

ADVICE TO THE SENTENCING GUIDELINES COUNCIL

Sentencing for Theft from a Shop



The Panel's Advice to the Court of Appeal

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(see inside back cover for contact details)

FOREWORD BY THE CHAIRMAN

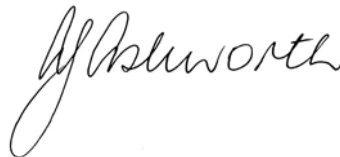
In this advice the Sentencing Advisory Panel invites the Sentencing Guidelines Council to consider the Panel's proposals for guidelines on sentencing adults for the offence of theft from a shop.

Theft from a shop offences are sentenced, predominately in a magistrates' court, in greater numbers than any other either way offence. The Panel's research shows that many offenders appearing before the courts for sentence will have committed a relatively low level offence with no aggravating features but often they will have a large number of previous convictions for similar offences. The Panel has considered whether this finding justifies a different approach to sentencing offences of theft from a shop.

When deciding sentence for any offence, the courts routinely balance the requirement to sentence according to the seriousness of the offence - which is increased by the existence of previous convictions - with the need to impose a sentence that will be most effective in preventing re-offending. The Panel has concluded that there is no need to suggest a different approach specifically for this offence.

The Panel proposes that the starting point for sentencing an offence of theft from a shop without any aggravating features should be a non-custodial sentence. The advice identifies a number of factors that will aggravate an offence and justify an increased sentence. Where, for example, an offence involves violence resulting in injury, a custodial starting point is proposed.

The advice recognises that the level of harm caused by an offence may be greater when it is perpetrated against a small retailer and this will need to be taken into account when sentencing.



Professor Andrew Ashworth
Chairman of the Sentencing Advisory Panel

SENTENCING FOR THEFT FROM A SHOP

THE PANEL'S ADVICE TO THE SENTENCING GUIDELINES COUNCIL

INTRODUCTION

1. Following a request from the Sentencing Guidelines Council for guidance on sentencing for offences of dishonesty, the Sentencing Advisory Panel has produced advice on sentencing for theft from a shop. The Panel decided to focus separately on this type of theft because it forms the largest category of sentenced theft cases (55,828 adult offenders in 2005) and involves more sentenced cases than any other either-way offence. Subsequent advice will cover sentencing for a group of other theft and dishonesty offences; advice on sentencing for fraud and forgery offences will follow.
2. The Panel has given careful consideration to all the views expressed in the 61 responses received to its consultation paper. Details of those who responded are set out in Annex F. In addition, the Panel commissioned research to collect data on a sample of 1,563 offences of theft from a shop sentenced in the latter half of 2004 and early 2005. The data was collected from prosecution files from within eight CPS areas across England and Wales. The findings provide detailed information about the nature of the offence committed and factors associated with the sentence imposed. A full report of the findings is available on our website.¹
3. Section One of the advice provides background information about the offence; Section Two sets out the assessment of seriousness of the offence and identifies important aggravating and mitigating factors; and Section Three provides the Panel's proposed sentencing guidelines and an assessment of the likely impact of the Panel's proposals on current sentencing practice.

¹ *Sentencing in Cases of Theft from Shops*, Research report 3, published 24 August 2006, www.sentencing-guidelines.gov.uk/research/index.html

SECTION ONE: BACKGROUND INFORMATION

The offence

4. Section 1(1) of the Theft Act 1968 provides that theft occurs where a person "dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it." The offence is triable either way and has a maximum penalty of seven years' imprisonment on indictment and six months' imprisonment or a fine not exceeding the statutory maximum, or both, summarily.
5. The Panel's advice considers only 'customer' theft from retail shops and stores, commonly called "shoplifting". It does not cover theft by an employee which has been included in a separate advice.
6. A sentence needs to be commensurate with the seriousness of the offence. This requires an assessment of a range of factors including those sentences imposed for other offences. The Panel's research shows that a typical offence of theft from a shop involves low value goods, no, or little, planning and no violence or damage. Since this typical offence does not involve the elements of breach of trust, unlawful entry or invasion of private space present in some other typical theft and dishonesty offences, it will be at a comparably lower level of seriousness. Where such factors are present in a theft from a shop, they will aggravate the seriousness of the offence. In light of the sentences generally imposed for those other theft and dishonesty offences, the Panel is proposing (see the proposed guideline on page 12) that a non-custodial sentence will

normally be appropriate for a typical offence (as defined) of theft from a shop.

