

**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**16 June 2023**  
**SC(23)JUN07 - Fraud**  
**TBC**  
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## **1 ISSUE**

1.1 The fraud, bribery and money laundering guidelines came into force in October 2014. An assessment of the impact of the guidelines on sentence outcomes was published in June 2018. This found: “For most offences, average severity either stayed within the expected boundaries (based on historical data) or volumes were too low to assess with robustness whether the guideline had caused a shift”.

1.2 In the absence of evidence to the contrary, the guidelines have been considered to be operating as intended. However, there have been some recent pieces of feedback that require consideration by the Council.

## **2 RECOMMENDATION**

2.1 That the Council considers whether any amendments to the Fraud guideline are required and if so, how this should be approached.

## **3 CONSIDERATION**

### **The assessment of harm**

3.1 The Justice Committee published a report, [‘Fraud and the Justice System’](#) in October 2022. This contained the following:

#### [Sentencing Guidelines](#)

117. Under current sentencing guidelines, fraud crimes carry penalties of up to 10 years imprisonment for the most severe cases. However, for crimes where the financial loss is less than £5,000, the maximum tariff is one year’s custody with the majority of those found guilty instead receiving a fine or community order. The City of London Police and other contributors to our inquiry called for these guidelines to be revisited, as the impact of losing £5,000 to one person can be as significant as the impact of losing £50,000 is to another.

118. The current sentencing guidelines focus on the level of financial loss resulting from a crime rather than the impact on victims. Sentencing guidelines for other crimes, such as assault, take into consideration the psychological distress caused to a victim. As discussed in chapter 2, the impact of fraud crimes can go far beyond

financial loss, with some victims of these crimes experiencing profound emotional and psychological distress. We heard that the focus on financial loss “is based on an out-of-date view that fraud victims only suffer financial harm and only require financial reparations for their harm.”

119. In addition to the consideration of the impacts on the victim, the City of London Police also called for other aggravating factors to come into consideration, such as hindering recovery of money to the victims, as well as calling for sentences to be strengthened with maximum sentences brought in line with those for money laundering.

120. The CPS also supported the expansion of sentencing guidelines to consider factors outside of pure financial loss, emphasising the importance of seeing the full context of fraud crimes, outlining that “it is not just the financial effect but the compromising effect on the way we lead our lives.”

121. However, not all witnesses to our inquiry felt that the sentencing guidelines required amendment. Mark Fenhalls KC of the Bar Council outlined that he had “no particular complaint about any of them”, highlighting instead that the issue was that sentencing guidelines do not act as a deterrent to those committing the crimes as offenders are aware that the chances of being subjected to criminal punishment for fraud crimes are very low.

**122. The loss of a comparatively small amount of money can have a greater impact on one individual than the loss of a greater amount on another. The current sentencing guidelines do not recognise this and therefore overlook the emotional and psychological impact that fraud crimes can have on their victims. Sentencing guidelines should be amended to give greater consideration to the emotional and psychological harms caused by fraud crimes alongside the financial losses incurred.**

3.2 There are several fraud guidelines (including revenue fraud and benefit fraud); the one most relevant to this issue is simply titled [Fraud](#). When developing the guideline the Council took care to ensure that the effect on the victim was taken into account in sentencing and used a two-stage harm model:

## **Harm**

**Harm** is initially assessed by the actual, intended or risked loss as may arise from the offence.

The values in the table below are to be used for **actual** or **intended** loss only. Intended loss relates to offences where circumstances prevent the actual loss that is intended to be caused by the fraudulent activity.

**Risk of loss (for instance in mortgage frauds) involves consideration of both the likelihood of harm occurring and the extent of it if it does. Risk of loss is less serious than actual or intended loss. Where the offence has caused risk of loss but no (or much less) actual loss the normal approach is to move down to the corresponding point in the next category. This may not be appropriate if either the likelihood or extent of risked loss is particularly high.**

<b>Harm A – Loss caused or intended</b>		
<b>Category 1</b>	£500,000 or more	Starting point based on £1 million
<b>Category 2</b>	£100,000 – £500,000 <b>or</b> Risk of category 1 harm	Starting point based on £300,000
<b>Category 3</b>	£20,000 – £100,000 <b>or</b> Risk of category 2 harm	Starting point based on £50,000
<b>Category 4</b>	£5,000 – £20,000 <b>or</b> Risk of category 3 harm	Starting point based on £12,500
<b>Category 5</b>	Less than £5,000 <b>or</b> Risk of category 4 harm	Starting point based on £2,500
<b>Risk of category 5 harm, move down the range within the category</b>		

### **Harm B – Victim impact demonstrated by one or more of the following**

The court should then take into account the level of harm caused to the victim(s) or others to determine whether it warrants the sentence being moved up to the corresponding point in the next category or further up the range of the initial category.

