



Sentencing Guidelines Council

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# **Theft and Burglary in a building other than a dwelling**

*Response to Consultation*

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**December 2008**



## Foreword

The guideline has been agreed by the Council after careful consideration of advice from the Sentencing Advisory Panel and of responses to its consultation guideline, published simultaneously on 10 March 2008.

This document sets out the main issues raised in the responses, the conclusions of the Council and the reasoning behind the conclusions.

The purpose and scope of the consultation by the Council is limited. Once again, a number of unsolicited responses were received and the Council noted the additional work undertaken by those who had chosen to respond. Interested parties are reminded that the appropriate and most helpful time for wider input to the guideline development process is when the Panel publishes a consultation paper that is open to all.

The definitive guideline can be found at [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk) or can be obtained from the Sentencing Guidelines Secretariat, 4<sup>th</sup> Floor, 8-10 Great George Street, London SW1P 3AE.

Chairman  
Sentencing Guidelines Council  
December 2008



1. The consultation guideline was published on 10 March 2008. Those invited to respond were:
  - Lord Chancellor and Secretary of State for Justice
  - Home Secretary
  - Attorney General
  - Justice Committee
  - Party Leaders and the Convenor of the Crossbench Peers in the House of Lords
2. The Lord Chancellor responded to the consultation, incorporating the views of the Home Secretary and Attorney General (the Ministers' response). Ministers indicated that they were broadly content with the guideline and raised a small number of matters for consideration.
3. A response was received from the Justice Committee (the Committee) which derived from an oral evidence session and written submissions from a number of organizations. The Committee welcomed the approach taken in the guideline in a number of important respects, particularly the flexibility provided to sentencers to take account of factors particular to these offences of dishonesty.
4. Additional responses were received from:
  - CIFAS, Fraud Prevention Service
  - Crown Prosecution Service
  - Police Federation of England and Wales
  - The Association of Convenience Stores
  - HH Judge Lambert
  - Bar Council, Law Reform Committee
  - British Retail Consortium
5. The main points raised by respondents are detailed below. Some relate to wider issues and are considered under a 'general matters' heading, whilst others are dealt with under the appropriate section heading drawn from the consultation guideline.

### **General matters**

6. The Committee reported that witnesses had emphasised the benefits that restorative justice approaches can have, both for victims of crime and in contributing to the rehabilitation of an offender. The Committee considered that such approaches may be appropriate in a limited number of cases and suggested that the guideline remind sentencers of their availability.
7. Information and available evidence about restorative justice projects and schemes, in so far as they can be considered in relation to sentencing, is considered in relation to all of the projects that the Panel and Council undertakes. The Council was satisfied that a restorative justice element might form part of a community sentence imposed for an offence of dishonesty and that relevant guidance had already been published in relation to that.

**The Council agreed that there should be no change to the guideline.**

8. The Ministers' response raised an issue in relation to the relative impact of the guideline for theft and burglary of a building other than a dwelling on sentencing of men and women offenders, given the high number of women convicted of offences of dishonesty and sentenced to custody.
9. The Panel, having analysed statistical information and current sentencing patterns, commissioned independent research on the factors influencing sentencing for this particular form of theft, looking in particular at whether there was an association between sentencing and either gender. In addition, the Panel sought views about the potential disproportionality of impact of its proposals for sentencing the various offences of dishonesty under consideration, by gender, age or ethnicity of offenders.
10. The Panel concluded that its proposals did not discriminate against women or others. Those proposals were accepted by the Council and no justification for a change to sentencing practice was found. Issues relating to the sentencing of women offenders are included in current work to develop an *Overarching Principles of Sentencing* guideline.
11. Ministers also expressed concern that the guideline could potentially lead to an increase in the use of the top category of seriousness across all of the offences covered, which would bring about a significant change in sentencing practice and increase the prison population. It was suggested that the guideline should be clearer that the top category was only for the most serious cases.
12. In its response, the Committee stated that the guideline struck an effective balance between the policy aims of matching the seriousness of an offence to the sentence, and ensuring that custody was reserved for serious and violent offenders, whilst allowing flexibility for more severe sentences to be imposed where an offence involves specific factors such as targeting of vulnerable victims.
13. The proposals made in the consultation guideline derived from consideration of current sentencing patterns, the Panel's research and consideration of existing case law and sentencing principles. For most of the offences, the starting points and ranges for the highest seriousness level are some way below the maximum penalty available. The Council considered that it would be rare for a sentence close to the maximum to be justified. However, in order to promote consistency of approach, the consultation guideline had described the circumstances when a sentence above the highest range indicated might be appropriate through specific guidance supported by explanatory text. As with other guidelines, the Council will monitor sentencing patterns.

