

12 May 2009

Dear Colleague

CONSULTATION PAPER ON SENTENCING FOR BURGLARY IN A DWELLING

The Sentencing Guidelines Council has asked the Sentencing Advisory Panel to produce advice on sentencing for burglary in a dwelling. Guidance on this high-volume offence will complement the recently published sentencing guidelines on *Theft and Burglary (non-dwelling)* and will help to ensure consistency for similar types of offending.

As a significant proportion of offenders sentenced for burglary in a dwelling are aged under 18, this paper relates to the sentencing of both adults and youths. Following a recent consultation, the Panel plans also to produce advice to the Council on more general principles of sentencing for youths, built around the different sentencing framework that applies to young offenders. The Panel will take into account both the responses to its general consultation on youths and the responses to this specific consultation on burglary when formulating its advice to the Council on sentencing youths for burglary in a dwelling.

The Panel previously published advice on sentencing for 'domestic burglary' in 2002, leading to the Court of Appeal's guideline judgment in *McInerney and Keating*. Concerns about the extent to which the effect of *McInerney* was being misunderstood led the Court to issue clarification in the recent judgment in *Saw*, providing a non-exhaustive list of features that may indicate that either culpability or impact is "raised" or "seriously raised".

The Panel has sought to develop the approach in *Saw*, reflecting the judgment's particular emphasis on both the impact on the victim(s) of the offence and the recognition that a wide range of features, alone or in combination, may produce an offence of the same level of seriousness. In order to adapt this approach to the established pattern of Council guidelines, the Panel has considered it necessary to define the base level of culpability and of harm from which a decision can consistently be made that the level is "raised" or "seriously raised". We would like to know whether consultees consider this approach to be sufficiently precise for a court to apply the guideline consistently, or whether it is possible to identify more clearly defined levels of seriousness by reference to particular features relating to either culpability or impact.

As is its usual practice, the Panel has proposed provisional starting points based on a first time offender convicted after a not guilty plea. Where a court is sentencing an offender for a third offence of burglary in a dwelling, statute provides for a presumptive minimum sentence of three years custody. In *McInerney* the Court accepted the structure of the Panel's previous advice, which suggested starting points for first, second and third time domestic burglars, in an attempt to ensure a graded approach. In light of subsequent statutory provisions, the Panel is asking consultees whether it is still helpful to provide guidance in relation to sentencing an offender convicted of a second offence of burglary in a dwelling. The responses to these and our other questions will help to inform the Panel's approach in the advice that it submits to the Council.

Please send your response to Mrs. Lesley Dix, Secretary to the Panel, at the Sentencing Guidelines Secretariat, either by post to 4th floor, 8-10 Great George Street, London, SW1P 3AE, or by email to info@sentencing-guidelines.gsi.gov.uk. **Responses should be received by 5 August 2009.**

The names of those who respond to Panel consultation papers are listed in the published advice to the Sentencing Guidelines Council. **If you do not want your name to appear on the list, please state this clearly and your response will be recorded only as one of a given number of confidential responses; please note that an automatic confidentiality disclaimer generated by your IT system will not suffice.** Anonymous responses are also welcomed, although these are less helpful in allowing the Panel to understand the background to the views submitted.

Responses to consultation papers are not routinely published but the Freedom of Information Act 2000 (FOIA) places an obligation on the Panel to release all responses upon request, **including those submitted 'in confidence' or anonymously.** Under the Act there is a statutory Code of Practice on confidentiality with which public bodies must comply and, whilst we would take full account of any reasons given for regarding information as confidential, absolute confidentiality cannot be guaranteed.

Where a response from a private individual is to be released, the name, contact details and anything else that would obviously reveal the identity of the sender will be removed in accordance with the requirements of the Data Protection Act 1998.

Where a response submitted on behalf of a group, organization or public body is to be released, the name of the individual submitting the response will be removed but the identity and contact details of the group, organization or public body will remain.

Yours sincerely,

Professor Andrew Ashworth

Chairman, Sentencing Advisory Panel

BURGLARY IN A DWELLING

CONSULTATION PAPER

INTRODUCTION

1. The Sentencing Guidelines Council has asked the Sentencing Advisory Panel to produce advice on sentencing for burglary in a dwelling. The Panel previously published advice on sentencing for 'domestic burglary' in 2002, leading to the Court of Appeal's guideline judgment in *McInerney and Keating*.¹ However, this judgment pre-dates the Criminal Justice Act 2003, which established a new sentencing framework, as well as the current system of sentencing guidelines. Guidance on the high-volume offence of burglary in a dwelling will complement the recently published sentencing guidelines on *Theft and Burglary (non-dwelling)*² and will help to ensure consistency for similar types of offending.

2. This paper is in five sections; the first describes the nature of the offence and the current pattern of offending, the second considers recent sentencing practice and existing guidance, the third examines the seriousness of the offence and the fourth contains the Panel's proposals for sentence starting points and ranges for adult offenders. The Panel's normal approach is to propose guidelines for the sentencing of adult offenders only except for those offences in relation to which the proportion of offences committed by youths is particularly high. As 27% of offenders sentenced for burglary of a dwelling in 2007 were aged under 18,³ the final section of this paper examines the sentencing of youths.

¹ [2003] 2 Cr App R (S) 39

² Published 9 December 2008: www.sentencing-guidelines.gov.uk

³ As a proportion of offenders sentenced for all offences in 2007, only 7% were aged under 18. For all indictable offences (excluding motoring), 16% of offenders sentenced in 2007 were aged under 18

SECTION ONE: THE OFFENCE

The scope of the offence

3. The offence of burglary may be committed in a dwelling or other building. Under section 9 of the Theft Act 1968 ('the 1968 Act') the offence of burglary in a dwelling will be committed where:

(a) the offender enters the dwelling as a trespasser intending to steal, to inflict grievous bodily harm, or to commit criminal damage (in which case the offence is complete as soon as the entry has occurred and no theft (or further offence) needs to take place); or

(b) the offender enters the dwelling as a trespasser and actually goes on to steal or to inflict grievous bodily harm (or attempts to do either).

4. Entry as a trespasser may occur without forced entry to the premises, since the offender may enter by an open door or window, or deceive the householder into allowing entry.

5. The Council has recently published a guideline on burglary in a building other than a dwelling.⁴ Accordingly, this consultation paper covers only burglary in a dwelling. For the purposes of this offence, a dwelling includes a house or flat and also may include an inhabited vessel or vehicle (such as a houseboat or caravan),⁵ or a domestic outhouse or garage linked to the dwelling by a connecting door. Communal areas of multi-occupancy buildings are also included, provided they are normally secured.

6. This paper considers only those offences of burglary in a dwelling involving theft or an intention to steal, since that is the most commonly occurring situation. Where the main element of the offence is grievous bodily harm or criminal damage, the normal expectation would be for the offender to be charged with one of those offences rather than an offence of burglary. However, should an offence

⁴ see para.1 above

⁵ s.9(3)

of burglary be charged in such circumstances, a court may wish to draw on the existing sentencing guidelines for those offences,⁶ treating the entry as a trespasser as an aggravating factor.

7. Where at the time of the burglary the offender has with him or her any firearm (genuine or imitation), weapon of offence, or explosive, the separate offence of aggravated burglary is committed.⁷ This offence is not considered in this consultation paper because it is more akin to robbery or an offence against the person. Furthermore, only a small number of offences are sentenced each year, and sentencing appears to be consistent.⁸

8. Unless otherwise specified, the term 'burglary in a dwelling' is used in this paper to cover both the completed and attempted (i.e. without entry) burglary of domestic premises.

9. In relation to an adult offender, the offence of burglary in a dwelling is normally triable either way. It is triable only on indictment if it involves the commission of, or intent to commit, an offence which is triable only on indictment, if any person in the dwelling was subjected to violence or the threat of violence,⁹ or if the offender has been convicted of two other domestic burglaries committed on separate occasions after 30 November 1999 and one was committed after conviction of the other.¹⁰

Prevalence and perceptions of burglary in a dwelling

10. The British Crime Survey (BCS) estimates that there were 729,000 'domestic' burglaries and attempts in 2007/08, showing no change from the previous year.¹¹ The police recorded 280,704 burglaries in a dwelling in 2007/08,

⁶ *Assault and other offences against the person* (published 2008); *Magistrates' Court Sentencing Guidelines* (published May 2008; see *Update 2* published December 2008); www.sentencing-guidelines.gov.uk

⁷ Section 10 of the 1968 Act

⁸ The number of offences is small at around 200 per annum i.e. 2% of offences of burglary in a dwelling. In 2007 the custody rate for aggravated burglary in a dwelling was 90%, the same as in 1999; in the intervening period, it remained between 86% and 92%. The average custodial sentence length was 45.5 months in 1999, and has risen slightly to 49.4 months in 2007

⁹ Magistrates' Court Act 1980, s.17(1) and sch.1, para.28(c)

¹⁰ Powers of Criminal Courts (Sentencing) Act 2000, s.111

¹¹ *Crime in England and Wales 2007/08*, Home Office Statistical Bulletin 07/08; <http://www.homeoffice.gov.uk/rds/pdfs08/hosb0708.pdf>. The BCS only measures domestic burglary and not burglary of a building other than a dwelling

a 4% fall from the previous year. These figures reflect a considerable decline in the number of burglaries in a dwelling in England and Wales from the significantly high numbers in the mid-1990s; the BCS estimated that there were 1,770,000 burglaries and attempts in 1995, and the police recorded a peak of 676,412 offences in 1994.¹²

11. The proportion of people recorded in the BCS as having a high level of worry about burglary fell from a peak of 26% in 1994 to 12% in 2007/08; this figure has remained at 12-13% since 2003/04 and is at the same level as those with a high level of worry about car crime (the figure for worry about violent crime has also fallen but is still slightly higher at 15%). However, it has been suggested that the economic recession may lead to a rise in property crimes such as burglary in a dwelling.¹³ The latest quarterly figures show that recorded burglaries have risen slightly, although BCS interviews indicate that the level of domestic burglary remains stable.¹⁴ In any case, burglary is still sufficiently common to affect many individuals and households.¹⁵

The nature of the offence

12. Definitions of burglary have changed over time,¹⁶ but violation of the privacy of a dwelling has long been considered the most serious form of illegal entry into buildings.¹⁷ Whilst commercial burglaries are often viewed simply as “theft combined with damage”,¹⁸ residential burglaries may cause (greater) psychological harm to the occupants through the invasion of the home and the loss of personal belongings, especially where they have sentimental value. As

¹² www.homeoffice.gov.uk/rds/pdfs07/recorded-crime-1898-2002.xls

¹³ see, for example, ‘Economic gloom could reverse the downward trend in recorded crime’, *The Times*, 18 July 2008: www.timesonline.co.uk/tol/news/politics/article4354229.ece; <http://www.telegraph.co.uk/news/uknews/2660470/Credit-crisis-Minister-admits-crime-will-rise.html>, 1 September 2008

¹⁴ *Crime in England and Wales: Quarterly Update to September 2008*; Home Office Statistical Bulletin 01/09: <http://www.homeoffice.gov.uk/rds/pdfs09/hosb0109.pdf>. Between October 2007 and September 2008 the number of recorded burglaries in a dwelling rose by 4%

¹⁵ Roger Tarling and Tonia Davison, *Victims of burglary: a review of the literature* (2000), p 6; http://www.victimsupport.org.uk/vs_england_wales/about_us/publications/burglary_in_britain_report.pdf

¹⁶ For example, housebreaking was an offence until 1968 when it was absorbed into the new definition of burglary laid down in the Theft Act

¹⁷ Mike Maguire, *Burglary in a dwelling: the offence, the offender and the victim* (1982), p. 7. In recommending the fundamental changes to the law which resulted in the 1968 Act, the Criminal Law Revision Committee considered that the fact that the place burgled is a dwelling is only one of the possible aggravating features, and to isolate one feature would be illogical and harmful. However in 1991 the maximum penalty for burglary of a non-dwelling was reduced, clearly indicating that domestic burglary should be punished more severely: Criminal Justice Act 1991, s 26(2)

¹⁸ Andrew Ashworth, *Sentencing and Criminal Justice* (2005), p 133

many homes have several occupants, an offence often will result in harm to more than one victim.