7. The existence of certain aggravating factors will make an individual offence more serious, taking it outside the definition of a typical offence and moving it across the community or custody thresholds. The Panel's research shows that offenders sentenced for theft from a shop usually have a number of previous convictions and the accumulation of these will be a significant factor when deciding sentence. In accordance with section 143(2) of the Criminal Justice Act 2003, any recent previous convictions for other theft and dishonesty offences will need to be taken into account in sentencing. Where an offender demonstrates a level of 'persistent' or 'seriously persistent' offending, the community and custody thresholds may be crossed even though the other characteristics of the offence would otherwise warrant a lesser sentence.
8. As stated in Council guidelines, it is not inevitable that a community or custodial sentence should be imposed where the threshold has been crossed. The court will consider whether there is any personal mitigation that may reduce the sentence or, where it is considering custody, whether there is suitable intervention in the community which provides sufficient punishment while addressing the rehabilitation of the offender to prevent future offending.²

Characteristics of sentenced cases

9. The Panel's survey of 1,563 offences provides the most detailed information currently available about sentenced offences of theft from a shop. The findings give descriptive

² *Overarching Principles: Seriousness*, published 16 December 2004, www.sentencing-guidelines.gov.uk

detail of the characteristics of the offence and the offender and also examine the association between different factors and the sentence imposed. Some of the key findings from the survey are presented below. The Panel is aware that, like many other acquisitive crimes, many more offences of theft from a shop are committed than are reported and recorded. The experience of some retailers may, therefore, not match the profile of sentenced offences reported in the research.

Key findings

- The majority of the 1,563 offences (82%) took place against major chain stores, primarily general retailers (30%), supermarkets (28%) and chemists (10%). Just 10 individual retail companies accounted for 40% of all the offences in the research.
- The median value of goods stolen was £40 and the average value was £88. Just over one third of offences (35%) involved goods valued at £25 or less and almost a quarter (23%) involved goods valued at between £26-50. A fifth of goods (19%) taken were valued at between £51-100 and 13% were valued at over £100. A minority (10%) were valued at over £200.
- Details of whether stolen goods were recovered were not specifically collected in the survey but it was the observation of the researchers that goods were normally recovered in cases where the offender was detained at, or close to, the scene. These cases represented 72% of the offences overall.
- For most offences (59%), the research could not ascertain the offender's motivation for the offence. In a quarter of offences (24%), drugs were considered to be the main motivating factor for the offence. Other reasons identified were: stealing as part of an enterprise (3%), out of need (9%) or because of status/pressure (4%).
- Some element of physical violence to retail employees was present in 10% of offences; 8% involved a slight amount of violence such as a push or shove and 2% involved injury serious enough to leave a mark. A further 4% of offences involved threatening or abusive behaviour. Only 1% (12) of sentenced offences in the sample involved use of a weapon - generally a syringe or knife.
- In 5% of offences there was evidence of some damage having been caused as a result of the theft. In 1.5% of the offences sentenced, additional damage was caused when the offender was detained.
- Higher sentences were imposed where offences involved a high value of goods taken, violence or damage.
- Almost all offenders sentenced for the offence had previous convictions. Of the 1,443 offences where information on previous convictions and sentence was known, only 5% had no previous convictions. On average, an offender had been sentenced on 19 previous occasions for a total of 42 offences, of which 21 were for theft and kindred offences and 12 for theft from a shop. Offenders with a greater number of previous convictions received higher penalties.

- A community sentence was the most common disposal for theft from a shop offences (32%), followed by absolute and conditional discharges (27%) and custody (26%).
- The research evaluated the independent significance of individual factors on sentencing in a magistrates' court. The findings showed that:
 - The likelihood of a community sentence rather than a fine or discharge being imposed increased most significantly if an offender had been previously banned from the store targeted, was on benefit or undertaking self treatment (such as a drug rehabilitation programme) or was being dealt with by the court at the same time for another offence. The likelihood increased further with each pound (£1) increase in the value of the goods stolen and for each increase in the number of previous convictions.
 - The likelihood of a custodial sentence being imposed instead of a community sentence increased most significantly if the offender was a repeat offender who had been sentenced to custody for the last offence of theft from a shop, was remanded into custody at the time of the sentence, had no fixed abode or was labelled a persistent offender.
 - When looking at the influence of gender alone (having controlled for other significant factors) it was found that being male significantly increased the likelihood of receiving a custodial sentence, as opposed to a community sentence.
 - There was no association between sentence and an offender's ethnicity.

10. The Panel's research and responses to the consultation show that current sentencing practice follows the approach outlined above (in paragraphs 6-8) and it sees no reason to propose any significant changes.

