

ADVICE TO THE SENTENCING GUIDELINES COUNCIL

Sentencing for Domestic Burglary



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FOREWORD BY THE CHAIRMAN

This is the final advice of the Panel to the Sentencing Guidelines Council and it completes a review of all the commonly sentenced offences of dishonesty. It contains nine recommendations relevant to the sentencing of this serious offence which, it is widely recognised, can have a profound effect on those whose home is burgled.

In May 2002, the Panel published its advice to the Court of Appeal on this offence which, in December 2002, gave rise to the guideline judgment in *McInerney, Keating*. As noted in both the Panel's consultation paper (published 12 May 2009) and in this advice (see paragraph 37), that judgment resulted in a noticeable change in sentencing practice. In particular, a higher proportion of offences was sentenced in a magistrates' court and a higher proportion of community sentences was imposed in both the Crown Court and in magistrates' courts. The number of offences reported continues to reduce whether measured through the British Crime Survey or through those offences recorded by the police.

However, since 2002 there have been significant changes to the sentencing framework following the enactment of the Criminal Justice Act 2003, and the guidelines developed by the Sentencing Guidelines Council have adopted a style different from that previously used by the Court of Appeal. This prompted the Court of Appeal to issue further guidance in its judgment in *Saw and others* in January 2009.

The advice reviews the developments since 2002 and incorporates not only the responses to consultation but also the relevant parts of the Panel's research into public attitudes to sentencing undertaken as part of its consultation on the *Overarching Principles of Sentencing*; that research was published in June 2009.¹

The Panel received a high number of responses to its consultation and, as always, has considered each response carefully. We are extremely grateful to all who have assisted in our deliberations.

Professor Andrew Ashworth
Chairman of the Sentencing Advisory Panel

¹ *Public Attitudes to the Principles of Sentencing*: published 16 June 2009; www.sentencing-guidelines.gov.uk

INTRODUCTION

1. The Sentencing Guidelines Council has asked the Sentencing Advisory Panel to produce advice on sentencing for domestic burglary. The Panel previously published advice on sentencing for this offence in 2002, leading to the Court of Appeal's guideline judgment in *McInerney and Keating*.² 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 this high-volume offence will complement the guidelines on *Theft and Burglary (non-dwelling)*.³
2. This advice 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 factors relevant to the assessment of the seriousness of an individual offence, the fourth considers aspects of offender mitigation likely to be particularly relevant when determining sentence for this offence and the fifth contains the Panel's proposals for sentence starting points and ranges for adult offenders.
3. The Panel's normal approach has been 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. Even though 25% of offenders sentenced for burglary of a dwelling in 2008 were

aged under 18,⁴ the Panel is not proposing separate guidelines since the Council has now published its definitive guideline on the approach to sentencing of youths which sets out the approach to be adopted.⁵

4. Some responses to the Consultation Paper urged the Panel to make separate provision for offenders aged 18–24. Attention was drawn to proposals suggesting that an approach closer to that for the sentencing of youths was more appropriate than the current approach. Whilst the Panel recognises the strength in the arguments that have been advanced suggesting that a different approach may be more effective with this age group, the statutory framework only distinguishes between those 18 years and over and those aged between 10 and 17 years. Accordingly, no distinction has been drawn in this advice between offenders aged 18–24 and those who are older. In each situation, a court will need to identify the purpose(s) of sentencing that are most appropriate for the individual before it and apply the resultant guideline within that context.

² [2003] 2 Cr App R (S) 39

³ published 9 December 2008; www.sentencing-guidelines.gov.uk

⁴ as a proportion of offenders sentenced for all offences in 2008, only 6% were aged under 18; for all indictable offences (excluding motoring), 15% of offenders sentenced in 2008 were aged under 18

⁵ *Overarching Principles – Sentencing Youths* published 20 November 2009; www.sentencing-guidelines.gov.uk