13. In terms of the initial decision to commit burglary in a dwelling, three categories of offence have been identified: *planned* (where there was a time gap between the choice of target and the offence), *search* (where the offender decided to commit a burglary and went looking for a suitable target), and *opportunistic* offences. Studies indicate that the majority of offences fall into the 'search' category, with most of the remainder being 'planned'.¹⁹ Opportunistic, spur-of-the-moment offences have been regarded as characteristic mainly of youths under the influence of alcohol and those with alcohol dependency problems.²⁰ However, some offenders also act spontaneously and burgle properties they pass on their way to somewhere else, for example between their home and the city centre, school or work.

14. According to the 2007/08 BCS, 40% of domestic burglaries (294,000) were attempts, in which the offender tried unsuccessfully to enter the premises. Failure to gain entry usually will result from the activation of an alarm, an inability to physically 'break into' the home, or the presence of an occupant, neighbour or passer-by.

15. Of the 435,000 incidents in which the burglar did gain entry, 73% (318,000) involved some loss of property; this latter category of offences is more likely to be reported than attempts or burglaries involving no loss, partly due to the insurance claim that many victims will make in an attempt to replace any stolen items.

16. 10,635 (3.8%) recorded burglaries in a dwelling in 2007/08 were distraction or 'artifice' burglaries, where the offender gained entry to the house by some form of trick or deception.²¹ Such cases may involve the offender(s) falsely claiming to read a gas or electricity meter, or making a bogus offer to carry out work on the victim's home, and often involve elderly victims.

¹⁹ For example, Claire Nee and Amy Meenaghan, *Expert decision making in burglars* (2006), *Brit J Criminol* 46(5) 935-949

²⁰ Trevor Bennett and Richard Wright, *Burglars on burglary* (1984)

²¹ see fn.11

17. The nature of burglary in a dwelling has been explored in a detailed analysis of the findings from the 2005/06 BCS:²²

- someone was at home when 58% of attempted burglaries and 55% of completed burglaries took place - in 28% of all burglaries, someone was at home *and* was aware of what was happening;
- violence or threats were used in a minority of cases - 14% of all burglaries, including 16% of completed incidents and 12% of attempts;
- property was stolen in 71% of burglaries in which the offender managed to gain entry. Cash, jewellery and electrical goods and cameras were the most commonly stolen items;
- the average value of property stolen was estimated at £400. In 23% of burglaries where property was stolen, the value was under £100, while in 31% of cases it was at least £1,000;
- there was some damage to property in 53% of burglaries, including 69% of attempts and 43% of completed burglaries. Soiling and graffiti were rare, taking place in 3% and 1% of burglaries respectively;
- the average cost of damage caused in the course of all burglaries was estimated to be £153;
- victims were emotionally affected by the burglary in 87% of incidents, including 30% in which they reported being 'very much' affected, and 34% in which they were affected 'quite a lot'.

18. The 2000 BCS found that only 48% of burglary victims were insured. Most insured victims do make insurance claims that are successful, but only in a few cases does the insurance cover the full value of items stolen or damage incurred.²³ For a minority, the experience of making an insurance claim may be considered a form of secondary victimisation.²⁴

19. Research in the 1980s indicated that over a quarter of victims of burglary suffer quite serious shock, and that the lives of some two-thirds of victims are affected for a period of weeks following the offence.²⁵ More recent research

²² *Crime in England and Wales 2005/06: Supplementary Tables: Nature of burglary, theft, criminal damage, vehicle and violent crime*; http://www.homeoffice.gov.uk/rds/crimeew0506_tables_bvv.html#burglary

²³ R I Mawby, *Burglary* (2001), pp 42-44

²⁴ Tarling and Davison; see fn.15

²⁵ Maguire; see fn.17

found that a greater proportion of victims who reported a burglary described themselves as 'very much affected' than were affected by other types of offence such as violence, threats, vandalism or theft.²⁶ Anger, shock, fear and anxiety are the most common reactions, with some victims suffering from an inability to sleep for some time after the offence. In the long term, levels of fear tend to be lower than those amongst victims of violence, but significantly higher than amongst members of the public who have not experienced burglary.²⁷

20. Many victims suffer from feelings of suspicion or mistrust of neighbours, friends and acquaintances, which is unsurprising given the fact that many offences of burglary in a dwelling are committed by persons living in the same area.²⁸ Where fear prevents victims from leaving their home unprotected, their quality of life deteriorates. Research has found that being the victim of a property crime increases the likelihood of moving home within the following year by 12%;²⁹ many more people will not be in a financial position to move home, "virtually 'imprisoned' in areas where they feel unsafe".³⁰

Detection and cautioning

21. Only 16% of recorded offences of burglary in a dwelling in 2007/08 resulted in detection and sanction for the offender, in comparison with an overall sanction detection rate of 28% of all offences.³¹ This low rate is mainly due to the fact that the offence is more likely to be reported than some other crimes, but is one in which the offender is less likely to be seen and is rarely identified.³²

22. 15,424 persons were either cautioned or found guilty of burglary in a dwelling in 2007. 16% (2,520) were cautioned: of the 10,608 adults, 11% were

²⁶ 39% of victims who reported the burglary (and 31% of those who did not) were very much affected. The figures for victims who reported the offence were 36% for threats, 35% for violence, 34% for vandalism and 21% for theft: *Public perceptions and victims' experiences of Victim Support: findings from the 1998 British Crime Survey* (2000); Mike Maguire and Jocelyn Kynch

²⁷ FH Norris, K Kaniasty and MP Thompson, 'The psychological consequences of crime' in Davis et al, *Victims of Crime* (1997)

²⁸ Maguire, Mawby; see fns. 17 and 23

²⁹ L. Dugan, 'The effect of criminal victimization on a household's moving decision', *Criminology* (1999) 903-928. This study found that violent crime had a lesser impact on the likelihood of moving home

³⁰ Mawby, p 47, see fn.23

³¹ *Crime in England and Wales 2007/08*, p 175. 'Sanction detections' include offences which are cleared up through a formal sanction i.e. charge, summons, caution, TIC. This is now the measure preferred by the Home Office due to changes in Counting Rules

³² see fn. 22

cautioned, against an overall adult caution rate of 34% for indictable offences excluding motoring; of the 4,816 youths, 29% were cautioned for this offence, against an overall youth caution rate of 60%.

SECTION TWO: CURRENT SENTENCING PRACTICE AND EXISTING GUIDANCE

The sentencing framework

Sentencing of adults

23. The maximum penalty for an adult offender convicted of burglary in a dwelling is a level 5 fine and/or 6 months imprisonment when sentenced summarily, or 14 years imprisonment on indictment. This compares with a maximum penalty on indictment of 10 years for burglary of a building other than a dwelling, and life imprisonment for aggravated burglary.

24. Section 111 of the Powers of Criminal Courts (Sentencing) Act 2000 provides for a presumptive minimum sentence of three years imprisonment for an adult convicted of burglary in a dwelling for a third time,³³ not including attempted burglary. Any reduction for a guilty plea must not take the sentence below 28.8 months (80% of the minimum).³⁴

Sentencing of youths

25. There is a separate sentencing framework for offenders aged under 18 at the time of conviction, which is outlined below.³⁵ Most burglary offences committed by persons under the age of 18 are sentenced in a youth court, where the maximum penalty is a 24 month detention and training order. However, as burglary in a dwelling falls into the category of 'grave crimes', a young offender may appear in the Crown Court for sentence if a youth court has determined that a longer period of detention is likely to be required.³⁶ A young offender may also be sentenced in the Crown Court as a result of being charged jointly with an adult offender whose case has been committed to that court.³⁷

³³ This applies where the offender has been convicted of two other domestic burglaries committed on separate occasions after 30 November 1999

³⁴ Criminal Justice Act 2003, s.144

³⁵ see paras 101 to 119 below. The Sentencing Advisory Panel has recently consulted on *Principles of sentencing for youths*: www.sentencing-guidelines.gov.uk

³⁶ Magistrates' Courts Act 1980, s. 24, and Powers of Criminal Courts (Sentencing) Act 2000, s. 91

³⁷ The relevant procedures will change upon implementation of the relevant provisions of the Criminal Justice Act 2003, sch.3

Existing guidance on sentencing for burglary in a dwelling

The previous advice of the Panel

26. As mentioned above, the Panel published advice on sentencing for 'domestic burglary' in 2002. In order to inform its proposals, the Panel commissioned a detailed survey of public attitudes to sentencing in such cases.³⁸ Drawing on the findings of this research, the Panel identified the features of a 'standard' domestic burglary, which was assumed to have been committed by a repeat offender: the theft of electrical goods; the theft of personal items; damage caused by the break-in; some turmoil in the house; and no violence but some trauma to the victim. Aggravating features were divided into those considered to be of 'high' and 'medium level' relevance.

27. Four levels of seriousness were defined by reference to these features: at the lowest level a burglary would involve no damage and either no theft or property of very low value; the second level encompassed offences displaying most of the features of a standard burglary; the third level was reached if any 'medium relevance' aggravating factor was present; and the highest level involved any 'high relevance' factor. Due to the existence of a presumptive minimum sentence for a third offence, at each level of seriousness the Panel set out starting points for first-, second- and third-time offenders, in an attempt to ensure a graded approach. For offences at the lowest level of seriousness, the Panel proposed the starting point of a community sentence for a first-time offender. At the three higher levels, custodial starting points were proposed; for a first-time offender these were nine, twelve and 18 months imprisonment respectively.

McInerney and Keating

28. In the subsequent guideline judgment in *McInerney and Keating*,³⁹ the Court of Appeal gave general support to the Panel's analysis of the issues, adopting its definitions of a 'standard' domestic burglary, aggravating factors of 'high' and 'medium' relevance, and the four levels of seriousness. However, as well as identifying other aggravating factors, the Court stated that the distinction

³⁸ *Sentencing of Domestic Burglary*, Neil Russell and Rod Morgan (2001); http://www.sentencing-guidelines.gov.uk/docs/burglary_research.pdf

³⁹ [2003] 2 Cr App R (S) 39

between 'high' and 'medium' factors is helpful "as long as it [is] appreciated there is no clear line between the categories and they can overlap".

29. The Court also expressed the view that short custodial sentences are not effective in rehabilitating burglars, and thus put unjustifiable pressure on the prison estate and public resources in general. Subject to certain conditions, the Court held that the starting point for a first-time domestic burglar offending at all but the highest level of seriousness should be a community order, on the basis that a well-planned and properly enforced community sentence might be more effective than a brief period in custody.

The Magistrates' Court Sentencing Guidelines (MCSG)

30. In May 2008 the Council published definitive guidelines covering most of the offences regularly coming before the magistrates' courts.⁴⁰ The MCSG for burglary in a dwelling is based on the *Mclnerney* judgment but the principles have been adapted to accommodate the structure adopted by the Council for all sentencing guidelines; this is based on a first-time offender. In addition, the meaning of 'starting point' in Council guidelines is different from that in the guideline case.⁴¹

31. In line with standard practice, the MCSG moved away from the definition of a 'standard domestic burglary' and, since it is concerned only with sentencing and mode of trial decisions in a magistrates' court, identifies three rather than four levels of seriousness. The lowest and medium levels are similar to the 'low-level' and 'standard' burglaries as defined in *Mclnerney* but, whilst the starting point for the former is also a (medium level) community order, the starting point for the latter is 12 weeks custody instead of a community order. The highest level of seriousness covers the theft of goods of high value or the presence of any aggravating feature, and the starting point is committal to the Crown Court.

⁴⁰ *Magistrates' Court Sentencing Guidelines*: www.sentencing-guidelines.gov.uk

⁴¹ This was noted by the Court of Appeal in *Saw and others* [2009] EWCA Crim 1; see para. 32

Saw

32. In the recent case of *Saw*,⁴² the Court of Appeal considered six unrelated cases in which it was argued, on the basis of *Mclnerney*, that the sentences that had been imposed for offences of burglary in a dwelling were excessive. Rejecting each appeal, the Court described *Mclnerney* as “difficult of application”⁴³ and noted that “misunderstandings about its effects still persist”.⁴⁴ The main difficulties were identified as: the use of the term ‘starting point’ in a sense different from that which has been used since in Council guidelines; the use of the concept of the ‘first-time burglar’, while at the same time the ‘standard burglary’ was assumed to have been committed by a ‘repeat offender’; and the division of aggravating factors into those of high and medium level of relevance, which the Court considered to be insufficiently flexible in practice.