SECTION TWO: SERIOUSNESS

11. In assessing the seriousness of any offence, section 143(1) of the CJA 2003 provides that a court must consider the offender's culpability in committing the offence and the harm which the offence caused, was intended to cause or might foreseeably have caused. The seriousness of the offence is the key factor that will determine the sentence. The Council guideline on seriousness identifies a number of levels of culpability and different types of harm.³

CULPABILITY

12. An offence of theft from a shop requires dishonesty and an intention to deprive the owner permanently of the goods. Culpability, therefore, will be at the highest level although to varying degrees. The Council guideline on seriousness specifies that the "precise level of culpability will be determined by such factors as motivation, whether the offence was planned or spontaneous or whether the offender was in a position of trust". In theft from a shop cases, the least culpable offender will be the opportunistic thief who steals on impulse, and the most culpable will be the one who goes equipped to steal valuable items or steals as part of an organised enterprise designed for commercial gain.

³ *Overarching Principles: Seriousness*, published 16 December 2004, www.sentencing-guidelines.gov.uk

HARM

13. The Panel's proposed guidelines take into consideration the cumulative effect of the harm caused by an offence. The main type of harm caused by theft from a shop is the financial loss to the retailer as measured by the monetary value of the goods stolen. Retailers highlight the totality of the loss incurred as also including the additional costs of preventative security measures, higher insurance premiums and time spent by staff dealing with the prosecution of offenders. The seriousness of an individual case will, nonetheless, need to be judged on its own dimension of harm and culpability rather than as part of a collective social harm.⁴ It would be wrong for sentencers to increase the sentence on an individual offender in order to reflect the harm caused to retailers in general by the totality of theft from a shop offending.

AGGRAVATING FACTORS

14. The Council guideline on seriousness lists a number of factors that might aggravate the seriousness of an offence because they indicate either a higher level of culpability or a more than usual degree of harm (the full list is in Annex C). In the Panel's view, the aggravating factors discussed below relate particularly to the offence of theft from a shop.

Small retailer

15. The circumstances of the retailer will be a proper consideration in assessing the level of harm. Consultees have stated that smaller retailers may suffer a high degree of harm. In terms of financial loss, theft of goods of a

relatively low value is likely to have a much greater impact on the profits of a small independent shop than on those of a large retail chain. Small retailers may also be more vulnerable and easier to target because they are less able to afford the security measures available to larger stores. They may live in fear of what might happen during a theft as any confrontation with an offender is likely to be intimidating. The Panel is of the view that a greater level of harm may be caused where the theft from a shop is against a small retailer.

Recommendation 1

The circumstances of the retailer are a proper consideration in assessing the level of harm caused by an offence of theft from a shop. A greater level of harm may be caused where the theft is from a small retailer.

Involving a child

16. In some circumstances, a child will accompany an offender during the offence. Where a child is unaware of the offence being committed (for example, where the child is asleep in a pushchair), the Panel considers that the offence should not be considered more serious unless the child is being used to distract attention away from the illegal activity. In those circumstances, it is likely to indicate greater planning and, therefore, higher culpability.
17. If a child is used to assist in committing the offence, for example by leaving the store with stolen items, this indicates both increased culpability and harm. Use of a child may indicate planning and encourage the child to view stealing as acceptable behaviour.

⁴ *Overarching Principles: Seriousness*, published

16 December 2004, www.sentencing-guidelines.gov.uk

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18. Where the child is not directly involved in the theft harm may still be caused. The offender may seek to blame the child to try to avoid detection. In any event, witnessing the offender being apprehended is likely to cause distress to the child.
 19. Many consultees felt that the child's awareness of the crime was an important factor in determining whether offence seriousness increased. The Panel agrees with this view and considers that the mere presence of a child does not make the offence more serious. Only if a child is involved in, or likely to be aware of, the theft or could be influenced or distressed by it should the offence be seen as more serious.

Recommendation 2

The seriousness of a theft from a shop is aggravated by the presence of a child where the child is involved in or likely to be aware of the theft or can be influenced or distressed by it.

Offender subject to a banning order

20. The Panel's research showed that the fact that an offender was subject to a banning order at the time of the offence, which covered the store in which the theft was committed, was significantly associated with courts imposing higher sentences. Banned offenders may be subject to an Anti-Social Behaviour Order, a specific banning order obtained by a retailer through civil action or an exclusion order issued by a Business Crime Reduction Partnership. The aim of banning orders is to prevent offenders, who are known to retailers for previously stealing goods from them, from entering named stores or shopping centres. The Panel is of the view that an offence is

more serious where a banning order has been ignored as it shows persistent targeting of the store and a complete disregard for the authority of the order. It sees no reason why the offence should be aggravated to differing degrees based on the type of banning order; the only fact to be established is that the offender was aware of the existence of the order. However, where an offender is being sentenced also for breach of an ASBO, the court needs to ensure that there is no "double counting".

