should be prioritised above the evaluations of the other guidelines, any further evaluative work on theft would need to be added to the workplan to be considered more in the medium term.

Option two

3.14 The Council may feel that it has enough information now to make a decision about whether any revision of the guideline is necessary. Although there have been increases in sentence severity for some theft offences, we cannot be sure that these are attributable to the guideline as they occurred some months after the guideline was introduced, rather than immediately afterwards which would generally happen if the guideline was responsible.

3.15 And, even if the guideline is thought to be responsible, the Council may feel that the consequences can be tolerated. The evaluation found that the severity score increased by only less than one severity score point in a scale of 1-100, and the increases since have been of a similar size. And if the findings of the evaluation continue to be relevant and the continued increases within shop theft are driven at least in part by the effect of an offender's previous convictions, Council may conclude that the guideline is working as intended, even if the full nature of the impact was not anticipated. The text in the guideline outlined at para 3.9 was developed due to the very high proportion of shop theft offenders with previous convictions, which can present sentencers with particular difficulty, no means to pay fines, community orders may be impractical due to difficulty with complying with requirements, and so on.

3.16 The guideline did try to assist courts with this difficult cohort of offenders- often shop theft offenders have drug and/or alcohol and/or mental health problems which lie behind the offending, so there is guidance on these points. There is also the text that says: 'previous diversionary work with an offender does not preclude the court from considering this type of offending again'. It may be that some of the increases seen recently reflect the particular cohort of offenders coming before the courts post-covid: perhaps they represent the more serious instances of shop theft.

Therefore, one course of action may be to decide, based on the available information, and the fact that the change is relatively small that it is not necessary to conduct any further analysis or revise the guideline.

Option three

3.17 The Council may feel on the basis of the available information that it can take the decision now that the guideline should be revised. However, the Council would need to be clear what the aim in revising the guideline would be – is it to revise the shop theft guideline to try to reduce the increase in sentence severity? If so, the Council would need to be clear that the unanticipated increase was undesirable and that sentences ought to be returned, insofar as it is possible, to their pre-2016 levels. This of course may cause handling issues but if the Council felt current levels were too high it is a course of action it could take. It would also not be the most straightforward piece of work for the Council to undertake, the guideline took over two years to produce and the shop theft guideline was particularly difficult to develop and required balancing a number of different concerns in an appropriate way. It is hard currently to see how the guideline could be constructed differently. Revising the guideline is likely to be resource intensive across both policy and analytical teams (further analysis would still be likely required as per Option 1 in order to assist in any

redrafting) and a decision would need to be made as to what priority to give it, given the other projects waiting. As noted earlier there are other guidelines waiting for initial evaluation. These are not reasons of course to stop the Council deciding to revise the guideline if it was felt the reasons for revisiting it were pressing.

Question 1: Which option does the Council prefer?

Question 2: If option 1, or Option 3 does the Council agree that any further work on theft would be added to the work plan to be considered in the medium term rather than given priority over any current or other already prioritised projects on the work plan?

4 EQUALITIES

4.1 Any equality issues will be considered in light of whichever option the Council chooses to proceed with.

5 IMPACT AND RISKS

5.1 Depending on the answers to the questions above-there may be an impact on workload/other priorities. A decision to prioritise further analysis and/or revision of this guideline carries the impact from a resource perspective of needing to deprioritise other work. Depending on what that work is, the Council may need to rationalise why the work on theft has been viewed as a higher priority.