33. For these reasons, the Court re-examined *Mclnerney* and offered fresh guidance on sentencing for burglary in a dwelling. Apart from cases where a low-level burglary involved minimal loss and damage, custodial sentences were said to be normally appropriate. ‘Limited raised culpability and/ or impact’ should lead to a sentence in the general range of 9 to 18 months imprisonment, although a community order may be appropriate if it provides the best prospect of preventing future offending. Where an offence involved ‘seriously raised culpability and/or serious impact’, the range would ordinarily be 18 months to four years; a community order would only be considered in the most extreme and exceptional circumstances.

Youths

34. The only existing guidance on sentencing for youths is found in the Youth Court Bench Book, which indicates that the average offence of burglary in a dwelling will be of a high level of seriousness.⁴⁵ The Panel has recently published a consultation paper on the general principles to be applied when sentencing young offenders, and this paper draws on the Panel’s provisional approach as set out in that consultation.⁴⁶

⁴² [2009] EWCA 1

⁴³ *ibid.*, [4]

⁴⁴ *ibid.*, [3]

⁴⁵ http://www.jsboard.co.uk/downloads/ycbb/ycbb_section2.pdf

⁴⁶ *Principles of sentencing for youths* (published December 2008): www.sentencing-guidelines.gov.uk

Current sentencing of adults

35. The number of adults sentenced for burglary in a dwelling has fallen significantly, from 12,990 in 1997 to 9,470 in 2007. The tables below set out the types of sentence imposed on adults for offences of burglary in a dwelling in magistrates' courts and in the Crown Court between 1997 and 2007.

Sentences imposed on adults in magistrates' courts for burglary in a dwelling 1997-2007

Sentence imposed	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Discharge	9%	7%	7%	7%	6%	7%	6%	5%	7%	6%	5%
Fine	8%	7%	8%	6%	5%	5%	4%	4%	3%	3%	3%
Community sentence	50%	50%	49%	49%	49%	49%	54%	55%	51%	45%	46%
Suspended sentence	0%	0%	1%	0%	0%	0%	1%	1%	3%	13%	15%
Immediate custody	31%	33%	33%	37%	38%	37%	34%	33%	33%	29%	27%
Other	2%	2%	1%	1%	2%	1%	1%	1%	2%	4%	3%
Total sentenced	3,043	2,965	2,669	2,131	1,911	1,877	2,385	2,255	2,145	2,365	2,652
Average custodial sentence	3.6 months	3.7 months	3.8 months	3.9 months	3.9 months	3.9 months	3.9 months	3.9 months	3.9 months	3.8 months	3.7 months

Sentences imposed on adults in the Crown Court for burglary in a dwelling 1997-2007

Sentence imposed	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Discharge	1%	1%	0%	1%	1%	0%	1%	1%	1%	0%	0%
Fine	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Community sentence	21%	21%	19%	18%	20%	22%	29%	30%	29%	20%	17%
Suspended sentence	1%	1%	1%	1%	1%	1%	1%	1%	2%	10%	15%
Immediate custody	77%	77%	79%	79%	78%	76%	69%	68%	67%	68%	66%
Other	0%	0%	0%	0%	1%	1%	0%	0%	1%	1%	1%
Total sentenced	9,947	9,899	9,776	9,259	8,456	9,243	8,768	7,961	7,100	6,547	6,818
Average custodial sentence	21.2 months	20.9 months	21.3 months	21.5 months	22.9 months	23.9 months	24.5 months	24.9 months	24.9 months	24.9 months	24.2 months

36. The guideline judgment in *McInerney* was handed down in December 2002 and was widely publicised, so it is possible to attempt to assess its impact by comparing sentencing up to and including 2002 with sentencing from 2003 onwards. The most significant trends are:

- the proportion of sentences imposed in the Crown Court peaked at 83% in 2002 and fell to 72% in 2007;
- in 2003 there was a 7% increase in the proportion of community sentences imposed in the Crown Court, with a corresponding decrease in immediate custodial sentences, in line with *McInerney*; similar but less marked changes occurred in magistrates' courts;
- this balance remained fairly stable until 2006 when the effect of *McInerney* appears to have been overtaken by the introduction of the suspended sentence order;⁴⁷ the number of suspended sentences increased by 8% and the number of community orders fell by 9% in the Crown Court; corresponding figures for magistrates' courts were 10% and 6% respectively, and these trends continued in 2007.

37. Mid-length custodial sentences (between six months and two years) imposed for burglary in a dwelling have fallen since 2002, but the average determinate custodial sentence length imposed in the Crown Court increased gradually, from 21.3 months in 1999 to 23.9 months in 2002, 24.5 months in 2003 and 24.8 months in 2006, before falling slightly to 24.2 months in 2007. Throughout this period the average sentence in magistrates' courts remained stable at 3.8-3.9 months, before falling very slightly to 3.7 months in 2007. The proportion of sentences of three years and over has increased since the presumptive minimum sentence became available, but the limited data available indicates that less than half of third-time domestic burglars received the minimum sentence in 2007.⁴⁸

⁴⁷ The SSO became available in April 2005

⁴⁸ Police National Computer data indicates that 581 offenders met these criteria in 2007 and 491 of these (85 per cent) were given a custodial sentence. Where a custodial sentence was given in 2007 about a quarter received a sentence of three years or more. A further quarter of those given a custodial sentence received a sentence of between 28.8 months to three years: *Sentencing Statistics 2007*; <http://www.justice.gov.uk/docs/sentencing-statistics-2007.pdf>

Sentencing of youths

38. 3,437 youths were sentenced for burglary in a dwelling in 2007, down from 4,100 in 1999. During that period the proportion of these offences resulting in an absolute or conditional discharge fell from 10% to 2%. The proportion of community orders decreased from 55% to 43%, due to the introduction of referral orders in 2002. The custody rate decreased from 31% in 1999 to 20% in 2005, rising to 23% in 2006 before falling to 21% in 2007. The average sentence length fluctuated between 9.8 and 11.1 months between 1999 and 2005, but it fell to 9 months in 2006 and remained at that figure in 2007.

39. Of the 3,437 youths sentenced for burglary in a dwelling in 2007:

21% (713) of offences resulted in a custodial sentence;

43% (1,487) a community order;

32% (1,093) a referral order;

0.6% (19) a fine;

2% (83) an absolute or conditional discharge; and

1% (42) were otherwise dealt with.

SECTION THREE: SERIOUSNESS OF THE OFFENCE

40. In both *McInerney* and *Saw*, the Court endorsed the words of the previous guideline judgment of *Brewster*.⁴⁹

“Domestic burglary is, and always has been, regarded as a very serious offence. It may involve considerable loss to the victim...

The loss of material possessions is, however, only part (and often a minor part) of the reason why domestic burglary is a serious offence. Most people, perfectly legitimately, attach importance to the privacy and security of their own homes. That an intruder should break in or enter, for his own dishonest purposes, leaves the victim with a sense of violation and insecurity....”

41. In *Saw* the Court described burglary in a dwelling as both an offence against property and, “often more alarmingly and distressingly”, an offence against the person. It emphasised that “[s]omething precious is violated by burglary of a home, and those who perpetrate this crime should be sentenced and punished accordingly.” As discussed above,⁵⁰ most victims are emotionally affected and some suffer considerable distress. For these reasons, the maximum penalty for burglary in a dwelling is higher than that for other burglary⁵¹ and twice that for theft in a dwelling, where the offender is present with the authority of the occupier and there is consequently no element of trespass or ‘breaking into’ the home.⁵²

42. Offences of burglary in a dwelling range from opportunistic offending involving no forced entry, no damage and no theft, to the use of violence against the property and the victim in order to steal goods of very high value. Nevertheless there is a considerable degree of overlap between the ‘standard’ burglary identified by the Panel’s previous research⁵³ and the findings of the BCS

⁴⁹ [1998] 1 Cr App R (S) 181

⁵⁰ see paras. 19 and 20 above

⁵¹ However, it should be noted that non-dwelling burglary includes outbuildings and garages, and is not purely commercial.

⁵² However, it should be noted that theft in a dwelling is often aggravated by a breach of trust

⁵³ see para.26

summarised above.⁵⁴ In *Saw*, it was stated that every offence will be treated as serious, apart from genuinely exceptional cases such as where a person of good character puts his hand through an open window to steal a bottle of water on a summer's day. Describing this example the Court stated that "[w]ithout trivialising the offence, that smacks more of petty theft than burglary".

43. The starting point for a court considering sentence is an assessment of seriousness of the offence which is based on the offender's culpability and any harm that the offence caused, was intended to cause, or might foreseeably have caused.

44. Even within the levels of culpability and harm, there will be degrees of seriousness. In *Saw* the Court of Appeal used the term *impact* instead of harm and based its approach on whether or not culpability or impact was "raised" and, if so, to what degree. In determining the degree, a court was directed to take into account a range of factors but it was made clear that this was not an exhaustive list. It was pointed out that "different cases throw up different features, and sometimes the different features are unusual"⁵⁵ and that a single factor may, where it is particularly serious, indicate a severe sentence on its own. The Court concluded that all factors drive a court to base its assessment of seriousness on "the overall criminality of the defendant" (in the light of previous convictions) and the "true impact" of the offence on the victims.

45. The following paragraphs propose a base level of culpability against which the factors identified in *Saw* can be considered as indicative of raised culpability; the same approach is taken in relation to harm. In the interests of consistency, the Panel uses the term "harm" rather than "impact" throughout its proposals since culpability and harm are the two parameters of offence seriousness identified in statute⁵⁶ and are now widely accepted and understood. The Panel intends that the dimensions of harm in its proposals should mirror the Court of Appeal's assessment of the impact of this type of offending including any wider dimensions invoked by the terminology used in *Saw*.

⁵⁴ see para.17 above

⁵⁵ [2009] EWCA Crim 1 at [25]

⁵⁶ Criminal Justice Act 2003, s. 143(1)

46. The issue of previous convictions is examined in light of the presumptive minimum sentence for a third conviction of burglary in a dwelling. The section concludes by setting out factors which may constitute offender mitigation.

Culpability

47. In relation to offences generally, the *Seriousness* guideline⁵⁷ defines four levels of criminal culpability – intention, recklessness, knowledge and negligence. Since burglary always requires intention (both through the need for the entry to be as a trespasser and the elements of the offence of theft), culpability will be in the highest of these categories. This has been one of the influences on the general sentencing levels for this offence. The Panel proposes that the base level of culpability should be defined as an offence involving no significant planning or professionalism; the factors described in the paragraphs below will assist a court in determining the extent to which culpability is increased or decreased from this base level.

48. Whilst an offender may not have intended to cause harm beyond that arising from the loss of property, some distress to the victim should have been foreseeable. In *Saw* the Court stated:

“Whether or not the dwelling house burglar has any specific intention to cause harm, he runs the risk that the victim or victims may suffer serious adverse consequences. Where this happens, sentences should be reflective even of unintended consequences.”⁵⁸

Factors indicating raised culpability

Violence used or threatened against the victim

49. Where a burglary involves violence or the threat of violence, the offence is triable only on indictment,⁵⁹ it may also lead to the offence being charged as

⁵⁷ www.sentencing-guidelines.gov.uk. The Panel has recently consulted on *Overarching Principles of Sentencing* (consultation paper published July 2008), and this guideline will be revised as a result

⁵⁸ [7]

⁵⁹ Magistrates' Court Act 1980, sch.1

robbery which is subject to separate guidelines from either the Sentencing Guidelines Council or the Court of Appeal.⁶⁰ Furthermore, the use or threat of violence may be charged as a separate offence. If it has not been charged separately, it will make an offence of burglary more serious.