Recommendation 3

The fact that an offender is subject to a banning order that includes the store in which the offence is committed is an aggravating factor for an offence of theft from a shop. Breach of any type of order (an ASBO, civil banning order or a shop imposed ban) should all aggravate to the same degree.

Intimidation, threat or violence and additional damage to property

21. In the context of an offence of theft from a shop, if there is any significant harm or threat of violence it should be charged as a separate offence and sentenced accordingly. This may explain why, in the Panel's research, the majority of offences did not involve any violence or abuse or damage. There are, nonetheless, some cases of theft from a shop where the offender has intimidated or threatened a member of staff with only an offence of theft being charged. The Panel's research found that higher sentences tended to be imposed where violence or additional damage had been present in an offence. The Panel is of the view that the use of force, threat or intimidation by an offender results in a greater level of harm and should be treated as a significant aggravating factor. The

additional damage to property sometimes caused when an offender is tackled or detained will also aggravate the seriousness of the offence. The Panel has reflected this in its proposed guideline, where the degree of intimidation, threat or violence or the level of damage present, is an important factor determining the starting point for sentence.

Recommendation 4

The use of force, threat or intimidation during a theft from a shop will significantly aggravate the seriousness of the offence. Any additional damage to property arising from the offence will also make an offence more serious.

High value

22. The Panel's research showed that most offences of theft from a shop involved low value items, although a significant minority (23%) involved goods valued at over £100. It showed that the increasing value of the goods stolen, when considered in isolation from other factors, was associated with the sentence imposed. However, the high value of goods stolen will, to some extent, be associated with other more serious characteristics of an offence also identified as aggravating factors such as the degree of planning, professionalism and/or operating in a group. Accordingly, care will need to be taken to avoid "double counting". Some offenders may deliberately target high value goods (such as an item of jewellery). Deliberately targeting high value goods may suggest both higher culpability and greater harm and is a standard aggravating factor (see list in Annex C).

Recommendation 5

The value of goods involved in a theft from a shop is normally less significant than other aggravating factors but deliberately targeting high value goods should always make an offence more serious.

Offenders operating in groups or gangs

23. Some thefts from a shop will be committed by offenders operating in organised groups or gangs. This is a standard aggravating factor which is likely to increase significantly the seriousness of an offence. Levels of culpability and harm are both likely to be greater for this type of offending. In relation to culpability, the offence will be planned and goods may be stolen to sell on. In relation to harm, a greater amount can be stolen and high value goods may be targeted. There may also be circumstances where group theft will involve a greater degree of threat or intimidation to staff or to members of the public who are in the shop at the time.

24. The Court of Appeal in Page⁵ suggested that custodial sentences of 4 years might be appropriate for offences committed by organised gangs repeatedly or on a large scale, and in excess of 4 years if violence was used. It is the Panel's view that theft from a shop involving group or gang offending is the most serious category of offending for this type of theft. Consequently, in its proposed guideline, it recommends a custodial sentence as a starting point.

Recommendation 6

The fact that an organised group or gang has committed a theft from a shop seriously aggravates the offence.

⁵[2005] 2 Cr. App. R. (S.) 37

MITIGATING FACTORS

25. The Council guideline on seriousness⁶ identifies a list of mitigating factors that might reduce an offender's culpability or the harm caused (see Annex C). The Panel has not identified any additional mitigating factors that would apply to the assessment of the seriousness of theft from a shop. However, two important factors relating to personal mitigation have been identified as having particular relevance to theft from a shop.

Personal mitigation

Desperation or need

26. The Panel consulted on whether an offence committed in desperation or need should mitigate the seriousness of the offence. This was considered in relation to extreme circumstances where an offender is motivated to steal food due to particular hardship resulting from poverty or homelessness and not a need resulting from drug or alcohol dependency. The view most commonly expressed was that this was a matter of personal mitigation and not offence seriousness. The Panel agrees with this view.

Recommendation 7

The fact that an offence has been committed in desperation or need arising from particular hardship may count as personal mitigation in exceptional circumstances.

Recovery of stolen goods

27. In many cases of theft from a shop where the offender has been apprehended, the goods stolen will be recovered. Where goods can be resold there may be a reduction in the financial loss suffered by the retailer. However, many consultees said that the recovery of stolen goods should have no bearing on the assessment of seriousness because the culpability of the offender, whose intention was to steal the goods, is unaffected. This reflects the Council guideline on seriousness which states that the initial factor in determining the seriousness of an offence is the culpability of the offender.⁷ It follows that whether or not the goods are recovered should not significantly influence an assessment of the seriousness of the offence. However, the recovery of goods can be important in enabling courts to award the right level of compensation to the retailer. The Panel's view, supported by its consultees, is that if an offender actively assists in the recovery of saleable goods that would not otherwise have been found, this may count as personal mitigation.