**The Council considered that there should be no change to the guideline.**

14. The four forms of theft within the guideline are those which occur most frequently. However, there are other recognised forms for which

sentencing guidance would be helpful. One respondent pointed out that the types of theft covered by the guideline are not exhaustive and invited the Council to consider how the principles in the guideline might be applied to other forms of theft.

15. The Panel covered four forms of theft in two advices. Consideration was given to producing a generic guideline for theft, but it was found that the features of the forms of theft and factors influencing sentencing were different and should be individually reflected in separate guidelines.
16. The Council was concerned that as not all forms of theft were covered individually, this could leave a gap in the guidance available to courts, or cause the guidelines to be used in a way that was not intended. Accordingly, it agreed that the guideline should indicate that the principles as regards assessing the seriousness of an offence of theft and consideration of ancillary orders were of general application.

**Additional advice would be added to the guideline indicating that the general principles were likely to be of assistance to a court dealing with a form of theft not covered by a separate guideline.**

17. The Committee welcomed the recognition in the guideline that certain victims may be particularly vulnerable and the flexibility within the guideline for the judiciary to react to that factor. The Committee also remarked on the prevalence of repeat offenders in this offence group and the need to tackle underlying behaviour. It suggested that the guideline could helpfully remind the judiciary that they are not constrained by any perception of having to move up a scale of penalties when dealing with such offenders.
18. All Council offence guidelines emphasise the need for the judiciary to give careful consideration to the thresholds for sentences, and stress that there is flexibility to move up or down and beyond suggested starting points and sentencing ranges to reflect factors relating to the offence and offender in individual cases.

**The Council considered that there should be no change to the guideline.**

### **Culpability of an offender**

19. Since offences of theft and burglary of a building other than a dwelling involve dishonesty, they are always likely to be in the highest level of culpability (of the four levels set out in the *Seriousness* guideline published in December 2004) in any case since the offence would have been committed intentionally.
20. The motivation of an offender is an aspect of the assessment of culpability. For the purposes of the suggested starting points and ranges in this guideline, the offender is taken to have been motivated by greed or a desire to live beyond their means. A suggestion that where an offence is motivated by an intention to cause harm, or out of revenge, this would aggravate an offence was accepted by the Council.

**The Council agreed that the guideline should be clear that an offence will be aggravated where an offender was motivated by an intention to cause harm, or out of revenge.**

### **Degree of harm**

21. The Council considered whether the guideline adequately provided for the situation where the amount stolen was comparatively small in terms of value, but large in comparison with the resources of the victim. It was agreed that in such cases, the monetary value of the property stolen may not reflect the full extent of the harm caused, and regard should be had to other factors in order to assess the impact of the offence. This was an issue of particular importance in relation to offences of theft in breach of trust and burglary in a building other than a dwelling.

**The Council agreed that the guidance on this issue should be strengthened in the general principles section of the guideline and as regards the two particular offences.**

### **Offender (personal) mitigation**

22. The consultation guideline set out three factors of general relevance to offences of theft and burglary in a building other than a dwelling that might influence the type of sentence imposed in an individual case.

23. In relation to 'impact on sentencing of an offender's dependency', the Committee observed that as well as 'addiction', other factors that can lead to offending behaviour may need to be addressed, such as social or family matters, or mental health problems. It considered that the guideline ensured that the judiciary could determine a sentence appropriate to the seriousness of the offence, and at the same time consider the whole circumstances of the offender.

24. The Ministers' response suggested that the text relating to 'impact on sentence of an offender's dependency' should be expanded to take account of interventions that fall short of treatment, but which might be effective in reducing alcohol dependency. This would supplement information and guidance provided in the Criminal Justice Act 2003 and *New Sentences* guideline (published by the Council in December 2004) in relation to requirements that can now be imposed as part of community and suspended sentence orders.

**The Council agreed to add some additional information as suggested.**

### **Theft in breach of trust**

25. In relation to the scope of the concept of breach of trust, clarification was sought in relation to whether the principles in the guideline were limited to employer and employee and other 'white collar' relationships, which had been the subject of guidance from the Court of Appeal. It was suggested that it should cover a wider range of relationships, including those of care

and social workers and their clients, and recognise that trust between colleagues may be as fundamental as that between employer and employee for example.

26. Trust was not defined in the consultation guideline and the Council considered the forms of relationship that would be expected to come within the terms of this guideline. It concluded that the concept should be widely drawn to include theft which occurs in circumstances where the offender was in a position of authority in relation to the victim, or would be expected to have a duty to protect the interests of the victim.