Knife or other weapon carried

50. Carrying a knife or other weapon suggests a willingness to threaten or use violence and therefore increases culpability. Where a weapon is possessed at the time of entry into the dwelling or commission of the theft, this is likely to constitute the more serious offence of aggravated burglary.⁶¹ In some cases it may not be clear that the offender was in possession of the weapon at the relevant time (for example because the offender claims to have picked up the weapon once inside the dwelling in order to facilitate an escape) and in such circumstances, Crown Prosecution Service charging policy suggests that a charge of burglary in a dwelling should be preferred, possibly with an additional charge of possession of an offensive weapon. However, the additional charge may not be available if there are difficulties establishing that the offender had possession of the weapon in a public place. If the carrying of a weapon is not charged separately, it will make an offence of burglary more serious.

Planning

51. Planning an offence involves greater culpability than committing an offence spontaneously. The degree of planning might be identified through the fact that an offender carried an implement to be used to gain entry, that the property stolen was of high economic value (particularly where it is never found) or that the offender worked with others in a group. A particular home may be targeted because the offender believes that, for example, the occupier(s) are on holiday, in hospital, or at a football match.⁶² Another example of planning is the fairly recent phenomenon whereby offenders, usually working in groups at night, use a specially designed implement to steal car keys via a window or letter box in order to drive away a vehicle from a property, often stealing to order. Some of these

⁶⁰ *Robbery* definitive guideline issued by the Sentencing Guidelines Council in 2006: www.sentencing-guidelines.gov.uk; *Attorney General's Reference Nos. 38-40 of 2007* [2007] EWCA Crim 1692; *Attorney General's Reference No 60 of 2008* [2008] EWCA Crim 2695

⁶¹ see para. 7 above

⁶² *Afonso Alves becomes 15th footballer to be targeted by burglars*, *The Telegraph*, 16 March 2009: <http://www.telegraph.co.uk/news/uknews/5000147/Afonso-Alves-becomes-15th-footballer-be-targeted-by-burglars.html>

elements might also indicate that the offender is a “professional” and that element is explored further in paragraph 55 below.

Victim deliberately targeted

52. In most cases of burglary an offender will select a dwelling on the basis of factors unrelated to the personal characteristics of the occupier(s), such as whether the building is occupied at the time.⁶³ Selecting a property for such reasons is different from targeting a particular victim, and the latter will indicate greater culpability.⁶⁴ Evidence of targeting a victim may be found where an offender has intentionally selected a dwelling that has been burgled before; this is especially common during the month after the first burglary.⁶⁵ Research indicates that one offender may burgle the same place on more than one occasion, possibly because the layout is known, items were identified that could not be carried the first time or for which a buyer has been found, or new items will have been purchased to replace those stolen in the earlier burglary.⁶⁶ Alternatively, a recently burgled dwelling may be targeted by another offender on the grounds that a property attractive to one burglar is likely to be so to another, especially if there is a suggestion that security is poor. Repeat victimisation is not only indicative of heightened culpability but may also increase harm.⁶⁷

53. In *Mclnerney*, the MCSG and *Saw*, motivation by spite is specifically identified. The judgment in *Saw* also referred to targeting on racial grounds; racially motivated conduct is a statutory aggravating factor,⁶⁸ as is religiously motivated conduct⁶⁹ or conduct motivated by the (presumed) disability or sexual orientation of the victim.⁷⁰

⁶³ see, for example, Nee and Meenaghan (2006); see fn.19

⁶⁴ Targeting a property also may indicate greater culpability where it involves planning: see para.51 above

⁶⁵ Mawby, pp 53-55; see fn. 23

⁶⁶ A study of burglars under probation supervision (who tended to have committed many offences) found that no less than 31% admitted to burgling the same place on more than one occasion: J Ashton, I Brown B Senior and K Pease, 'Repeat victimisation: offender accounts', *International Journal of Risk, Security and Crime Prevention* (1998) 269 -279.

⁶⁷ See para. 64 below

⁶⁸ Criminal Justice Act 2003, s.145

⁶⁹ *ibid.*

⁷⁰ CJA 2003, s.146

Vulnerable victim deliberately targeted

54. As mentioned above,⁷¹ a significant minority of offences are distraction burglaries, in which vulnerable elderly people are often targeted;⁷² such offences are particularly serious.⁷³

'Professionalism'

55. 'Professional' offending is a generic aggravating factor. Past research has suggested that the majority of offences of burglary of a dwelling do not involve a great degree of skill or rational planning,⁷⁴ but a small number of offenders have been described as 'professional' or 'high-level' burglars, who employ a degree of organisation.⁷⁵ As described in the paragraph above, the degree of planning will make an offence more serious. However, at times the term 'professionalism' has been used to describe offenders who have committed burglary *persistently*, rather than with any particular degree of skill or organisation.⁷⁶ Since the implementation of the Criminal Justice Act 2003, it has become clear that previous convictions may make an offence more serious and it seems appropriate for that aspect to be clearly separated from the degree of planning in any particular offence.

Previous convictions

56. Section 143(2) of the Criminal Justice Act 2003 states that a court must treat each previous conviction as an aggravating factor if it considers that it can reasonably be so treated having regard both to the nature of the offence to which the conviction relates and its relevance to the current offence, and to the time that has elapsed since the previous conviction.

57. Research suggests that most offenders have previously committed a range of offence types, although these are usually property-related and rarely violent

⁷¹ see para.16

⁷² *Distraction burglary amongst older adults and ethnic minority communities*, Home Office (2003); <http://www.homeoffice.gov.uk/rds/pdfs2/hors269.pdf>

⁷³ The deliberate targeting of *vulnerable* victim(s) is a generic aggravating factor: see Annex A

⁷⁴ Instead offences are motivated by short-term desires such as excitement, ostentatious spending or feeding a drug habit. However, most research on burglars has focused on 'captive populations' on probation or in prison; thus the findings may be more typical of 'failed' burglars than burglars in general – Mawby, p.61; see fn.23

⁷⁵ Maguire; see fn.17

⁷⁶ Ashworth, pp.201-202; see fn.18

offences.⁷⁷ The Court in *Saw* emphasised that “the culpability of the offender is not diminished merely because it is the common characteristic of many offences of burglary that the offender has previous convictions”. To the contrary, the Court endorsed the statement in *Brewster* (as it had done in *McInerney*), that “the record of the offender is of more significance in the case of domestic burglary than in the case of some other crime”. The Panel considers that recent and similar dishonesty offences, such as dwelling or non-dwelling burglaries and distraction thefts⁷⁸ from the homes of elderly occupiers, should aggravate an offence of burglary in a dwelling.⁷⁹ Where the offender has a previous conviction for burglary in a dwelling, this may warrant special consideration; see the discussion at paragraphs 74 to 77 below.

Offence committed on bail or shortly after the imposition of a non-custodial sentence

58. In *Saw* the Court of Appeal identified this element as one commonly encountered in relation to offences of burglary. Where an offender commits an offence whilst on bail, this will increase the seriousness of an offence in accordance with section 143(3) of the Criminal Justice Act 2003. Where an offender has recently been sentenced for another offence, this is likely to increase the seriousness of an offence in accordance with section 143(2) of the Criminal Justice Act 2003 (see paragraph 56 above). It may also indicate an intention to continue to offend and thus influence the choice of sentence.

Factors indicating lower culpability

Offence committed on impulse

59. In *Saw* the Court confirmed that where a burglary in a dwelling is committed on impulse this will indicate a lesser degree of culpability. However, if the offence also involves a high level of harm, the fact that it was committed on impulse will have a limited effect on the seriousness of the offence.

⁷⁷ Mawby, pp. 61- 63; see fn.23

⁷⁸ Distraction thefts can occur in a range of situations, for example when one offender distracts a victim in the street by asking for directions while another steals from the victim’s person or vehicle. In other circumstances a distraction theft may be very similar to a distraction burglary: see para.16

⁷⁹ For a more detailed discussion of the impact of relevant previous convictions, see *Overarching Principles of Sentencing*, p.20, published July 2008, www.sentencing-guidelines.gov.uk

Offender played a subsidiary role in the offence

60. Past research indicated that burglars often worked together, but that there was little evidence of hierarchy or leadership.⁸⁰ More recently it has been suggested that most burglars work alone,⁸¹ but where the offender has acted together with others he or she may have taken a role that could be regarded as being on the fringes of the burglary,⁸² for example by acting as a lookout or driving a 'getaway' vehicle. The Panel takes the view that all roles played by a group of offenders are integral to the commission or success of an offence and that everyone involved is therefore equally culpable; the fact that an offender claims to have played a lesser role must be weighed against the fact that group offending is regarded as an aggravating factor that makes an offence more serious. Whilst it might be legitimate for a court to impose a more severe sentence on an offender shown to have played the leading role in an offence, on the grounds that this is an aggravating factor, the Panel's provisional view is that playing a subsidiary role (should that be proved) should not be treated as mitigation. The Panel welcomes the views of consultees on whether there are circumstances in which an offender's subsidiary role should influence sentence and if so, what effect that should have on sentence.

Question 1

Do you agree that, in principle, all those involved in an offence of burglary in a dwelling are of equal culpability or do you consider that there are circumstances in which an offender might be shown to have played a subordinate role? If there are subordinate roles, what impact if any, should they have on sentence?

Offender was exploited by others

61. Whatever the role of the offender, he or she may have been exploited by others due to vulnerability relating to factors such as age, maturity or intelligence. Again, where this is established (not merely asserted), it indicates lower culpability.

⁸⁰ N Shover, 'The social organization of burglary', *Social Problems* (1973) 499 - 514

⁸¹ Mawby, p.71; see fn.23

⁸² Saw [26]

Harm

62. As noted earlier, an offence of burglary in a dwelling can be seen as an offence against the person as well as an offence against property. In *Saw* the Court of Appeal emphasised that the impact on the victims is an important factor in determining offence seriousness. The harm caused by an offence of burglary in a dwelling is often greater than that intended by the offender, but the statutory description of harm includes not only the harm actually caused but that which was intended or foreseeable. The most obvious harm arising from burglary in a dwelling is the loss of the items stolen and any damage done; however, the emotional harm caused to victim(s), though more difficult to quantify, may be equally or more significant. As many homes have several occupants, an offence will often result in harm to more than one victim.

63. Most offences of burglary in a dwelling will involve a degree of turmoil in the house, and some distress to the victim(s). The degree of loss and damage involved in an offence will vary significantly, but offences often will involve minimal loss and minimal or no damage,⁸³ particularly if there was no forced entry. The Panel has decided to treat this as the base level of harm in its proposals; the factors described in the paragraphs below will assist a court in determining the extent to which harm is increased or reduced from this level.

Factors indicating raised harm

Trauma to the victim beyond the normal level

64. In most cases, an offender is unlikely to have intended emotional harm to the victim, but some such harm generally will have been foreseeable. As discussed above,⁸⁴ for many victims the violation of their right to privacy and security in their own homes has a greater impact than any actual theft. Even where there is no damage or loss of property, most victims experience some psychological or emotional harm. Although, as noted in *Saw*, “the sense of disturbance and distress suffered by the home owner is not quantifiable in bare

⁸³ see para.17 above

⁸⁴ see paras.40 and 41 above

economic terms”,⁸⁵ it will be a key factor in determining the level of seriousness of an offence of burglary in a dwelling. Repeat victimisation may also increase the harm caused by the offence in terms of distress, inconvenience and expense to the victim, heightening feelings of insecurity in the long term⁸⁶ and further increasing the likelihood of the victim(s) moving home.⁸⁷ A victim impact statement may inform a court’s assessment of whether the burglary has resulted in a greater than usual degree of trauma to the victim(s).

Ransacking or vandalism of property

65. The Panel’s previous research indicated that a ‘typical’ burglary involves some turmoil in the home, such as drawers upturned or damage to some items, and this was accepted in *Mclnerney*. Where property has been subject to “ransacking” - defined in this context as leaving the home or any part of it in complete disarray - this is likely to increase the impact on the victim(s). Gratuitous damage involving acts of vandalism or soiling (i.e. damage over and above that necessary to commit an offence) is rare but causes greater harm to the victim(s), as well as indicating particularly high culpability.

Theft of or damage to property of high economic or sentimental value

66. When assessing the value of property stolen or damaged, financial value alone is not a sufficient measure. For the purpose of assessing the harm caused by an offence of burglary in a dwelling, the harm caused by the loss of property will need to take into account the financial value relative to the financial resources of the victim(s), the importance of sentimental value and the possibility that removal of an item might have severe practical consequences, if, for example, it is essential for the victim’s occupation (see, for example, the earlier discussion about the theft of a car at paragraph 51).