Recommendation 8

The fact that stolen goods are recovered has no bearing on the assessment of seriousness of an offence of theft from a shop. However, actively assisting in their recovery can amount to personal mitigation, particularly where the property might not otherwise have been found.

⁶ *Overarching Principles: Seriousness*, published 16 December 2004, www.sentencing-guidelines.gov.uk

⁷ *Overarching Principles: Seriousness*, published 16 December 2004, www.sentencing-guidelines.gov.uk

SECTION THREE: THE PANEL'S PROPOSED SENTENCING GUIDELINE

28. The Panel proposes the following sentencing guideline. It identifies the characteristics of an offence that could take it over the community and custody thresholds and those that would suggest a custodial sentence of 12 months or more.

Theft from a shop: Theft Act 1968 s.1(1)

Maximum sentence: 7 years custody

Mode of trial: triable either way

The starting point in the guideline applies to a first-time offender convicted after a trial.

The meaning of "range", "starting point" and "first time offender" within Sentencing Guidelines Council guidelines is explained in Annex B

Only additional aggravating and mitigating factors specifically relevant to this offence are included in the guideline. When assessing the seriousness of any offence, the courts must always refer to the full list of aggravating and mitigating factors in the Council guideline on seriousness.⁸

Type/nature of activity	Sentencing Range
Organised gang/group and substantial violence or threat of violence (short of robbery)	<u>Starting point:</u> 12 months custody <u>Range:</u> 36 weeks to 4 years custody
Significant intimidation or threats or Physical violence resulting in <u>slight</u> injury or Very high level of planning or Significant related damage	<u>Starting point:</u> 6 weeks custody <u>Range:</u> High level community order to 36 weeks custody
Low level intimidation or threats or Some planning eg. a session of stealing on the same day or going equipped or Some related damage	<u>Starting point:</u> Low level community order <u>Range:</u> Fine to medium level community order
No (little) planning or sophistication and goods stolen of low value	<u>Starting point:</u> Fine <u>Range:</u> Conditional discharge to low level community order

⁸ *Overarching Principles: Seriousness*, published 16 December 2004, www.sentencing-guidelines.gov.uk

Additional aggravating factors	Additional mitigating factors
<ul style="list-style-type: none"> • Professional offending • Child is involved or aware of theft • Offender is subject to a banning order that includes the store targeted • Victim particularly vulnerable (e.g. small independent shop) • Offender targeted high value goods 	<p>Personal Mitigation</p> <p>Offence committed in desperation or need (resulting from poverty or homelessness)</p> <p>Actively assisting in recovery of goods that might not otherwise have been found</p>

Impact assessment

29. The Panel's research has produced some useful data on the profile of sentenced theft from a shop cases. This has enabled a number of statistical simulations which try to predict the likely outcome of the Panel's proposals on current sentencing practice (see Annex D). In summary, if the proposals are adopted it is possible that more offences will result in a fine or a discharge and fewer community orders or custodial sentences will be imposed than at present. However, these estimates are based on a number of important assumptions and are subject to wide margins of error. It is not possible to say with confidence that, overall, there would be any discernable change from current sentencing practice.

ANNEX A

Theft from a shop	Theft Act 1968, s.1(1)
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Triable either way:

Maximum when tried summarily: Level 5 fine and/or 6 months Maximum when tried on indictment: 7 years

OFFENCE SERIOUSNESS (CULPABILITY AND HARM)		
A. IDENTIFY THE APPROPRIATE STARTING POINT		
Starting points based on first time offender pleading not guilty		
Examples of nature of activity	Starting point	Range
No (little) planning or sophistication and goods stolen of low value	Fine	Conditional discharge to low level community order
Low level intimidation or threats or some planning eg. a session of stealing on the same day or going equipped or some related damage	Low level community order	Fine to medium level community order
Significant intimidation or threats or physical violence resulting in slight injury or very high level of planning or significant related damage	6 weeks custody	High level community order to Crown Court
Organised gang/group and substantial violence or threat of violence (short of robbery)	Crown Court	Crown Court