SECTION ONE: THE OFFENCE

The scope of the offence

5. The offence of burglary may be committed in a dwelling or other building. Under section 9 of the Theft Act 1968 ('the 1968 Act'), such an offence 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).
6. 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. 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),⁶ 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.
7. Although terminology varies, the most common term to describe this offence appears to be 'domestic burglary'; accordingly, the Panel has adopted that term for use in this advice.
8. Unless otherwise specified, the advice covers both the completed and attempted (i.e. without entry) offence. However, it considers only those offences involving theft or an intention to steal, 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 of burglary be charged in such circumstances, a court may wish to draw on the existing sentencing guidelines for those offences,⁷ treating the entry as a trespasser as an aggravating factor.
9. 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.⁸ This offence is not considered in this advice 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.⁹
10. 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

⁶ s.9(3)

⁷ *Assault and other offences against the person* (published 2008); *Magistrates' Court Sentencing Guidelines* (initially published May 2008; *Update 3* published October 2009): www.sentencing-guidelines.gov.uk

⁸ Theft Act 1968, s.10

⁹ around 1,500 per annum i.e. less than 1% of offences of burglary in a dwelling. In 2008 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, rising to 50.4 months in 2008

on indictment, if any person in the dwelling was subjected to violence or the threat of violence,¹⁰ 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.¹¹

Prevalence and perceptions of domestic burglary

11. The British Crime Survey (BCS) is a large survey of a representative sample of people aged 16 and over resident in households in England and Wales. The survey asks people about their experiences and perceptions of crime and includes questions on attitudes towards a wide range of crime-related topics (e.g. anti-social behaviour, the police, and the criminal justice system). It provides the most reliable measure of the extent of victimisation and of national trends over time. Its figures are not affected either by whether a crime is reported or by changes to the way in which a crime is recorded. By way of comparison, police-recorded crime is based on figures supplied by the police to the Home Office and covers crimes which are reported to and recorded by the police. It provides a good measure of trends in well-reported crimes and also in the less common but more serious crimes. It is an important indicator of police workload and provides data for small geographic areas.
12. Differences in the profile of offences between the two sources are also influenced by the different coverage of the BCS and police recorded crime; for example, recorded crime includes crime experienced by under 16s and commercial premises, and the BCS does not.

Some crimes are more likely to be reported and recorded than others; overall less than half of BCS crime is reported to the police.

13. The BCS estimates that there were 744,000 domestic burglaries and attempts in 2008/09, similar to the previous year. The police recorded 284,445 domestic burglaries in 2008/09, a 1% increase from the previous year. These figures reflect a considerable decline from the significantly higher 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 just over 700,000 offences in 1993.¹² However, burglary is still sufficiently common to affect many individuals and households.¹³
14. 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 11% in 2008/09; this figure has remained at 11–13% 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 14%). However, it has been suggested that the economic recession may lead to a rise in property crimes such as domestic burglary.¹⁴

¹⁰ Magistrates' Courts Act 1980, s.17(1) and sch.1, para. 28(c)

¹¹ Powers of Criminal Courts (Sentencing) Act 2000, s.111

¹² *Crime in England and Wales 2008/09*, Home Office Statistical Bulletin 11/09; www.homeoffice.gov.uk/rds; having less than 'basic' home security is one of the factors most strongly associated with a higher risk of domestic burglary: see para. 4.3

¹³ Roger Tarling and Tonia Davison, *Victims of burglary: a review of the literature* (2000), p.6; www.victimsupport.org.uk

¹⁴ see, for example, 'Economic gloom could reverse the downward trend in recorded crime', *The Times*, 18 July 2008; www.timesonline.co.uk

The nature of the offence

15. Definitions of burglary have changed over time,¹⁵ but violation of the privacy of a dwelling has long been considered the most serious form of illegal entry into buildings.¹⁶ Whilst commercial burglaries are often viewed simply as "theft combined with damage",¹⁷ 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 or personal value. As many homes have several occupants, an offence often will result in harm to more than one victim.
16. In terms of the initial decision to commit domestic burglary, 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*. Studies indicate that the majority of offences fall into the 'search' category, with most of the remainder being 'planned'.¹⁸ 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.¹⁹ 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.