Economic value

67. In its judgment in *Saw* the Court of Appeal included “high economic value” in its list of features commonly encountered in offences of burglary of a dwelling and which would be likely to indicate raised culpability or impact. Where property

⁸⁵ [7]

⁸⁶ Mawby, p.59; see fn.23

⁸⁷ see fn.29

of high economic value is stolen this may be a factor in determining the extent to which an offence is planned as well as playing a part in determining the harm caused to victim(s). However, it appears to the Panel that monetary value needs to be seen as part of the broader context of assessing harm.

Financial impact

68. As mentioned above, the average value of goods stolen in domestic burglaries has been estimated at £400, with damage costing an average of £153 to repair.⁸⁸ While in a prosperous home these amounts may not be significant, they would have a considerable impact on many of the inner-city dwellers in deprived areas who are most at risk of burglary.⁸⁹ As noted above, those with fewer financial resources also are less likely to have insured the contents of their homes; in such circumstances the harm caused will be even greater.

Sentimental value

69. The sentimental value of stolen or damaged property is not quantifiable in monetary terms but, for many victims, this is one of the most distressing aspects of a burglary. Research indicates that half of victims lose items of some sentimental value such as jewellery, watches and records of family memories.⁹⁰ Where the items taken or damaged are of significant sentimental value, such as the only photograph of or letter from a deceased family member, the harm caused by an offence is likely to be high, not least because these objects are irreplaceable.

Occupier at home or returns home while offender present

70. An offender may select what is believed to be an unoccupied dwelling, and may choose to offend during daytime, believing that it will be easier to commit the offence without detection.⁹¹ However, some offences are committed at night and there will be a greater likelihood that the dwelling will be occupied and the occupants will be asleep.

⁸⁸ see para.17 above

⁸⁹ Tarling and Davison; see fn.15

⁹⁰ Mawby, p.44; see fn.23

⁹¹ *ibid.*, p.73

71. It is likely that a victim will suffer greater harm if at home when the burglary takes place, even if the offence is only discovered some time later. Where a victim comes face-to-face with the offender, this will increase the harm to an even greater degree.

72. The Panel's previous research indicated that the time at which the offence was committed was not significant in isolation, but that this factor becomes relevant when someone is at home; to come home during the day and discover a burglary has taken place was considered likely to be less traumatic than for a victim to get up in the morning and discover that a burglary had happened while he or she was in bed.⁹² The Panel's advice emphasised that the time was not significant in itself, but in *McInerney* the Court expressed the view that a burglary of an occupied home is further aggravated if it is committed at night, because it must be more frightening to the occupants if they find that they have intruders at a time when they are in the dark, particularly if they are woken from their sleep.⁹³ In *Saw* the Court of Appeal emphasised the potential for increased impact when an occupier is at home either at night or during the day pointing out not only the alarm and distress caused at the time but also the uncertainty and fear that follows.

Factor indicating a lesser degree of harm

No theft or theft of property of very low economic or sentimental value

73. In *Saw* the Court stated that "[i]f nothing, or only property of very low economic or sentimental value, is taken, that obviously reduces the gravity of the offence".⁹⁴

Question 2

Do you agree that these are the features most commonly found in relation to burglary in a dwelling and likely to affect the assessment of the seriousness of an offence? Are there any other features that you consider relevant?

⁹² see fn.38, p.45

⁹³ Previous legislation restricted the definition of burglary to breaking and entering at night, with offences committed in daylight being considered less serious, on the basis that the sleeping householder was in no position to defend himself (by force of arms). However by the time the law was simplified by the 1968 Act the development of police forces, street lighting and the telephone network had made the difference between daylight and night-time offences less important: Maguire, p.7; see fn.17

⁹⁴ [26]

Repeat Offending

A second offence of burglary in a dwelling

74. In light of the presumptive minimum sentence for an offender convicted of a third burglary in a dwelling, the Court in *McInerney* accepted the previous advice of the Panel, which suggested separate starting points for second-time offenders in an attempt to ensure a graded approach; these were double the length of the starting points suggested for first-time offenders, and half the length of the starting points suggested for third-time offenders. If this approach were applied to the Panel's current provisional proposals, there would be a starting point of 18 months for a low-level second offence of burglary in a dwelling, 2 years for a medium-level second offence and 4 years for a high-level second offence. Since that judgment, Parliament has provided for previous convictions to aggravate the seriousness of an offence where a court considers that to be reasonable.⁹⁵

75. In light of that statutory change, the Panel has considered whether it is now helpful to provide guidance in relation to sentencing an offender convicted of a second offence of burglary in a dwelling and, if so, whether that should include previous convictions for similar offences such as burglary in a non-dwelling. The Panel would welcome the views of consultees as to whether, when sentencing for a second offence of burglary in a dwelling, a court should follow the general approach to previous convictions⁹⁶ or apply a different approach and, if the latter, what this should be. The issue is further complicated by the fact that not all offenders convicted of a third burglary in a dwelling will fall within the qualifying criteria for the statutory minimum sentence discussed below and that sentences for these offenders and those convicted of a second offence need to be proportionate one to the other as well as in comparison with the minimum sentence for a third qualifying offence.

⁹⁵ Criminal Justice Act 2003, s.143(2)

⁹⁶ see paras. 56 to 57 above

A third offence of burglary in a dwelling

76. Where an adult offender is convicted of a third qualifying domestic burglary (i.e. the offender has previously been convicted of two other burglaries in a dwelling committed on separate, consecutive, occasions after 30 November 1999) there is a presumptive minimum sentence of three years imprisonment, and any reduction for a guilty plea must not take the sentence below 28.8 months (80% of the minimum).⁹⁷

77. However, a court is not obliged to impose the minimum sentence if it considers that there are particular circumstances relating to any of the offences or to the offender that would make it unjust to do so. In *McInerney* the Court identified examples of the type of situation where a three-year sentence might be unjust:

- two of the offences were committed many years earlier than the third offence;⁹⁸
- the offender has made real efforts to reform or conquer a drug or alcohol addiction, but some personal tragedy triggers the third offence;⁹⁹
- the first two offences were committed when the offender was under 16.

Question 3

Do you agree that the Panel should give guidance in relation to sentencing an offender convicted of a second offence of burglary in a dwelling? If so, what increase in sentence do you consider to be appropriate?

Question 4

Do you agree with the circumstances in which the Court suggested it might be unjust to impose the presumptive minimum sentence? Are there any other situations in which it might be unjust to impose the minimum sentence?

⁹⁷ Criminal Justice Act 2003, s.144

⁹⁸ For further detail on previous convictions see the Panel's recent consultation on *Overarching Principles of Sentencing*, paras.42-60 (published July 2008); www.sentencing-guidelines.gov.uk

⁹⁹ *ibid.*

Offender mitigation

78. Factors relating to the circumstances of the offender do not affect the seriousness of the offence, but may be relevant to the selection of sentence. In *Saw* the Court mentioned several factors that may constitute mitigation: good character, genuine remorse, ready cooperation with police, a positive response to previous sentences, age, and the state of health of the offender. These factors are of general application and therefore are not specifically listed below.

79. The Panel has identified factors that may be more likely to apply to an offender who has committed burglary in a dwelling, in addition to the generic factors listed in the *Seriousness* guideline.¹⁰⁰ The Panel has previously consulted on these factors in relation to offences of theft and dishonesty and considers that the principles established in the Council guideline *Theft and Burglary (non-dwelling)*¹⁰¹ can be applied to the offence of burglary in a dwelling.

Voluntary restitution

80. Where an offender voluntarily returns property or money taken in a burglary, this should be regarded as a mitigating factor as it reduces both the harm to the victim and the gain to the offender. A further pragmatic reason for accepting voluntary restitution in mitigation is that it may create an incentive for offenders to return property, which in some cases will have sentimental value to the victim.

81. The point at which the goods are returned may be an indicator of the degree to which it reflects genuine remorse and a desire to right a wrong, or is merely a calculated step designed to reduce the severity of the sentence that is likely to be imposed. In general, the earlier the property is returned the greater the degree of mitigation the offender should receive. However, if an offender has been temporarily or permanently prevented by circumstances beyond his or her control from returning stolen items, the degree of mitigation should depend on the

¹⁰⁰ see Annex A

¹⁰¹ December 2008, www.sentencing-guidelines.gov.uk

point in time at which, and the determination with which, the offender tried to return the items.¹⁰²

Dependency of the offender

82. Many offenders convicted of acquisitive crimes are motivated by an addiction, often to illegal drugs, alcohol or gambling. Research has indicated that drug misusers are three times more likely to commit burglary than non-misusers, although drug misuse is more closely associated with offences such as theft from a shop and robbery.¹⁰³

83. An offender's dependency does not affect the assessment of seriousness of an offence, but it may properly influence the type of sentence imposed if he or she is making a genuine attempt to break the cycle, or to address its causes.¹⁰⁴ In particular, it may sometimes be appropriate to impose:

- a drug rehabilitation requirement, or
- an alcohol treatment requirement, or
- an activity or supervision requirement including alcohol specific information, advice and support

as part of a community order in an attempt to break the cycle of addiction and offending, even if an immediate custodial sentence would otherwise be warranted.¹⁰⁵ In these circumstances an offender should be committed to the Crown Court for sentence, so that any breach of the order can be sentenced within the powers of that court.

84. A suspended sentence order may be less appropriate than a community order, even though it also can contain treatment requirements. Statute provides for a more flexible response to breach of a community order, with the purpose being to secure compliance rather than to punish,¹⁰⁶ making it more suitable for drug-dependent offenders who are highly likely to breach an order whilst adapting

¹⁰² see the draft guideline, *Sentencing for Fraud – statutory offences*, p.11, 25 February 2009, www.sentencing-guidelines.gov.uk

¹⁰³ Trevor Bennett and Rae Sibbitt, *Drug Use Among Arrestees* (2000); Home Office

¹⁰⁴ *Saw*, [27]

¹⁰⁵ see the Council guideline on *New Sentences: Criminal Justice Act 2003* (published 2004). The Court of Appeal gave guidance on the approach to making drug treatment and testing orders, which also applies to imposing a drug rehabilitation requirement, in *Attorney General's Reference No. 64 of 2003 (Boujettif and Harrison)* [2003] EWCA Crim 3514 and *Woods and Collins* [2005] EWCA Crim 2065 summarised in the Sentencing Guidelines Council *Guideline Judgments Case Compendium* (section (A) Generic Sentencing Principles) available at www.sentencing-guidelines.gov.uk.

¹⁰⁶ *New Sentences: Criminal Justice Act 2003*, December 2004, p.13, www.sentencing-guidelines.gov.uk

to the demands of drug treatment. In addition, the length of the custodial term within a suspended sentence order is limited to a maximum of 12 months, which may not properly reflect the seriousness of the original offence. When sentencing for breach of a community order there are no such restrictions.

Financial pressure

85. The primary motive in most cases of burglary in a dwelling is generally financial; this may be due to greed or a desire to live beyond one's legitimate means, or it may be due to desperation or need arising from particular hardship. In principle, financial pressure is a factor that neither increases nor diminishes an offender's culpability in relation to the offence. However, where financial pressure is exceptional and not of the offender's own making, it may in very rare circumstances constitute offender mitigation.

Question 5

Do you agree that the factors identified above constitute offender mitigation? Are there any other factors relating to the offender that you consider particularly relevant to this offence?

SECTION FOUR: SENTENCING OF ADULT OFFENDERS

Aims of sentencing

86. Section 142 of the Criminal Justice Act 2003 requires courts to have regard to five purposes of sentencing: punishment, crime reduction, reform and rehabilitation, public protection, and reparation. The sentencer must consider which of these purposes is appropriate in each particular case, and how it or they might be achieved.¹⁰⁷ Most sentences will involve an element of punishment, but a court may also aim to rehabilitate when deciding what requirements to include in a community or suspended sentence order, and reparation to the victim may indicate a particular form of community order and/or a compensation order. However, the dominant consideration is that the sentence imposed must be proportionate to the seriousness of the offence.¹⁰⁸ The purposes most relevant to the presumptive minimum sentence appear to be public protection and crime reduction, through a combination of deterrence and incapacitation.