#### **Level of harm: victim impact**

##### **High impact – move up a category; if in category 1 move up the range**

- Serious detrimental effect on the victim whether financial or otherwise, for example substantial damage to credit rating
- Victim particularly vulnerable (due to factors including but not limited to their age, financial circumstances, mental capacity)

##### **Medium impact – move upwards within the category range**

- Considerable detrimental effect on the victim whether financial or otherwise

##### **Lesser impact – no adjustment**

- Some detrimental impact on victim, whether financial or otherwise

3.3 The Chairman wrote to the Justice Committee pointing out that their report failed to note that the guideline does, in fact, take account of harm other than financial harm. The Committee responded:

The committee acknowledges that the current sentencing guidelines do create scope for factors other than financial loss to be taken into account when sentencing. However, we heard from many contributors to our inquiry that the wording in the guidelines of harm as “financial or otherwise” is not considered to give sufficient weight to these other factors, particularly emotional and psychological harms. We heard throughout our inquiry that the impact of a fraud crime on an individual can be severe regardless of the financial loss incurred, which is why we made our recommendation that the guidelines should be made clearer by making explicit reference to emotional and psychological harms instead of these being implicitly referred to as other harms that could result in an offence being moved up the category range.

We welcome the work the Sentencing Council does in promoting consistency in sentencing and believe that a change to the fraud guidelines to ensure that non-financial harms are more clearly set out would help the judiciary ensure that sentences passed for fraud crimes reflect the harm that they cause.

3.4 An issue has also arisen in the case of [R v Alexander \[2022\] EWCA Crim 1868](#) which came before the CACD in September 2022. The issue for the court has been summarised as follows:

1. The fraud consisted of the offender posing on-line as two different people, including as a model agency. As a result of fake websites and other aspects of deception, he persuaded a young woman (whom he knew already from school) to send increasingly explicit photographs, moving from bikini to lingerie shots, and then to full nude photographs which he kept.
2. Accordingly, there was no financial harm in the sense of a money equivalent for the fraud. The Guidelines for “Harm A – loss caused or intended” are entirely financial. They only have money brackets, with Categories 1 to 5.
3. Non-financial impact on a victim comes to be considered at Harm B stage, which states **“Harm B – Victim impact demonstrated by one or more of the following:**  
The court should then take into account the level of harm caused to the victim(s) or others to determine whether it warrants the sentence being moved up to the corresponding point in the next category or further up the range of the initial category.”
4. For High Impact, which justifies moving up a category, the following is stated:  
“Serious detrimental effect on the victim whether financial or otherwise, for example substantial damage to credit rating.”
5. Sending nude photographs of oneself as a result of a fraud was assessed as high impact. The point which arose, is the argument that an offence such as this one – with financial loss being less than £5,000 – would start at the lowest of categories 1 to 5 (namely category 5), with the consideration at Harm B stage being only whether to move up from that, and only moving up one category.
6. In a case such as this one (which with online deception might become increasingly prevalent) a sentencer might conclude that they should usually start at category 5 given the way the Harm A table is set out with financial loss as the primary category. When coming to Harm B, even moving up a category for High Impact would still keep the offence within a fairly low category.
7. In a non-financial case such as this one, the way that the Harm A table is worded might point a sentencer to start too low, with limited ability to move up more than a category where the object of the fraud was (for example) highly intimate photographs that do not readily equate to a financial loss.

3.5 The suggestion is that the Council should consider adding some wording to the guideline to cater for cases where there is no pecuniary loss.

