

Consultation Stage Resource Assessment: Fraud Offences

1 INTRODUCTION

1.1 This document fulfils the Council's statutory duty to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services¹.

2 RATIONALE AND OBJECTIVES FOR NEW GUIDELINE

2.1 In August 2012, the Sentencing Council received a request from the Lord Chancellor under section 124 of the Coroners and Justice Act 2009 to prepare a sentencing guideline on corporate fraud and bribery. This request was made to ensure that guidance on appropriate sentencing levels for these offences would be available to coincide with the introduction of Deferred Prosecution Agreements. DPAs are not a result of criminal convictions, and therefore the proposed Sentencing Council guidelines are not applicable to DPAs; however, the Lord Chancellor felt that a sentencing guideline would be useful to help inform the level of financial penalty terms that form part of a DPA.

2.2 The preparation of sentencing guidelines involves a substantial fixed costs in terms of research efforts, Council time, and the process of consultation and publication. To ensure efficient use of its limited resources, the Sentencing Council therefore took this opportunity to consider sentences for individuals as well as corporations.

2.3 Unlike the existing Sentencing Guidelines Council (SGC) guidelines for fraud, the new guidelines include bribery and money laundering and, within the revenue guideline, the common law offence of cheating the revenue. The new guidelines are also applicable when sentencing offenders convicted of conspiracy to commit the substantive offence.

2.4 In preparing this draft guideline, the Council has had regard to the purposes of sentencing and to its statutory duties. The Council's aim throughout has been to ensure that all sentences are proportionate to the offence committed and in relation to other offences. There is some evidence that current sentencing practice does not reflect the existing SGC guideline. The approach that has been taken in developing the draft guideline aims to regularise and ensure the consistency of current sentencing practice rather than to alter it.

3 SCOPE

3.1 As stipulated by section 127 of the Coroners and Justice Act 2009, this assessment considers the resource impact of the guideline on the prison service, probation service and youth justice services.

3.2 Since a guideline has been produced that will apply to organisations, this assessment also considers any possible effect on fine levels.

4 SUPPORTING EVIDENCE

¹ Coroners and Justice Act 2009 section 127

4.1 To ensure that the objectives of the guideline are realised, and to better understand the potential resource impacts of the guideline, the Council has carried out analytical and research work in support of the guideline.

4.2 Research has been conducted with sentencers at magistrates' courts and at the Crown Court. This work involved working through sentencing case studies with sentencers to understand how the new guideline may change their sentencing practice and taking views on draft proposals. Further research work of this nature is planned during the consultation period. It is expected that a write up of this work will be published alongside the consultation response paper.

4.3 The Council has also undertaken statistical analysis of current sentencing practice to help inform the sentencing ranges in the draft guideline. Detailed statistics of sentencing for the offences covered by the guideline can be found at the following URL: <http://sentencingcouncil.judiciary.gov.uk/consultations-current.htm>.

4.4 Official sentencing statistics have been supplemented with a review of recent cases in the magistrates' courts and the Crown Court, which has enabled the Council to identify the harm and culpability factors present in offences. The main sources of this data have been Court of Appeal transcripts, case studies provided by the CPS, and media reports. However, this information is not available for all cases, and we are aware that availability of data tends to be biased in favour of cases with certain features. For instance, data is more likely to be available for high severity cases or cases that attract media interest for other reasons.

4.5 Despite the evidence which has been collected, understanding current sentencing practice for fraud offences has been more challenging than for many of the other sentencing guidelines produced by the Council. This is primarily because the offence categorisations in the Court Proceedings Database (CPD) and Crown Court Sentencing Survey (CCSS) database do not correspond closely to the categorisations in our proposed new guidelines. As a result, it is difficult to get a picture of aggregate sentencing practice that is specific to the individual fraud offences in the new guideline.

4.6 One of the new guidelines applies to sentencing organisations for fraud, money laundering and bribery. For this guideline, the data problems were compounded by very low historical sentencing volumes, which have meant that it has not been possible to use sentencing data to develop a representative picture of sentencing levels for organisations. Sentencing levels have been assessed with reference to civil penalties and penalties imposed by regulatory authorities, and fines imposed in other jurisdictions for similar offending, and by consulting judges and other legal practitioners who have had experience working in this area.

4.7 The relative paucity of data means that there is a heightened risk that the proposed new sentencing guideline will have unanticipated effects on sentence levels. This is detailed further in section 8 of this document.

5 KEY ASSUMPTIONS

5.1 To estimate the resource effect of a new guideline, an assessment is required of how it will affect aggregate sentencing behaviour. This assessment is founded on the objectives of the new guideline, and backed up by the research and analytical work which has been undertaken in support of the guideline. However, strong assumptions must be made, in part because it is not possible precisely to foresee how sentencers' behaviour may be affected across the full range of sentencing scenarios. Any estimates of the impact of the new guideline are therefore subject to a large degree of uncertainty.