The Panel's proposals

Levels of seriousness

87. In *Saw* the Court of Appeal stated that the level of sentence should be determined by reference to the overall criminality of the defendant and the true impact of the offence on the victims. Rather than identifying specific determinants of seriousness, the Court used the less specific descriptions of raised culpability and raised impact. It identified four levels of seriousness; the least serious offences would be characterised by minimal loss, minimal damage, no raised impact and no raised culpability – such offences would be suitable for a community penalty rather than a custodial sentence. Where there is raised culpability and/or impact the custodial threshold is likely to have been crossed; where that is limited, sentence lengths of between 9-18 months would be appropriate and where that was “seriously raised”, lengths would be between 18

¹⁰⁷ see the Panel's consultation on *Overarching Principles of Sentencing*, paras. 23-25, July 2008, www.sentencing-guidelines.gov.uk

¹⁰⁸ Criminal Justice Act 2003, s.143(1)

months and 4 years for a single offence. Sentences beyond that level would be appropriate where culpability and/or impact is at an extreme level.

88. This approach does not follow that of Council guidelines, which define several levels of seriousness based on the type or nature of the offence, and provide a precise starting point and a range within which sentence should normally fall for offences at the relevant level. Whilst the approach in *Saw* has its own internal consistency, both the description of the type and nature of offence and the starting points are less precise than in a Council guideline.

89. Anticipating that the Sentencing Guidelines Council will expect to follow its established pattern for guidelines, the Panel has sought to develop the approach in *Saw* to reflect the particular emphasis on the harm caused to victim(s), the potentially wide range of features that may be present, and the recognition that the level of seriousness may be raised by one of those features alone or a number in combination.

90. In order for this approach to be developed, the Panel has considered it necessary to define the base level of culpability and of harm from which a decision can consistently be made that the level is “raised” or “seriously raised”. If the guideline is to contain exact starting points (as usual) in order to enable a court to apply the guideline consistently, it will also be important to determine the extent to which those starting points are based on the level of culpability, the level of harm or both.

91. In common with the Council’s standard approach, the starting points and ranges set out in the table on page 43 below apply to a first-time offender pleading not guilty. Paragraphs 56 to 57 above provide guidance on sentencing offenders with relevant previous convictions.

92. At the lowest level, an offence of burglary in a dwelling will involve minimal loss and no or minimal damage. Where none of the listed factors indicating greater culpability or harm are present, the proposed starting point is a medium level community order, within a range of a low level community order to 12 weeks

custody. A fine is unlikely to be appropriate unless there are significant mitigating factors. However, as the Court stated in *Saw*, genuinely exceptional cases should be treated exceptionally.¹⁰⁹

93. The custody threshold normally will be passed where any of the listed factors indicating greater culpability or harm is present. At the medium level of seriousness, where an offence involves limited raised culpability and/or harm, the proposed starting point is 12 months custody, within a range of a high level community order to 2 years custody. A community order may be appropriate if it provides the best prospect of preventing future offending¹¹⁰ due to the circumstances of the offender, such as where an offender has reached a critical stage in his or her life with a real prospect of turning away from offending. Where an offender has a dependency on illegal drugs, the court may wish to consider whether a community order, particularly in the latter case one including a treatment programme, might be more effective at addressing the underlying causes of the offending.¹¹¹

94. At the highest level, where an offence involves seriously raised culpability and/or serious harm, the proposed starting point is 2 years custody, within a range of 12 months to 4 years custody. At this level a community order should only be considered in the most extreme and exceptional circumstances.¹¹²

95. Offences of a high level of seriousness involving a combination of aggravating features including significant professionalism may lead to a sentence beyond the range.¹¹³ Such offences are likely to involve offenders with relevant previous convictions; this issue is considered separately above.¹¹⁴

Question 6

Do you agree with the Panel's proposed starting points and ranges for a first-time adult offender? If not, why not?

¹⁰⁹ see para.42 above

¹¹⁰ *Saw*, [31]

¹¹¹ see para.83 above

¹¹² *Saw*, [32]

¹¹³ In *Maloney* [2007] EWCA Crim 2568 the Court approved a sentence of 12 years imprisonment where the offender pleaded guilty to a single offence of conspiracy to commit burglary (consecutive sentences could have been passed if the burglaries had been charged as separate offences) which involved 38 'distraction' burglaries taking place within four months

¹¹⁴ see paras. 56 to 57 above

Multiple offences

96. Where an offender is convicted of two or more offences, the court will normally impose a separate sentence in relation to each offence; it must then determine whether the sentences should run concurrently or consecutively. Where separate offences arise out of the same incident, the established principle is that the sentences should run concurrently. In exceptional circumstances, such as where an offender has committed a seriously violent or sexual assault at the time of the burglary, the court may decide to impose consecutive sentences or a mixture of concurrent and consecutive sentences. When offences arise out of separate incidents, such as those that the offender asks to be taken into consideration, the accepted practice is to impose consecutive sentences. The application of the totality principle requires that the overall sentence remains proportionate to the seriousness of the cumulative offending behaviour.

Ancillary and other orders¹¹⁵

Restitution order

97. A court may order that stolen goods be restored to the victim or that a sum not exceeding the value of the goods be paid to the victim from money taken out of the offender's possession at the time of apprehension.¹¹⁶ On the application of the victim, the court may also order that other goods representing the proceeds of disposal or realisation of the stolen goods be transferred to the victim. Where the stolen property cannot be traced or the offender is not in possession of sufficient money at the time of apprehension, a restitution order will not be available and a compensation order should be considered instead. A restitution order should not normally impact on or influence the choice of sentence as the offender has no control over the making of the order.

¹¹⁵For further detail see the Sentencing Advisory Panel's recent consultation on *Overarching Principles of Sentencing*, paras.286-289; www.sentencing-guidelines.gov.uk

¹¹⁶ Powers of Criminal Courts (Sentencing) Act 2000, s.148

Compensation order

98. The court must consider making a compensation order in any case where an offence has resulted in personal injury (including distress), loss or damage.¹¹⁷ In cases where it is difficult to ascertain the full amount of the loss suffered by the victim, consideration should be made to making a compensation order for an amount representing the agreed or likely loss. When imposed as an ancillary order, a compensation order normally should not impact on or influence the choice of sentence. However, where a court considers that it is appropriate to impose both a fine and a compensation order and the offender has insufficient means to pay both, priority must be given to the compensation order.¹¹⁸ Where an offender has acted to free assets in order to pay compensation, this is akin to making voluntary restitution and may be regarded as offender mitigation.

Confiscation order

99. Where there is evidence in a case before the Crown Court that the offender has benefited financially from his or her offending, the court must consider whether to make a confiscation order.¹¹⁹ If the court makes a confiscation order, it must take account of the order before it imposes a fine or a deprivation order,¹²⁰ but it must not otherwise take account of the confiscation order in deciding the appropriate sentence.¹²¹ Where a court makes both a compensation order and a confiscation order and it believes that the offender does not have sufficient means to satisfy both orders, it must direct that the compensation is paid from the confiscated assets.¹²²

Deprivation order

100. A court may deprive an offender of property used or intended to be used to commit or facilitate the commission of an offence, for example a motor vehicle.¹²³ Where the property also has an 'innocent use', a deprivation order must be taken into account when considering whether the overall penalty is commensurate with the seriousness of the offence.¹²⁴ However, where the property can be used only for the

¹¹⁷ Powers of Criminal Courts (Sentencing) Act 2000, s.130

¹¹⁸ *ibid.*, s.130(12)

¹¹⁹ Proceeds of Crime Act 2002. A magistrates' court may commit the offender to the Crown Court for sentence with a view to such an order being made.

¹²⁰ Proceeds of Crime Act 2002, ss.13(2) and (3)

¹²¹ *ibid.*, s.13(4)

¹²² *ibid.*, ss.13(5) and (6)

¹²³ Powers of Criminal Courts (Sentencing) Act 2000, s.143

¹²⁴ *Buddo* (1982) 4 Cr App R (S) 268, *Joyce and others* (1989) 11 Cr App R (S) 253, *Priestley* [1996] 2 Cr App R (S) 144.

purpose of crime, a deprivation order should not be taken into account when determining the appropriate sentence.

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Factors to take into consideration

1. The starting points and ranges in the proposed guideline are for a first time adult offender convicted after pleading not guilty.
2. The sentence should reflect the level of harm resulting from the offence even where that was unintended.
3. At Level 3, the starting point is for those offences where:
 - in relation to harm, the offence resulted in minimal loss and damage;
 - in relation to culpability, there was no significant planning or professionalism.
4. Culpability is “raised” when any of the factors identified in the proposed guideline as relating to culpability is present.
5. Harm is “raised” where any of the factors identified in the proposed guideline as relating to harm is present.
6. Culpability is “seriously raised” where several factors indicating raised culpability are present. It may also be seriously raised where one or two of these factors is present at a very high level.
7. Harm is “seriously raised” where several factors indicating raised harm are present. It may also be seriously raised where one or two of these factors is present at a very high level.
8. A sentence beyond the range in Level 1 is likely where culpability or harm is at an extreme level.
9. Attempted burglary is prosecuted more frequently than attempts to commit other offences and it is important that sentencing reflects any harm that was intended or foreseeable, as well as the culpability of the offender and any harm actually caused. Certain facts, such as planning and possession of a weapon or other equipment, may help to identify the level of harm intended within an attempt but the seriousness of the intended offence may not always be easy to prove.
10. Each previous conviction will aggravate the seriousness of an offence where the court considers this is reasonable having regard to the nature of the previous conviction, its relevance to the current offence and the time that has elapsed since the conviction.
11. Section 111 of the Powers of Criminal Courts (Sentencing) Act 2000 (minimum sentence) applies to offenders convicted of a third qualifying burglary.
12. Factors relating to the circumstances of the offender which, while not affecting the seriousness of the offence, may be relevant to the selection of sentence, include the voluntary return of stolen property, exceptional financial pressure or a dependency on drugs or alcohol.

BURGLARY IN A DWELLING

ADULT OFFENDERS

Theft Act 1968, section 9

Triable either way:

Maximum penalty when tried summarily: Level 5 fine and/or 6 months imprisonment

Maximum penalty when tried on indictment: 14 years imprisonment

Type/ nature of activity	Starting point	Sentencing range
Level 1 Seriously raised culpability and/or serious harm (<i>where the level of culpability or harm is extreme, a sentence outside the range should be considered</i>)	2 years custody	12 months to 4 years custody
Level 2 Limited raised culpability and/or harm	12 months custody	Community order (HIGH) to 2 years custody
Level 3 Minimal loss and damage and no raised culpability and/or harm	Community order (MEDIUM)	Community order (LOW) to 12 weeks custody

Factors indicating raised culpability	Factors indicating lower culpability
<ol style="list-style-type: none"> 1. Violence used or threatened against victim. 2. Knife or other weapon carried. 3. Planning e.g. as indicated by carrying of housebreaking implement(s). 4. 'Professionalism'. 5. Victim deliberately targeted. 6. Vulnerable victim deliberately targeted. 7. Offence committed on bail or shortly after imposition of sentence. 	<ol style="list-style-type: none"> 1. Offence committed on impulse. 2. Offender exploited by others.
Factors indicating raised harm	Factor indicating lesser degree of harm
<ol style="list-style-type: none"> 8. Trauma to victim beyond normal level. 9. Ransacking or vandalism of property. 10. Theft of/ damage to property of high economic or sentimental value. 11. Occupier at home or returns home while offender present. 	<ol style="list-style-type: none"> 3. No theft or theft of property of very low economic or sentimental value

SECTION FIVE: SENTENCING OF YOUTHS

101. The approach to assessing the seriousness of an offence outlined above applies equally to offences committed by persons aged under 18, but as mentioned above the sentencing framework that applies is significantly different from that for adult offenders.