OFFENCE SERIOUSNESS (CULPABILITY AND HARM)	
B. CONSIDER THE EFFECT OF AGGRAVATING AND MITIGATING FACTORS (OTHER THAN THOSE WITHIN EXAMPLES ABOVE)	
Common aggravating and mitigating factors are identified in the pullout card. The following may be particularly relevant:	
<u>Factors indicating higher culpability</u> 1. Professional offending 2. Child is involved or aware of theft 3. Offender is subject to a banning order that includes the store targeted <u>Factors indicating greater degree of harm</u> 1. Victim particularly vulnerable (e.g. small independent shop) 2. Offender targeted high value goods	<u>Factors indicating lower culpability</u> <u>Personal Mitigation</u> Offence committed in desperation or need (resulting from poverty or homelessness) Actively assisting in recovery of goods that might not otherwise have been found

FORM A PRELIMINARY VIEW OF THE APPROPRIATE SENTENCE, THEN CONSIDER OFFENDER MITIGATION Common factors are identified in the pullout card

CONSIDER A REDUCTION FOR A GUILTY PLEA
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CONSIDER ANCILLARY ORDERS, INCLUDING COMPENSATION Refer to pages 102-106 for guidance on available ancillary orders
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DECIDE SENTENCE GIVE REASONS

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**.

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- 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

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

IMPACT OF THE PANEL'S PROPOSALS

Introduction and Summary

1. The information obtained from the research project provided more detailed offence specific information than has been available to the Panel for other offences. This information was used to estimate the impact of the Panel's proposals on the sentencing outcomes.
2. The most likely predicted outcome is that there will be more offenders than at present given a fine or a discharge, and fewer given either a community order or a custodial sentence. If aggravating and mitigating factors are included to the fullest extent then there may be a small increase in the number of offenders given custodial sentences.
3. On an individual basis, it is estimated that about 60% of offenders will receive the same type of sentence as they would hypothetically receive under the current arrangements, with about 20% receiving a more lenient sentence and 20% a more severe sentence than at present.
4. **There are wide error bands around these central estimates, such that it is not possible to state with confidence that there will be any discernable change from the current position.**

Base Data

5. The base data were drawn initially from all the cases collected by the researchers for which the offender received a discharge, fine, community order or custodial sentence. In a few cases there were one or more relevant data items missing, and such data has been excluded from the analysis. There

were a total of 1,452 records which met the criteria for inclusion in the analysis.

Methodology

6. "Sentencing is an art, not a science"⁹ This often repeated quote implies that sentencing decisions are not an automatic function of the quantifiable circumstances of the relevant offence. It is not possible to predict the precise sentence that a specific offender will receive for a specific offence on a specific day but, of course, it is possible to make more general predictions.
7. For each offence, the probability of receiving each category of sentence is calculated, both under current sentencing practices and under the Panel's proposals. By comparing the two, the impact of the Panel's proposals can be estimated.

Current Sentencing Practice

8. The researchers had previously identified the relationship between various case and offender related factors and the sentence handed down. They quantified these relationships in terms of odds ratios. This is not to say necessarily there is a causal relationship between the factors and the sentence. If a particular area has a higher custody rate than average, this may be due to a harsher sentencing culture, or it may be due to a higher general level of seriousness in that area. Their conclusions have been taken as the starting point for this analysis.
9. A series of simulations was run in which for each offender a sentence was assigned according to the calculated probabilities of the various outcomes. It was found that in 26% of the cases the simulated outcome was

⁹ Sir Patrick Mayhew, Hansard, 4th February 1991, and frequently quoted elsewhere.

more lenient than the actual outcome, in 48% of cases they matched and in 26% of cases the simulated outcome was more severe.¹⁰ So while the explanatory factors go some way to explaining the range of sentencing, there is considerable unexplained variation.

Panel's Proposed Sentencing Practice

10. The Panel has proposed a set of sentencing ranges, according to the features of the offence. These features do not always map exactly on the data collected by the researchers, and so a number of proxy indicators have been used. The table below shows how features of the offence, and any aggravating or mitigating factors govern the proposed sentencing range along with the nearest equivalent data item from the research dataset.

Offence Features Governing Starting Point and Aggravating and Mitigating Factors

Features of offence	Equivalent Research Parameter	Starting Point	
Organised gang or group and substantial violence or threat	Weapon used Serious injury	12 months custody	
Significant intimidation or threats	Slight violence or threat	6 weeks custody	
Violence resulting in slight injury			
Very high level of planning			Strong evidence of planning
Significant related damage			Damage value greater than £100
Low level intimidation or threat	Abuse	Low level community order	
Some planning	Minor or implied evidence		
Some related damage	Damage up to £100		
Little planning and low value of goods	Absence of above features	Fine	
Professional offending	-	Aggravating factor	
Child present who is distressed by the offence	Child used		
Some damage	Not used as damage defines a feature of the offence		
Offender banned from shop	Banned from store		
Vulnerable victim	Small or family business		
High value of goods taken	Goods value over £200		
Offence committed out of need	Need	Mitigating factor	
Assisted in recovery of goods	-		

¹⁰ Sentences were classed as Discharge or fine, (most lenient Community Order and Custody (most severe) but were not ranked within each category.