3.6 We sought the views of the CPS as to whether the case of Alexander was an outlier (the facts seemed closer to blackmail or threats to disclose private images than to fraud) and whether there were any trends in fraud prosecutions that the Council should be aware of. The initial response from the CPS was that the case did appear to be an outlier. However, subsequently a different view was put forward from one individual in the CPS:

On the question of whether the attached case of Alexander is an outlier, I don't believe it is, and I think that fraud by false representation was the best fit for at least part of the offending:

- This offending in the attached case involved two stages: (i) Obtaining intimate photographs by means of various false representations; and (ii) threatening to distribute those photographs unless the victim sent the offender more intimate photographs. There were charges of fraud and blackmail, presumably with the intention that the fraud covered the first part of the offending and the blackmail covered the second part. We accepted a plea to the fraud alone, but the basis of plea stated that the offender accepted the facts of the blackmail (para 11 of the judgment). This is an unusual approach, and we perhaps should have insisted on a plea to the blackmail as well, but it provided the court with adequate sentencing powers.
- Regarding the need for an intention to make a gain or cause a loss for fraud: S5 of the Fraud Act 2006 provides that the gain/loss must relate to property but that property means "any property whether real or personal (including things in action and other intangible property)". It therefore seems that it would apply to digital photographs, a conclusion supported by the plea in this case and the fact that the CA appeared happy to proceed on that basis (although it was not an issue they were asked decide). Blackmail also requires an intention to make a gain or cause a loss.
- Regarding whether we could now charge threats to disclose private sexual images (s33 of the Criminal Justice and Courts Act 2015): This offence would not apply to the first part of the offending in this case, so could not supplant the fraud charge. In respect of the second part of the offending, this offence requires an intention to cause distress, and s33(8) provides that "A person charged with an offence under this section is not to be taken to have intended to cause distress by disclosing, or threatening to disclose, a photograph or film merely because that was a natural and probable consequence of the disclosure or threat." Accordingly, it could be difficult to prove an intention to cause distress where the intention is to obtain further images or money; blackmail would seem to be the better choice.

Crucially, if the offending had stopped at the stage of obtaining intimate photographs by false representations, we would only have been able to charge fraud. Accordingly, it seems to me that the fraud guideline should be amended to take more account of harm besides simply financial harm. One possible approach is that taken by the [burglary guideline](#), which refers to "economic, commercial, cultural or of personal value".

Separately, even in cases of purely economic loss I think we should move away from the approach to harm taken in the current fraud guideline, which is based primarily on the financial value of the fraud, and towards an approach based equally on the impact on the victim: a loss of £2,500 (the starting point for the lowest category of harm) may be devastating for some people. This is currently reflected in the second stage of the harm assessment, but I feel it should be a more primary factor. There will be some difficulties with this, for example, it may be difficult to establish the extent of the impact where there have been a large number of victims and some cannot be identified, but impact could feature alongside financial value as part of a single stage approach to harm, again like the burglary guideline, where impact is given equal prominence as the degree of loss.

3.7 The CPS also drew attention to police interest in, and emphasis on, suicide following from being a victim of fraud.

3.8 It seems that there are several possible courses of action:

1. Do nothing – there is no evidence that the guideline is not working well in the majority of cases. A review of a small number of recent CACD cases suggests that courts are generally taking into account the impact on victims appropriately.
2. Keep the structure of the guideline as it is but amend the wording of the Harm B assessment – perhaps by giving further examples (such as those in the [Theft guideline](#)) of what could amount to ‘serious detrimental effect’ or by simply removing the current example ‘substantial damage to credit rating’ which may give the impression that emotional and psychological harms are not in scope.
3. (Possibly in addition to 2.) Add some wording to the harm assessment for situations where there is no pecuniary loss and the fraud may not be capable of being translated directly into a financial sum. Though it may be difficult to say much more than something along the lines of: ‘If there is no pecuniary loss the court should use its judgment to assess the level of harm’.
4. Restructure the harm assessment completely to put consideration of the emotional and psychological impact on the victim as a primary consideration on a par with the level of financial loss.

3.9 The fourth option is not recommended – but if the Council wished to explore it, work could be done to look at how this could be achieved. Options 2 and 3 could be consulted on as part of the miscellaneous amendments consultation in September. If the Council wished to pursue one or both of 2 and 3, suggestions are sought as to how this should be worded.