Aims of sentencing

102. Since it is not anticipated that a guideline for this offence will be published until after the implementation of the new sentencing framework for youths contained in the Criminal Justice and Immigration Act 2008 Act, this paper is based on that new framework. The Act provides that, when sentencing a youth, a court must have regard to the principal aim of the youth justice system, the welfare of the offender, and the purposes of sentencing.¹²⁵ The principal aim of the youth justice system is to prevent offending by children and young people.¹²⁶ The purposes of sentencing for those aged under 18 are punishment, reform and rehabilitation, protection of the public, and reparation to those affected by the offence.¹²⁷ As with offenders aged 18 and over, no order of priority is given to these purposes in statute, and several or all may be appropriate in a particular case. For example, a sentence designed to prevent re-offending also helps to promote the welfare of the young offender. Restorative justice is an important underlying principle in all youth justice disposals;¹²⁸ as well as reducing the harm done, it can also help to prevent re-offending.

General approach to sentencing youths

103. As with adult offenders, a court must impose a community or custodial sentence only if such a sentence is warranted by the seriousness of the offence. The normal approach in sentencing young offenders is that the penalty is scaled down to reflect both reduced culpability (for example, due to a lesser ability to

¹²⁵ Section 142A(2)

¹²⁶ When in force, section 142A(2) of the Criminal Justice and Immigration Act 2008 will require a court dealing with an offender aged under 18 to have regard to this aim complementing the existing requirement in section 37(2) of the 1998 Act

¹²⁷ Section 142A(3)

¹²⁸ YJB, *A guide to the role of youth offending teams in dealing with anti-social behaviour* (2006); www.yjb.gov.uk

foresee the consequences of actions) and the more onerous effects of punishments on their education and personal development. For the same reasons, the sentencing framework differs significantly depending on the age of the young offender.¹²⁹

104. The particular stage of intellectual or emotional maturity of the individual, which may not correspond with actual age, will also often influence sentence. Other offender mitigating factors that may be particularly relevant to young offenders include peer pressure and a lack of parental support.

Sentencing options

Referral order

105. Where a young person is convicted of an offence of burglary in a dwelling for the first time following a guilty plea, a youth court may impose only a referral order, an absolute discharge, hospital order or a custodial sentence.¹³⁰ Where the offender has pleaded guilty to all offences that are being sentenced together, has no previous convictions, has no previous orders to be bound over to keep the peace or to be of good behaviour, all the offences are imprisonable¹³¹ and the court is not imposing an absolute discharge, a hospital order or a custodial sentence, a court *must* impose a referral order. A court also has the power to impose a referral order where the offender *either* has been convicted of at least two offences, has pleaded guilty to at least one and not guilty to at least one and no previous convictions or orders to be bound over *or* the compulsory referral conditions would arise save for the fact that one of the offences is not imprisonable.¹³²

106. The effect of a referral order is to require the offender to attend meetings of a youth offender panel as established by a Youth Offending Team designated by the court. The order will specify a period for a contract to take effect between the offender and the panel; the minimum period is 3 months, the maximum 12

¹²⁹ see para.114 below

¹³⁰ Powers of Criminal Courts (Sentencing) Act 2000, s.16

¹³¹ *ibid.*, s.17(1)

¹³² *ibid.*, s.17(2), s.17(1A)

months.¹³³ The contract will be between the offender and a youth offender panel following agreement on a programme of behaviour aimed at preventing reoffending by the offender, which may include financial or other reparation, mediation sessions with the victim, unpaid work or service within the community, a curfew, attendance at school, undertaking specified activities and limiting contact with specified persons or access to specified places. Should the offender fail to comply, the panel may refer the offender back to court where the court may re-sentence. When a contract is complete, the conviction is normally spent for the purposes of the Rehabilitation of Offenders Act.

107. On the implementation of the relevant provisions in the Criminal Justice and Immigration Act 2008,¹³⁴ the circumstances in which a referral order can be made will be extended to enable the order to be used more widely and with greater flexibility. The amendments will enable a court to make a referral order where an offender has one previous conviction in relation to which a referral order was not made¹³⁵ or, in exceptional circumstances and on the recommendation of the 'appropriate officer',¹³⁶ where the offender has one or more previous convictions and has had one previous referral order.¹³⁷

Reparation order

108. A reparation order requires a young offender to make reparation to the victim(s) of the offence, and before making such an order the court will obtain the views of anyone so affected.¹³⁸ This work must last no longer than 24 hours and be completed within 3 months.

Fine

109. The court may impose a fine of up to £250 for offenders aged between 10 and 14, and up to £1,000 for those aged 15-17. Where the offender is under 16, the court must order that the fine is paid by the offender's parent unless that

¹³³ The Panel has recently considered the period to be specified within a referral order as part of its consultation on the principles to be applied when sentencing a young offender - *Principles of sentencing for youths*, December 2008, www.sentencing-guidelines.gov.uk

¹³⁴ ss.35 - 37

¹³⁵ Powers of Criminal Courts (Sentencing) Act 2000, s. 17(2B) as inserted by Criminal Justice and Immigration Act 2008 s.3

¹³⁶ *ibid.*, s.17(2D); a member of a youth offending team or an officer of a local probation board or provider of probation services

¹³⁷ *ibid.*, s.17(2C)

¹³⁸ *Ibid.*, s.73

would be unreasonable; in the case of an offender aged 16 or 17, the court has discretion to do so.

Youth rehabilitation order

110. The present provisions creating a number of youth community orders for a person under the age of 18 will change on the implementation of the relevant provisions in the Criminal Justice and Immigration Act 2008. This consultation paper considers only the new single community sentence, the youth rehabilitation order (YRO), as it is anticipated that the order will be implemented prior to the publication of the Panel's advice.

111. A court will be able to impose a YRO with one or more requirements variously designed to provide for punishment, for protection of the public, for reducing reoffending and for reparation. A similar transition took place in relation to adult offenders on the implementation of new community sentences under the Criminal Justice Act 2003. At that time the Sentencing Guidelines Council published a definitive guideline¹³⁹ that set out the principles upon which a court should determine the nature and extent of the requirements to be included within an order, emphasising the guiding principles of proportionality and suitability.¹⁴⁰ The Panel considers that this provides a useful framework for determining the content and length of a YRO, and it has recently consulted on a similar approach.¹⁴¹ Where a YRO is to be imposed, the Panel has proposed that the approach be based on low, medium and high ratings derived from the assessment of the risk of reoffending and of harm.

112. A *youth rehabilitation order with intensive supervision and surveillance* is also provided for in the 2008 Act but may be imposed only where a custodial sentence would otherwise have been appropriate.¹⁴² This order contains an 'extended activity requirement', and there are consequently further obligations to

¹³⁹ *New Sentences: Criminal Justice Act 2003* Sentencing Guidelines Council, December 2004 www.sentencing-guidelines.gov.uk

¹⁴⁰ *ibid.*, p.6

¹⁴¹ *Principles of sentencing for youths*, December 2008, www.sentencing-guidelines.gov.uk

¹⁴² Criminal Justice and Immigration Act 2008, ss.1(3) and 1(4); Criminal Justice Act 2003, s.174(2)(ca) and (cb) as inserted by Criminal Justice and Immigration Act 2008, sched.4, para.80(2)

include a supervision requirement¹⁴³ and a curfew requirement.¹⁴⁴ Where appropriate it may also include additional requirements, although any restrictions on liberty must be commensurate with the seriousness of the offence. Care will need to be taken to ensure that the requirements are not so onerous as to make the likelihood of breach almost inevitable.

113. A *youth rehabilitation order with fostering* can be imposed only where a custodial sentence would otherwise have been appropriate, and where the court is satisfied that a significant factor in the offence was the circumstances in which the young person was living and that the imposition of a fostering requirement would assist in the rehabilitation of the young person. Where appropriate, this order may also include other requirements (and must include supervision) but again these must be suitable and commensurate with the seriousness of the offence.

Detention and training order

114. Where a custodial sentence is imposed in the youth court, it must be a Detention and Training Order (DTO), which can only be for 4, 6, 8, 10, 12, 18 or 24 months. Where the offender is aged 10 or 11, no custodial sentence is available in the youth court. Where the offender is aged between 12 and 14, a custodial sentence may be imposed only if the child is a “persistent offender”.¹⁴⁵ Young people aged under 18 are generally vulnerable, dependent and still developing, and they may feel isolated or insecure in custody;¹⁴⁶ detention may not necessarily lower the chances of reoffending.

¹⁴³ A requirement to attend appointments with the responsible officer (or any other person determined by the responsible officer): *ibid.*, para.9

¹⁴⁴ A minimum of 2 hours and a maximum of 12 hours on any one day which must fall within the period of 6 months from the day on which the requirement first takes effect: *ibid.*, para.14. It is likely that this curfew will be electronically monitored: *ibid.*, para. 3(4)(b) and para.2

¹⁴⁵ *ibid.*, s.100

¹⁴⁶ A 2006 survey found that a third of youths in custody felt unsafe: *Young People in Custody 2004-2006: an analysis of children's experiences of prison*, HM Inspectorate of Prisons and YJB (2006); <http://inspectors.homeoffice.gov.uk/hmiprisons/thematic-reports1/YoungPeople04-06>

The Panel's proposals

115. Most cases of burglary in a dwelling committed by a young offender convicted after a trial will be sufficiently serious to justify the imposition of a YRO.¹⁴⁷ As mentioned above, a range of requirements can be attached to the order, and the court will consider which will best prevent further offending. The individual circumstances of the offender and the seriousness of the offence will be relevant factors. The court must ensure that the requirements imposed by the order are compatible with each other, and that as a whole the order is not so onerous as to make a breach likely. In exceptional cases, such as where an offence is at the lowest level of seriousness and there are significant mitigating factors, a fine may be appropriate.

116. In accordance with international obligations, including the United Nations Convention on the Rights of the Child, custody should be used for a youth only as a measure of last resort.¹⁴⁸ Since the minimum length of a DTO is four months, the custody threshold is higher for a youth than for an adult.

117. Even where the offence is sufficiently serious to cross the custody threshold, the court should normally choose a YRO in preference to a DTO, unless it is satisfied that all appropriate community orders have been tried and cannot prevent the youth from re-offending. The younger the offender, the more likely that perseverance with a YRO will be more effective in preventing re-offending than detention. Before imposing a custodial sentence, on implementation of the relevant provisions in the Criminal Justice and Immigration Act 2008, in most circumstances a court must be satisfied that a YRO with intensive supervision and surveillance or with fostering cannot be justified.

¹⁴⁷ As explained above in para. 104, where a young first-time offender pleads guilty, the court must make a referral order unless it imposes an absolute discharge, a custodial sentence or a hospital order

¹⁴⁸ United Nations Convention on the Rights of the Child, Article 37(b)

118. Where an offence has crossed the custody threshold,¹⁴⁹ the Panel proposes that:

- for a first time offender who has pleaded guilty, in most circumstances a referral order will be the most appropriate sentence;
- in most other circumstances, where available a YRO will be the most appropriate sentence;
- where a custodial sentence is unavoidable, a court should identify the starting point by reference to the starting point that would have been applicable if the offender had been an adult;
- in determining how to move from the adult starting point, take account of the maturity of the offender as well as chronological age.

119. The starting points and ranges in the table below are for a first-time offender aged 17 pleading not guilty. Greater sentencing powers will be available if the youth is sentenced for this offence in the Crown Court, but these will only be appropriate for the most exceptionally aggravated offences, where the offender has recent and relevant previous convictions and has not responded to any previous sentence. Where the offender is younger than 17, sentencers should consider whether a lower starting point is justified in recognition of the offender's age or immaturity.¹⁵⁰ Any detention and training order must be made for the shortest appropriate period of time,¹⁵¹ although adherence to this principle is limited by the prescribed statutory periods for which such an order may be imposed,¹⁵² and the court should take account of any time spent on a qualifying remand.¹⁵³

Question 7

Do you agree with the Panel's approach to the sentencing of youths convicted of burglary in a dwelling?