5.2 Historical data on changes in sentencing practice following the publication of guidelines can help inform these assumptions, but since each guideline is different, there is no strong evidence base on which to ground assumptions about behavioural change. The assumptions thus have to be based on careful analysis of how current sentencing practice corresponds to the guideline ranges presented in the proposed new guideline, and an assessment of the effects of changes to the structure and wording of the guideline. Research

work with sentencers helps with this process, but due to the huge range of possible factual scenarios and offending behaviour, not all sentencing scenarios can be explored with judges.

5.3 The resource impact of the new guideline is measured in terms of the change in sentencing practice that is expected to occur as a result of the new guideline. Any future changes in sentencing practice which are unrelated to the publication of the new guidelines are therefore not included in the estimates.

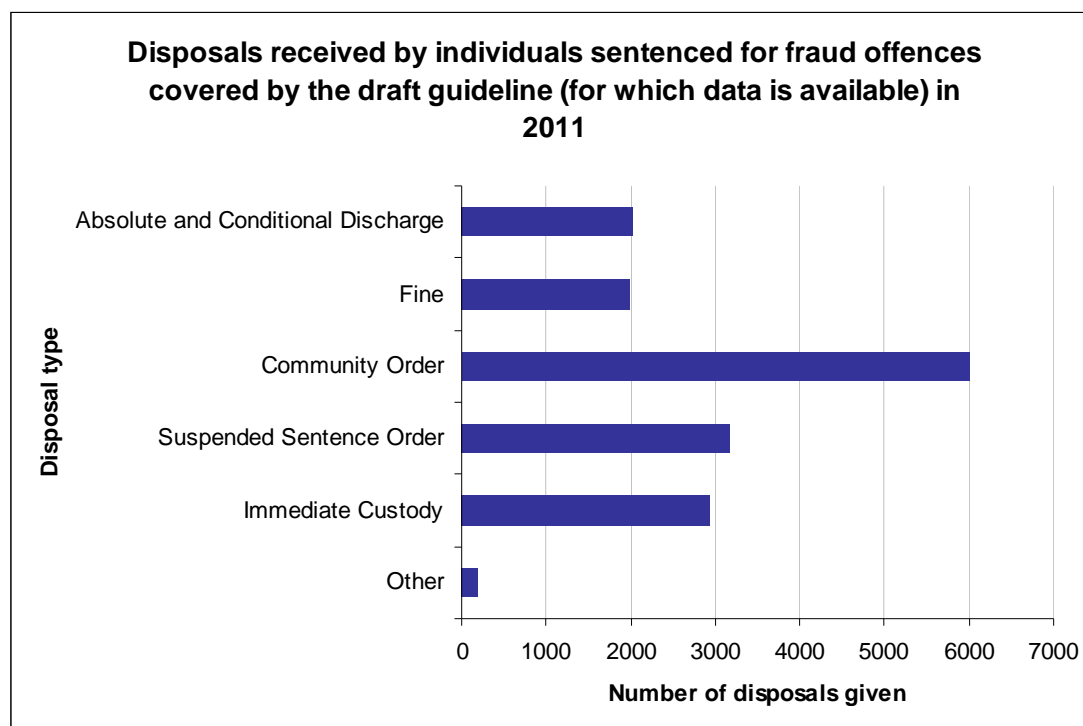
6 SENTENCING FOR FRAUD OFFENCES

6.1 Detailed sentencing statistics for fraud offences have been published on the Sentencing Council website at the following link: <http://sentencingcouncil.judiciary.gov.uk/consultations-current.htm>. This section presents simple statistics to give an indication of the volume of fraud offences and the sentences which are received for these offences.

Sentencing for individuals

6.2 The proposed new guideline covers some relatively high volume offences. In 2011, we have been able to identify 16,313 sentences for individuals that would fall under the proposed new guideline. There exist a number of offence categories which include sentences that may have fallen under the new guideline, but this would be dependent on the facts of the case and are therefore not included in the total. For instance, one offence categorisation covers some types of VAT and income tax fraud, but also several offences which would not be covered under our proposed new guideline, and it is not possible to split the data down further.

6.3 Amongst these 16,313 cases, the most commonly passed sentence was a community order. The following chart shows the disposal types used:



6.4 This figure shows that in 2011, 2,935 custodial sentences were passed for offences falling under the new guideline. To put this in perspective, this means that sentencing for these offences accounted for around 3% of all custodial sentences passed for adult offenders in 2011.

6.5 Due to relatively high sentencing volumes, giving effect to these sentences is resource intensive for both the prison and probation services.