3.10 One further thing to consider is the recently published [Home Office fraud strategy](#) which states (at paragraph 67):

#### **Proportionate punishment and reoffending**

67. A post-legislative review of the Fraud Act 2006 found that it remains a sound piece of legislation. Some useful suggestions were made on how the wider fraud framework could be improved. Recent reports produced by the House of Lords and House of Commons noted that there are aspects of the Fraud Act 2006 that merit rethinking. Therefore, the second phase of the independent review of fraud will assess the effectiveness of fraud offences to understand whether they meet the challenges of modern fraud, ensuring the penalties for fraud match the severity of the crime, and its financial and emotional impact on victims.

3.11 Any changes to the 2006 Fraud Act may necessitate changes to the guidelines. The recommendation would be to wait and see what (if any) changes are made to legislation before making substantive changes to guidelines.

**Question 1: What changes, if any, does the Council wish to make to the Fraud guideline?**

**Question 2: Should these be consulted on as part of miscellaneous amendments?**

#### **4 IMPACT AND RISKS**

4.1 Only a very small proportion of frauds result in a prosecution. The Justice Committee report states at paragraph 88: “In the year ending September 2021, the Crown Prosecution Service (CPS) prosecuted 7,609 defendants where fraud and forgery were the principal offence, with a conviction rate of 84.9%. Whilst this is a relatively high success rate, the level of prosecutions represents only about 0.75% of fraud crimes reported in the year.”

4.2 The various fraud guidelines overlap in terms of the offences covered (which include false accounting and conspiracy to defraud as well as the s1 Fraud Act offence), and so it is not possible to single out the volumes for the Fraud guideline discussed in this paper. However, it is reasonable to assume that the volume of offenders sentenced using the Fraud guideline is fairly high and that therefore any substantive changes to the guideline would have the potential to have an impact on prison and probation resources.

4.3 The number of offenders sentenced in 2022 for offences contrary to section 1 of the Fraud Act 2006 is lower than in the previous four years but the average custodial sentence length is higher for 2021 and 2022 when compared with previous years. This may indicate that more serious cases are being prioritised by the courts, or may reflect the nature of the offences being investigated and prosecuted.

#### **Number of adult offenders sentenced for offences covered by Section 1 of the Fraud Act 2006, 2018-2022<sup>1</sup>**

	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>2022</b>
Magistrates' courts	2,840	2,510	1,495	1,390	1,207
Crown Court	1,937	2,053	1,610	1,736	1,564
<b>Total</b>	<b>4,777</b>	<b>4,563</b>	<b>3,105</b>	<b>3,126</b>	<b>2,771</b>

#### **Number and proportion of adult offenders sentenced for Section 1 of the Fraud Act 2006, by sentence outcome, 2018-2022<sup>1,2</sup>**

	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>2022</b>
Absolute discharge	2	4	3	2	2

Conditional discharge	421	349	211	205	164
Fine	465	461	266	295	226
Community sentence	1,219	1,148	630	605	479
Suspended sentence	1,222	1,173	934	988	816
Immediate custody	1,298	1,283	937	932	969
Otherwise dealt with	150	145	124	99	115
<b>Total</b>	<b>4,777</b>	<b>4,563</b>	<b>3,105</b>	<b>3,126</b>	<b>2,771</b>

	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>2022</b>
Absolute discharge	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%
Conditional discharge	9%	8%	7%	7%	6%
Fine	10%	10%	9%	9%	8%
Community sentence	26%	25%	20%	19%	17%
Suspended sentence	26%	26%	30%	32%	29%
Immediate custody	27%	28%	30%	30%	35%
Otherwise dealt with	3%	3%	4%	3%	4%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

**Average custodial sentence lengths (ACSL) received by adult offenders sentenced to immediate custody for Section 1 of the Fraud Act 2006, 2018-2022<sup>1</sup>**

<b>ACSL (months)</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>2022</b>
Mean	17.1	21.0	19.9	23.8	23.8
Median	9.0	15.0	14.0	20.0	19.0

Table notes

1) Figures presented include the time period from March 2020 in which restrictions were initially placed on the criminal justice system due to the COVID-19 pandemic, and the ongoing courts' recovery since. It is therefore possible that these figures may reflect the impact of the pandemic on court processes and prioritisation and the subsequent recovery, rather than a continuation of the longer-term series, so care should be taken when interpreting these figures.

2) The category 'Otherwise dealt with' covers miscellaneous disposals. Please note that due to a data issue currently under investigation, there are a number of cases which are incorrectly categorised in the Court Proceedings Database (CPD) as 'Otherwise dealt with'. Therefore, these volumes and proportions should be treated with caution.