11. In order to assess the most likely outcome had the offence been sentenced under the proposed ranges, sentences were assigned to a category (i.e. custody, community or fine/ discharge), but not to any finer distribution within a category. The sentence will be influenced by any relevant aggravating and mitigating factors, but it is difficult to quantify the effect. Two options were considered:-

- Aggravating and mitigating factors only influence a sentence within its category (e.g. the size of the fine)
- Aggravating and mitigating factors cause a sentence to move up or down to the next category, where this is feasible.

12. Once the most likely outcome under the Panel's proposals has been established it is necessary to derive a probability that such an outcome will be experienced in any specific case. This was addressed by extrapolation from the current sentencing pattern. The table below shows relative frequency of all combinations of actual versus simulated outcome under the current sentencing arrangements, and it was assumed these would be carried forward to sentences passed under the Panel's proposals.

Probability of Simulated Disposal Given Actual Disposal

		Simulated Disposal		
		Fine or Discharge	Community Order	Custody
Actual Disposal	Fine or Discharge	56%	29%	16%
	Community Order	36%	41%	23%
	Custody	25%	29%	46%

13. It could be argued that one purpose of the guidelines is to improve consistency of sentencing, and therefore the variation would be less than that currently experienced but in the absence of supporting data, it is not feasible to quantify any such effect.

14. The tables below give details of the simulated changes to sentencing behaviour.

Simulated Overall Change in Sentencing Behaviour under Panel Proposals

Sentence	Predicted percentage change	
	[1]	[2]
Discharge or fine	5 ± 3 %	0 ± 2%
Community order	-3 ± 4 %	-2 ± 4 %
Custody	-3 ± 4%	2 ± 4%

Simulated Impact on Individual Offenders under Panel Proposals

Sentence	Percentage of offenders	
	[1]	[2]
More lenient	20 ± 1 %	19 ± 1 %
No change	60 ± 1 %	60 ± 1 %
More severe	19 ± 1 %	21 ± 1 %

[1] *Aggravating and mitigating factors only influence a sentence within its category (eg the size of the fine)*

[2] *Aggravating and mitigating factors cause a sentence to move up or down to the next category, where this is feasible.*

15. A trial simulation was run with the table of probabilities amended to allow for the possibility of greater consistency in sentencing to the new guidelines. The probabilities of simulated against actual disposals were arbitrarily increased by 10 percentage points for the cases where the simulated disposal matched the actual disposal, and decreased by 5 percentage points elsewhere, as per the table below.

17. **There is no empirical evidence to justify such a quantified change in sentence consistency, and the results should be regarded purely as a test of sensitivity to the initial assumptions.**

		Simulated Disposal		
		Fine or Discharge	Community Order	Custody
Actual Disposal	Fine or Discharge	66%	24%	11%
	Community Order	31%	51%	18%
	Custody	20%	24%	56%

Amended Probability of Simulated Disposal Given Actual Disposal

16. The results, shown in the table below, show this time there is a clear reduction in sentence severity.

Simulated Overall Change in Sentencing Behaviour under SAP Proposals

(Assumed greater consistency of sentencing)

Sentence	Predicted percentage change
Discharge or fine	11 ± 3 %
Community order	-8 ± 4 %
Custody	-7 ± 4%

SUMMARY OF THE PANEL'S RECOMMENDATIONS

Recommendation 1

The circumstances of the retailer are a proper consideration in assessing the level of harm caused by an offence of theft from a shop. A greater level of harm may be caused where the theft is from a small retailer.

Recommendation 2

The seriousness of a theft from a shop is aggravated by the presence of a child where the child is involved in or likely to be aware of the theft or can be influenced or distressed by it.

Recommendation 3

The fact that an offender is subject to a banning order that includes the store in which the offence is committed is an aggravating factor for an offence of theft from a shop. Breach of any type of order (an ASBO, civil banning order or a shop imposed ban) should all aggravate to the same degree.

Recommendation 4

The use of force, threat or intimidation during a theft from a shop will significantly aggravate the seriousness of the offence. Any additional damage to property arising from the offence will also make an offence more serious.

Recommendation 5

The value of goods involved in a theft from a shop is normally less significant than other aggravating factors but deliberately targeting high value goods should always make an offence more serious.