**The Council determined that the description of 'breach of trust' guideline should be developed, and examples included of some relationships that would come within the terms of the guideline.**

27. In relation to the degree of trust that might be breached, a view was presented that it was unnecessary to have two scales of trust, high and ordinary, within each level of seriousness as this would lead to debate and dispute within the sentencing process. It was also submitted that as trust is implicit, the level of trust breached should not affect the size of the sentence.

28. For theft in breach of trust, the two key determinants of seriousness are the amount stolen and the level of trust vested in the offender. This allows for those cases where breach of a higher degree of trust places an offence in a more serious category than using the value alone would provide. The Council concluded that the approach in the guideline is more likely to achieve consistency.

**The Council considered that there should be no change to the guideline.**

29. Three factors of personal mitigation (derived from long established principles) were identified in the guideline, which do not diminish the seriousness of an offence but may properly affect the sentencing decision.

30. The Council was invited to review the factor 'excessive responsibility and/or inadequate training'. It considered that the relevant point is that an offender may succumb to temptation and steal having been placed in a position of trust or given responsibility to an inappropriate degree. Such circumstances would not justify the theft, but may be regarded as mitigation.

**The Council considered that the wording of the factor should be developed so that the meaning is clear.**

### **Theft from the person**

31. The levels of seriousness for this form of theft were based on the vulnerability of the victim; the harm caused by the offence will be higher where the victim was vulnerable. In cases where the offenders sought out/targeted a vulnerable victim, the offence would be more serious. Points

were raised in relation to the definition of 'vulnerable victim' for the purposes of the guideline.

32. The definition of 'vulnerable victim' in the guideline gave examples of some who might come within the definition, but was not intended to be exhaustive. The Council agreed that, consistent with other Council guidelines, 'those with disabilities' should be specifically included. As regards tourists, it was decided that as such persons are vulnerable for reasons different from others listed as examples, this should be considered separately within the guideline.

**The Council decided that the wording of the definition of vulnerable victim should be developed.**

33. Concern was expressed in relation to the description of the highest level of seriousness for this form of theft. It was suggested that referring to intimidation or use/threat of force obscured the distinction between offences of theft and robbery. Where such behaviour occurs it was possible that additional offences could be charged and the behaviour should not elevate the gravity of the theft.

34. The Council considered that intimidation and/or the threat or use of force are known to be elements of some offences and should therefore be included. Where theft is charged rather than robbery, it is expected that the behaviour would not sustain a charge of robbery or may have occurred after the theft had taken place. It is the combination of the victim being vulnerable and the use of such intimidation or force which will place a case in the most serious category.

**The Council considered that there should be no change to the guideline.**

### **Theft from a shop**

35. The consultation guideline provided four levels of seriousness for this form of theft. A submission was made that a custodial sentence should be an option for all cases of theft from a shop, and particularly where there is any intimidation or threats and any related damage. The very act of theft is intimidation and if the seriousness of the offence is reduced offenders will not be discouraged and there will be a negative effect on retail staff.

36. Theft from a shop was the subject of separate consideration by the Panel which formed its proposals following consultation and a research study. As for other Council guidelines, the starting points and sentencing ranges are based on a first-time offender; the levels of seriousness were carefully distinguished, providing custody as an option only in the two highest categories of seriousness. Where there was actual rather than implicit intimidation and it was to a significant degree, custody will be available.

**The Council considered that there should be no change to the guideline.**

## **Burglary in a building other than a dwelling**

37. In the consultation guideline, the seriousness of an offence of burglary of a building other than a dwelling was based upon the value of the goods stolen. A representation was made that the cost of damage caused by a burglary, actual and consequential, often exceeds the value of the goods taken and should therefore be considered when seriousness is being assessed.
38. Damage caused to a building or property within it is a factor relevant to sentencing. Where the damage was gratuitous or exceeded what was necessary to commit the offence, this would be a general aggravating factor in accordance with the Council's *Seriousness* guideline. The absence of damage during the burglary is presented in the guideline as a factor in cases at the lower end of the seriousness scale. The Council agreed that damage should be considered alongside the value of the goods stolen when assessing seriousness generally.

**The Council agreed that the guideline and factors to take into consideration should be amended accordingly.**

39. Conflicting views were expressed in relation to the suggested starting point for the lowest category of seriousness. On one side, the view was that burglary of a non dwelling should not be regarded as being less serious than burglary of a dwelling and the minimum starting point should be a custodial sentence. Conversely, it was stated that domestic burglary is usually regarded as more serious than commercial, and at the lower end of the seriousness scale this guideline risks inverting that view.
40. The Council found that there was no compelling reason to change the starting points. The comparative seriousness of this offence, other offences of dishonesty and other groups of offences had been carefully considered.

**The Council considered that there should be no change to the guideline.**