Sentencing for organisations

6.6 Unfortunately, when interrogating the CPD and CCSS databases, it is difficult to identify cases we are sure would fall under the proposed new guideline because the offence categorisations in the databases, based on statute, do not closely correspond to the way the new guidelines have split out offences based on the type of fraudulent activity and likely victim. However, we know that very few sentences are passed on organisations for offences under the proposed new guideline.

6.7 For instance, in 2011, it was possible to identify four sentences passed on organisations in the Court Proceedings Database for which the proposed new guideline is likely to have applied. Amongst these sentences fine amounts were low, between £670 and £5,000. It is likely that this is an underestimate of the number of sentences which would have fallen under the new guideline because in the CPD there are other offence classifications which cover offending behaviour that may fall under the new guideline. However, even if we count all sentences for organisations in the 'fraud and forgery' category of the Court Proceedings Database, only 17 sentences were passed on organisations in 2011.

6.8 In our review of cases², we have also been able to identify, a small number of cases prosecuted by the Serious Fraud Office which would have fallen under our proposed new guideline. There have been seven such cases since 2008, but there were none before 2008. Unsurprisingly, the penalty levels (either fines or civil recovery orders) for these cases were high – ranging from £131,000 to \$12.7 million.

7 RESOURCE IMPACTS OF GUIDELINE

Sentences for individuals

7.1 The guideline aims to improve consistency of sentencing but not to cause changes in the use of disposal types. Guideline sentencing ranges have been set with this in mind, and the Council does not anticipate that the guideline will have an effect on custodial sentence lengths, or numbers of community orders or custodial sentences. As a result, no significant impact on prison, probation or youth justice resources is anticipated.

Sentences for organisations

7.2 The proposed new fraud guideline includes a single guideline on corporate offences which applies to many different offences: banking and insurance fraud, obtaining credit through fraud, revenue fraud, bribery and money laundering.

7.3 The guideline aims to improve the consistency of sentencing but not to cause changes in fine levels. The guideline is therefore not expected to result in any effects on fine levels or requirements for criminal justice resources.

8 RISKS

8.1 Two main risks have been identified:

Risk 1: The Council's assessment of current sentencing practice is inaccurate.

8.2 An important input into developing sentencing guidelines is an assessment of current sentencing practice. Council uses this assessment as a basis to consider whether current sentencing levels are appropriate or whether any changes should be made. Where Council is content with current sentencing levels, guideline sentencing ranges reflect the best data which is available on sentencing practice.

² See <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121211/text/121211w0001.htm#1212117800010>

8.3 As discussed in section 4 of this document, the data which is available on sentencing for fraud offences makes an assessment of current sentencing practice challenging. As a result, there is a risk that sentencing ranges do not accurately reflect current sentencing practice. This could result in unintentional changes in fine levels, or the mix of disposal types used for fraud offences.

8.4 This risk is mitigated by information that is being gathered by the Council's ongoing programme of research interviews, in which sentencers are reviewing the proposed guideline and commenting on whether it represents a departure from current sentencing practice. However, due to limitations on the number of research interviews that can be conducted, and the number of factual scenarios which can be explored, a risk remains.

8.5 Data on sentencing for organisations is particularly sparse, and as a result it has not been possible to develop an aggregate picture of sentencing levels for this type of offending from sentencing data. Instead, the Council has set sentencing levels to try and match current practice in consultation with judges and other legal professionals with experience in this area. Due to the lack of data, there is a heightened risk that sentence levels are inconsistent with current practice, and the guideline will have an unintended consequence on fine levels amongst organisations. However, the impacts of this risk materialising would be relatively small due to the very low volumes of sentences for organisations each year.

Risk 2: Sentencers do not interpret the new guideline as intended.

8.6 This could cause a change in the average severity of sentencing, with associated resource effects.

8.7 The Council takes a number of precautions in issuing new guidelines to try to ensure that judges interpret them as intended. Sentencing ranges are agreed on by considering sentencing data in conjunction with Council members' experience of sentencing. The Council has several expert advisors from various disciplines who scrutinise the guidelines. Prior to the guidelines' release, research is conducted with judges to assess the likely affect of the guidelines on sentencing practice, and following their release supporting materials are made available on the Sentencing Council website to aid the interpretation of the guidelines. Finally, consultees can feedback their views of the likely effect of the guidelines, and whether this differs from the effects set out in the consultation stage resource assessment.

8.8 The Council also uses data from the Ministry of Justice and the Crown Court Sentencing Survey to monitor the effects of its guidelines to ensure any divergence from its aims is identified as quickly as possible.

8.9 Nevertheless, the possibility of unintended consequences of the new guidelines cannot be ruled out.