Recommendation 6

The fact that an organised group or gang has committed a theft from a shop seriously aggravates the offence.

Recommendation 7

The fact that an offence has been committed in desperation or need arising from particular hardship may count as personal mitigation in exceptional circumstances.

Recommendation 8

The fact that stolen goods are recovered has no bearing on the assessment of seriousness of an offence of theft from a shop. However, actively assisting in their recovery can amount to personal mitigation, particularly where the property might not otherwise have been found.

THE CONSULTATION

In accordance with the duty imposed by section 171(3) of the Criminal Justice Act 2003, the Panel issued a consultation paper on the 24 August 2006.

Copies of the consultation paper were sent to 170 individuals and organisations including the Panel's 33 regular consultees and Resident Judges at each Crown Court Centre in England and Wales. It was also published on the Panel's website and in the Justice of the Peace Journal.

Responses were received from:

Council of Her Majesty's Circuit Judges
Crown Prosecution Service
Justices' Clerks' Society
Law Society
Magistrates' Association
National Offender Management Service
Police Federation of England and Wales
Council of District Judges (Magistrates' Courts)
Victim Support
British Retail Consortium

Additional responses were also received from:

Anti-Theft Committee, Boston Chamber of Commerce and Industry
Association of Convenience Stores Limited
Boots
Bournemouth Businesses Reducing Crime Ltd
British Shops and Stores Association
Camero Jewellers & Goldsmiths
Central Kent Bench
Mark Cleary (Retailer)
Criminal Bar Association
Criminal Law Solicitors' Association
Phil Davies, Spar Shop
Federation of Small Businesses
Dr Adrian Garfoot, Private individual
S R Hall, Magistrate
Martin Holt, Morrison Supermarket
Horticultural Trades Association
William Kay (Retailer)
David Lepper MP, Brighton and Hove
Lincolnshire and South Humberside Branch of the Magistrates' Association

London Criminal Courts Solicitors' Association
Luton Crown Court
HH Judge Charles Macdonald QC
Marks & Spencer
Mr McCusker (Retailer)
Ralph Morgans
Ron Miller, Magistrate, Bench Chairman, West Norfolk Bench
HH Judge Ronald Moss
Nacro
North East Retail Crime Partnership
The ORIS Group
Kishor Patel, Nisa Local
Powys and Herefordshire Branch of the Magistrates' Association
Public and Commercial Services Union
Retail Crime Operation (Birmingham) Ltd
Retail Week
Retailers Against Crime in York
David Ruddick, South West Staffordshire Bench
Robert Scrase, Magistrate, East Kent Bench
Spar Shop (Bristol)
Spar Shop (Stalybridge)
Suffolk Branch of the Magistrates' Association
George Tranter, Private individual
Department Manager, Waitrose (Petersfield)
Westbridge Motors (N'pton) Limited
Wilkinson
Ann Williams, Magistrate, Brecon Bench
District Judge Williams, Cardiff Magistrates' court
Ms Williams (Retailer)
Wine and Spirit Trade Association
Worcestershire Branch of the Magistrates' Association

1 anonymous response was received

The Panel also received copies of 68 letters from local branch managers of retail stores addressed to their local MPs; these were in a standard format and asked MPs to lobby the government in relation to the Panel's proposals. These could not be recorded as formal responses but the views expressed were nevertheless taken into account by the Panel.

The Sentencing Advisory Panel is an independent advisory and consultative body originally constituted under sections 80 and 81 of the Crime and Disorder Act 1998 (which came into force on 1 July 1999) and now constituted under section 169 of the Criminal Justice Act 2003. Its function, prior to implementation of the relevant provisions in the Criminal Justice Act 2003, was to provide fully researched, objective advice to the Court of appeal to assist the Court when it framed or revised sentencing guidelines.

The Criminal Justice Act 2003 established a Sentencing Guidelines Council with responsibility for issuing sentencing guidelines. With effect from 27 February 2004, the Sentencing Advisory Panel submits its advice to the Council rather than to the Court of Appeal.

The following were members of the Panel at the time this advice was delivered to the Sentencing Guidelines Council:

Professor Martin Wasik (Chairman)

His Honour Judge Anthony Ansell

Professor Andrew Ashworth QC (Hon)

His Honour Judge Philip Clegg

Ms Joanna Wallace

Amritlal Devani

Mrs Anne Fuller OBE JP

Professor Frances Heidensohn

David Mallen CBE

Michael Morgan

Judge Howard Riddle

John Staples

Ms Joan Webster QPM

Christopher Woolley

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Head of Sentencing Guidelines Secretariat: Kevin McCormac OBE
Secretary to the Panel: Mrs Lesley Dix

