

# SENTENCING ACADEMY

## **Sentencing Academy Response to Consultation: Burglary Offences Guideline**

*10 August 2021*

The Sentencing Academy welcomes this opportunity to respond to the Burglary offences guideline consultation. This document contains our response to specific questions; for the remaining questions we agree with the Council's proposals. We begin with a general comment about the uplift in severity.

### **The Increase in Severity**

In 'Section one: General approach', the Council acknowledges 'that sentences increased unexpectedly for non-domestic burglary when the [2012] guideline came into force' (p. 4). Analysis of the Crown Court Sentencing Survey data for domestic burglary showed that more cases were placed in category 1, and that the custody rate for category 1 increased significantly, following the introduction of the guideline in 2012 (pp. 15-16). These increases were both unexpected and unintended, but the consultation document announces that 'although the aggregate impact of the guideline on sentencing outcomes was not predicted, sentencing practice in individual types of case is proportionate to the seriousness of the offence' (p. 4).

The document provides no grounds for reaching this conclusion. It seems to be based on the continuing upward movement of sentences in the Crown Court (for domestic burglary) and in the magistrates' courts (for non-domestic burglary). Council appears to conclude that because the courts have moved their sentences upwards, not necessarily or wholly in response to the 2012 guideline, the higher sentence level should be continued. It is 'proportionate' because the courts have settled at this level. Proportionality is hence defined by whatever the courts are doing at any given point. This seems to be the reasoning of the second paragraph on page 4 of the consultation document. We find it unpersuasive.

Moreover, the final sentence of the second paragraph muddies the waters still further: 'this means that the higher sentences under the existing guideline are expected to be maintained for the more serious offences' (p. 4). Does this indicate that the Council is drawing a distinction between higher level sentences for 'serious' cases and a possible re-assessment of sentence levels for less serious forms of domestic and non-domestic burglary? This seems to be the approach taken on p. 11, where the consultation discusses sentence levels for non-domestic burglary. The unconvincing second paragraph from p. 4 is repeated, but the Council adds a signpost to community orders with a drug rehabilitation requirement or with an alcohol

treatment requirement, which may be ‘a proper alternative to a short or moderate custodial sentence.’ Some 73% of non-domestic burglars who were sentenced to custody received sentences of less than 12 months, so presumably sentences in this bracket are included within the reference to ‘moderate’ custodial sentences. It is unclear what is meant by the term ‘moderate’. Greater precision could be provided.

The severity uplift was clearly due to the guideline. This figure from the Council's research report reveals that in 2011, there was a natural hierarchy of seriousness. Less serious cases will always be more common than more serious crimes, whatever the offence. There will always be more common assaults than serious assaults. The introduction of the guideline changed this, artificially pushing less serious cases up a category. We describe this as ‘category creep’ due to the introduction of the guideline. How can the *most serious* category account for twice the volume of the *least serious* category of burglary? The guideline bumped many cases previously assigned to the lowest category up to the intermediate category. And some of the intermediate cases must have been promoted to the highest level. As can be seen, Category 1 accounted for almost 40% of cases in 2014 and only about 16% in 2011. This finding warrants greater analysis by Council.

**Figure 3: Distribution of offence category for non-domestic burglary, Crown Court, 2011-2014<sup>23, 24</sup>**



Source: Sentencing Council (2017) *Assessing the impact of the Sentencing Council’s Burglary offences definitive guideline*, p. 7.

**Question 1: Do you have any comments on the culpability factors? Are there any that should be removed or added?**

'[S]ome degree of planning' is a medium culpability factor. Almost all commercial burglaries require some degree of planning. Who, upon walking past a warehouse, spontaneously decides to break into the building? This factor will mean that all cases will go to Category A or B. It should be deleted. Significant planning should define Category A. Category C should remain as is, and B should be reserved for 'all other cases' – a standard Council way of assigning cases

in other guidelines. We note that under the previous version there were only 2 factors related to planning ‘a significant degree’ (high culpability) and ‘offence committed on impulse’ (lower culpability).

**Question 7: Do you have any comments on the culpability factors? Are there any that should be removed or added?**

Our response to Q1 also applies here.

**Question 14: Do you have any comments on the culpability factors? Do you agree that the factor relating to a weapon has been moved from culpability to step two?**

Our response to Q1 also applies even more here. Again, very few offenders commit *aggravated* burglary, i.e. with a weapon, spontaneously. Almost all cases will be excluded from Culpability Category C.

**Question 11: Do you agree with the inclusion of wording regarding cases of particular gravity above the sentence table? If not, please tell us why.**

We disagree with this wording. Courts will exceed the six year threshold where appropriate and do not need an extra reminder to do so. Council assures us this step is ‘without risking sentence inflation’ (p. 20). What is the evidence base for this claim? Any such direction at least *risks* sentence inflation. Finally, this additional ‘nudge’ to sentencers does not appear for other offences so why is domestic burglary singled out? It is not as though the volume of cases is rising; in fact, the Council's research shows that the number of domestic burglaries plunged over the period 2011 to 2019.

Another element of this extra wording is more problematic.

The consultation document states that only 2% of those sentenced for domestic burglary received sentences above six years’ custody. Thus six years remains the top of the offence range, and the guideline will state that ‘for cases of particular gravity, sentences above the top of the range may be appropriate’ (p. 20). This wording is directing courts to leave the guideline range in such cases, but without reference to the statutory test for departing from the total offence range. It is possible for a court to go above the offence range for any offence, but first the court must satisfy itself that it would be ‘contrary to the interests of justice’ to follow the guideline (i.e. to impose a sentence up to six years, in reference to domestic burglary). This is laid down by s. 59 of the Sentencing Act 2020 and it is much tighter than the Council’s proposed reference to what is ‘appropriate’ – and is surely the correct wording. Simply put, with this wording, Council is directing courts to ignore the statute, and to depart from the guideline without first meeting the statutory test for departure.

## **Imposition Guideline**

On p. 12, the Council proposes to remove the reference to the custody threshold (on p. 9 and p. 13 of the 2012 guideline) and to rely on the website link to the 2016 Imposition guideline. The Council should re-think this approach. The Imposition guideline is critical when a court is considering a custodial sentence of less than 12 months and when a community order or suspended sentence order is in play. Given this, there should be an *explicit link* that directs the court to the steps set out on pages 7-9 of the Imposition guideline. The same should apply to domestic burglary (p. 19).

## **Culpability and harm factors**

We support most of the proposed amendments of the culpability and harm factors. However, the wording of category 2 harms in non-domestic burglary is too loose: the first line of p. 11 refers to ‘theft of /damage to property causing some degree of loss ...’, but ‘some’ might be taken to include ‘any’, and it might be clearer to put ‘moderate’ or a similar word that marks the differences from ‘substantial’ (cat. 1) and ‘limited’ (cat. 3).

Professor Andrew Ashworth  
Professor Julian Roberts  
Dr Jonathan Bild