¹⁴⁹ Assuming a sentence under the dangerous offender provisions is not likely to be necessary. Burglary is a specified offence where it is committed with intent to inflict grievous bodily harm to a person or to do unlawful damage to a building or anything in it

¹⁵⁰ see the discussion of this issue in the Panel's recent consultation *Sentencing Principles – Youths*, December 2008, www.sentencing-guidelines.gov.uk ps. 19-21 and 67

¹⁵¹ see fn.148

¹⁵² see fn.150 above, ps.66 - 71

¹⁵³ Powers of Criminal Courts (Sentencing) Act 2000, s.101

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Factors to take into consideration

1. The starting points and ranges in the table opposite apply to a 17 year-old first time offender convicted after pleading not guilty. Where the offender is younger than 17, lower starting points and ranges are likely to be appropriate.
2. The sentence should reflect the level of harm resulting from the offence even where that was unintended.
3. At Level 3, the starting point is for those offences where:
 - in relation to harm, the offence resulted in minimal loss and damage;
 - in relation to culpability, there was no significant planning or professionalism.
4. Culpability is “raised” when any of the factors identified in the proposed guideline as relating to culpability is present.
5. Harm is “raised” where any of the factors identified in the proposed guideline as relating to harm is present.
6. Culpability is “seriously raised” where several factors indicating raised culpability are present. It may also be seriously raised where one or two of these factors is present at a very high level.
7. Harm is “seriously raised” where several factors indicating raised harm are present. It may also be seriously raised where one or two of these factors is present at a very high level.
8. A sentence beyond the range in Level 1 is likely where culpability or harm is at an extreme level.
9. Attempted burglary is prosecuted more frequently than attempts to commit other offences and it is important that sentencing reflects any harm that was intended or foreseeable, as well as the culpability of the offender and any harm actually caused. Certain facts, such as planning and possession of a weapon or other equipment, may help to identify the level of harm intended within an attempt but the seriousness of the intended offence may not always be easy to prove.
10. Each previous conviction will aggravate the seriousness of an offence where the court considers this is reasonable having regard to the nature of the previous conviction, its relevance to the current offence and the time that has elapsed since the conviction.
11. Factors relating to the circumstances of the offender which, while not affecting the seriousness of the offence, may be relevant to the selection of sentence, include the voluntary return of stolen property, exceptional financial pressure or a dependency on drugs or alcohol.

BURGLARY IN A DWELLING

OFFENDERS AGED 17*

Theft Act 1968, section 9

Triable either way:

Maximum penalty when tried in Youth Court: £1,000 fine and/or 24 months detention

Maximum penalty when tried on indictment: 14 years custody

Type/ nature of activity	Starting point	Sentencing range
Level 1 Seriously raised culpability and/or serious harm (<i>where the level of culpability or harm is extreme, a sentence outside the range should be considered</i>)	12 months detention	Youth rehabilitation order (HIGH) to 24 months detention
Level 2 Limited raised culpability and/or harm	Youth rehabilitation order (HIGH)	Youth rehabilitation order (LOW) to 12 months detention
Level 3 Minimal loss and damage and no raised culpability and/or harm	Youth rehabilitation order (LOW)	Fine to youth rehabilitation order (HIGH)

Factors indicating raised culpability	Factors indicating lower culpability
<ol style="list-style-type: none"> 1. Violence used or threatened against victim. 2. Knife or other weapon carried. 3. Planning e.g. as indicated by carrying of housebreaking implement(s). 4. 'Professionalism'. 5. Victim deliberately targeted. 6. Vulnerable victim deliberately targeted. 7. Offence committed on bail or shortly after imposition of sentence. 	<ol style="list-style-type: none"> 1. Offence committed on impulse. 2. Offender exploited by others.
Factors indicating raised harm	Factor indicating lesser degree of harm
<ol style="list-style-type: none"> 8. Trauma to victim beyond normal level. 9. Ransacking or vandalism of property. 10. Theft of/ damage to property of high economic or sentimental value. 11. Occupier at home or returns home while offender present. 	<ol style="list-style-type: none"> 3. No theft or theft of property of very low economic or sentimental value

* The starting points are based on a first-time offender aged 17 years old who pleaded not guilty. For younger offenders, sentencers should consider whether a lower starting point is justified in recognition of the offender's age or immaturity.

DIVERSITY ISSUES

120. The Panel has consulted key stakeholders to identify any factors relevant to sentencing that might result in outcomes that impact unfairly on grounds of race, disability, religion, ethnicity, gender, sexual orientation or age. The Panel is grateful to those who responded; no diversity issues specific to burglary in a dwelling were identified. However, the Panel would like to hear from consultees whether there are any reasons to believe that its proposals for sentencing those committing burglary in a dwelling might potentially impact unfairly on any individual group.

Question 8

Is there any reason to believe that the Panel's proposals will impact disproportionately on some offenders by reason of their gender, age, disability, race or ethnic background?

IMPACT ASSESSMENT

121. As acknowledged by the Sentencing Commission Working Group,¹⁵⁴ it is extremely difficult to assess what impact the Panel's proposals are likely to have on prison and probation resources without more detailed and more reliable sentencing data. The Panel's ability to produce an impact assessment is limited by the availability of sufficient data to carry out a projection analysis; whilst it was possible to produce an impact assessment in relation to earlier proposals for sentencing in relation to theft from a shop and certain causing death by driving offences, there is not enough data available to inform a detailed impact assessment on this occasion.

¹⁵⁴ *Sentencing Guidelines in England and Wales: an evolutionary approach*; www.justice.gov.uk/docs 5.1 p.16

SUMMARY OF QUESTIONS

Question 1

Do you agree that, in principle, all those involved in an offence of burglary in a dwelling are of equal culpability or do you consider that there are circumstances in which an offender might be shown to have played a subordinate role? If there are subordinate roles, what impact if any, should they have on sentence?

Question 2

Do you agree that these are the features most commonly found in relation to burglary in a dwelling and likely to affect the assessment of the seriousness of an offence? Are there any other features that you consider relevant?

Question 3

Do you agree that the Panel should give guidance in relation to sentencing an offender convicted of a second offence of burglary in a dwelling? If so, what increase in sentence do you consider to be appropriate?

Question 4

Do you agree with the circumstances in which the Court suggested it might be unjust to impose the presumptive minimum sentence? Are there any other situations in which it might be unjust to impose the minimum sentence?

Question 5

Do you agree that the factors identified above constitute offender mitigation? Are there any other factors relating to the offender that you consider particularly relevant to this offence?

Question 6

Do you agree with the Panel's proposed starting points and ranges for a first-time adult offender? If not, why not?

Question 7

Do you agree with the Panel's approach to the sentencing of youths convicted of burglary in a dwelling?

Question 8

Is there any reason to believe that the Panel's proposals will impact disproportionately on some offenders by reason of their gender, age, disability, race or ethnic background?

LIST OF CONSULTEES

Copies of the consultation paper have been sent to the people and organisations listed below. They include the organisations that the Panel is required to consult by the direction of the Sentencing Guidelines Council. In addition, copies have been sent to the Resident Judge at each Crown Court Centre and to the Chair of each Youth Panel in England and Wales.

Action for Children
Age Concern
Association of Chief Police Officers
Association of Directors of Children's Services
Association of Directors of Social Services
Association of Women Judges
Association of Youth Offending Team Managers
Barnardos
Board of Deputies of British Jews
The Catholic Church in England and Wales (Bishops Conference Secretariat)
Centre for Crime and Justice Studies
Chairs of Magistrates' Courts Youth Court Panels
Chief Inspector of Prisons
Chief Inspector of Probation
Children's Commissioner for England
Children's Commissioner for Wales
Children's Society
Council of District Judges (Magistrates' Courts)
Council of HM Circuit Judges
Crime Concern
Criminal Justice Alliance
Criminal Law Solicitors' Association
Crown Prosecution Service
Equality and Human Rights Commission
General Council of the Bar
Fawcett Society
General Synod (Church of England)
The Gypsy Council
Help the Aged
HM Prison Service
Hindu Council UK
Howard League for Penal Reform
Justice
Justices' Clerks' Society
Law Commission
Law Society
Liberty
Magistrates' Association
MIND (National Association for Mental Health)
Muslim Council of Britain
National Association for the Care and Resettlement of Offenders

National Association of Probation Officers
National Bench Chairmen's Forum
National Children's Bureau
National Offender Management Service
National Probation Service
The National Society for the Prevention of Cruelty to Children
Parole Board
Police Federation of England and Wales
The Police Foundation
Police Superintendents' Association
The Portia Trust
Prison Governors' Association
Prison Officers' Association
Prison Reform Trust
Probation Managers' Association
Royal Institute for the Blind (RNIB)
Royal Institute for the Deaf (RNID)
SANE
Sikh Council UK
SmartJustice
Society of Legal Scholars
Stonewall
Victims Advisory Panel
Victim Support
Victims of Crime Trust
Youth Justice Board

AGGRAVATING AND MITIGATING FACTORS IDENTIFIED IN THE SENTENCING GUIDELINES COUNCIL GUIDELINE 'OVERARCHING PRINCIPLES: SERIOUSNESS'

Aggravating factors

Factors indicating higher culpability:

- Offence committed whilst on bail for other offences
- Failure to respond to previous sentences
- Offence was racially or religiously aggravated
- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
- Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)
- Previous conviction(s), particularly where a pattern of repeat offending is disclosed
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
- Offenders operating in groups or gangs
- 'Professional' offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it
- Deliberate targeting of vulnerable victim(s)
- Commission of an offence while under the influence of alcohol or drugs
- Use of a weapon to frighten or injure victim
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- Abuse of power
- Abuse of a position of trust

Factors indicating a more than usually serious degree of harm:

- Multiple victims
- An especially serious physical or psychological effect on the victim, even if unintended
- A sustained assault or repeated assaults on the same victim
- Victim is particularly vulnerable
- Location of the offence (for example, in an isolated place)
- Offence is committed against those working in the public sector or providing a service to the public
- Presence of others e.g. relatives, especially children or partner of the victim
- Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
- In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)

Mitigating factors

Factors indicating significantly lower culpability:

- A greater degree of provocation than normally expected
- Mental illness or disability
- Youth or age, where it affects the responsibility of the individual defendant
- The fact that the offender played only a minor role in the offence

Personal mitigation

- Genuine remorse
- Admissions to police in interview
- Ready co-operation with authorities

MEANING OF “RANGE”, “STARTING POINT” AND “FIRST TIME OFFENDER” WITHIN SENTENCING GUIDELINES COUNCIL GUIDELINES

A Council guideline is generally for a *first time offender* convicted after a trial. It commonly provides a *starting point* based on an assessment of the seriousness of the offence and a *range* within which sentence will normally fall.

A clear, consistent understanding of each of these terms is essential and the Council and the Sentencing Advisory Panel have agreed the following definitions.

They are set out in a format that follows the structure of a sentencing decision which identifies first those aspects that affect the assessment of the seriousness of the offence, then those aspects that form part of personal mitigation and, finally, any reduction for a guilty plea.

In practice, the boundaries between these stages will not always be as clear cut but the underlying principles will remain the same.

In accordance with section 174 of the Criminal Justice Act 2003, a court is obliged to “*state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed*”.

In particular, “*where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate and the sentence is of a different kind, or is outside that range*” the court must give its reasons for imposing a sentence of a different kind or outside the range.

Assessing the seriousness of the offence

1.

- a) A typical Council guideline will apply to an offence that can be committed in a variety of circumstances with different levels of seriousness. It will apply to a **first time offender** who has been convicted after a trial. Within the guidelines, a **first time offender** is a person who does not have a conviction which, by virtue of section 143(2) of the Criminal Justice Act 2003, must be treated as an aggravating factor.
- b) As an aid to consistency of approach, a guideline will describe a number of types of activity falling within the broad definition of the offence. These will be set out in a column generally headed “type/nature of activity”.

- c) The expected approach is for a court to identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed. This will identify a **starting point** from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the *offence* (beyond those contained in the description itself) to reach a **provisional sentence**.
 - d) The range is the bracket into which the **provisional sentence** will normally fall after having regard to factors which aggravate or mitigate the seriousness of the offence. The particular circumstances may, however, make it appropriate that the **provisional sentence** falls outside the **range**.
2. Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the **provisional sentence** beyond the **range** given particularly where there are significant other aggravating factors present.

Personal Mitigation

3. Once the **provisional sentence** has been identified (by reference to the factors affecting the seriousness of the **offence**), the court will take into account any relevant factors of **personal** mitigation. Again, this may take the provisional sentence outside the range.

Reduction for guilty plea

4. Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. This reduction may take the sentence below the **range** provided.

Sentencing Guidelines Council
Sentencing Advisory Panel
May 2007