17. According to the 2008/09 BCS, 39% of domestic burglaries (292,000) were attempts, in which the offender tried unsuccessfully to enter the premises.²⁰ 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.
18. 9,092 (3.2%) of the domestic burglaries recorded by the police in 2008/09 were distraction burglaries, where the offender gained entry to the house by some form of trick or deception, a 10% reduction on the previous year.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. The nature of domestic burglary has been explored in a detailed analysis of the findings from the 2008/09 BCS:²²
 - someone was at home when 61% of attempted burglaries and 57% of completed burglaries took place – in 30% of all burglaries, someone was at home *and* was aware of what was happening;

¹⁵ e.g. housebreaking was an offence until 1968 when it was absorbed into the new definition of burglary in the Theft Act

¹⁶ 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)

¹⁷ Andrew Ashworth, *Sentencing and Criminal Justice* (2010), p.137

¹⁸ for example, Claire Nee and Amy Meenaghan, *Expert decision making in burglars* (2006) *Brit J Criminol* 46(5) 935–949

¹⁹ Trevor Bennett and Richard Wright, *Burglars on burglary* (1984)

²⁰ *Crime in England and Wales 2008/09*, Home Office Statistical Bulletin 11/09, Table 2.04; www.homeoffice.gov.uk/rds

²¹ *ibid.*

²² *Crime in England and Wales 2008/09: Supplementary Tables: Nature of burglary, theft, criminal damage, vehicle and violent crime*; http://www.homeoffice.gov.uk/rds/crimeew0809_tables_bvv.html

- violence was used or threatened in a significant number of cases where the victim was at home and saw the offender – 45% of all burglaries, including 59% of completed incidents and 34% of attempts;²³
- property was stolen in 70% of burglaries in which the offender managed to gain entry – cash, electrical goods and cameras, computer equipment and jewellery were the most commonly stolen items;
- the median value of property stolen was estimated at £450, an increase from £360 in the previous year;²⁴ in 25% of burglaries where property was stolen, the value was under £100, while in 29% of cases it was at least £1,000;
- there was some damage to property in 52% of burglaries, including 61% of attempts and 46% of completed burglaries – soiling and graffiti were rare, taking place in 2% and 1% of burglaries respectively;
- the mean cost of damage caused in the course of all burglaries was estimated to be £317;
- victims were emotionally affected by the burglary in 87% of incidents, including 29% in which they reported being 'very much' affected, and 27% in which they were affected 'quite a lot'.

20. The 2000 BCS found that only 48% of burglary victims were insured and analysis of the 2008/09 BCS confirms that households least

²³ the numbers in this part of the analysis are smaller than in many of the other parts and may not, therefore, be as representative

²⁴ this increase appears to be due mainly to an increase in property valued between £500 and £999 which may be connected with the increase in theft of computer equipment

likely to have contents insurance have a higher than average risk of burglary.²⁵ 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.²⁶ For a minority, the experience of making an insurance claim may be considered a form of secondary victimisation.²⁷

21. 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.²⁸ More recent research found that a greater proportion of victims who reported a burglary described themselves as 'very much affected' than did those who were affected by other types of offence such as violence, threats, vandalism or theft.²⁹ 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 longer term, victims of burglary appear to have lower levels of fear than that experienced by victims of violence. The level of fear, however, is still significantly higher than amongst members of the public who have not experienced burglary.³⁰

²⁵ *Crime in England and Wales 2008/09*, Home Office Statistical Bulletin 11/09, p.76; www.homeoffice.gov.uk/rds

²⁶ R.I. Mawby, *Burglary* (2001), pp.42–44

²⁷ Tarling and Davison; see fn.13

²⁸ Maguire; see fn.16

²⁹ 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

³⁰ F.H. Norris, K. Kaniasty, M.P. Thompson, 'The psychological consequences of crime' in Davis et al., *Victims of Crime* (1997)

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22. 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.³¹ Where fear prevents victims from leaving their home unoccupied, their quality of life deteriorates; this effect is likely to increase where the victim has experienced burglary on more than one occasion (see paragraph 51 below). Research has found that being the victim of a property crime increases the likelihood of moving home within the following year by 12%;³² many more people will not be in a financial position to move home, "virtually 'imprisoned' in areas where they feel unsafe".³³
24. 15,242³⁶ persons were either cautioned or found guilty of domestic burglary in 2008. 13% (2,046) were cautioned; of the 10,983 adults, 9% were cautioned, against an overall adult caution rate of 31% for indictable offences excluding motoring; of the 4,259 youths, 24% were cautioned for this offence, against an overall youth caution rate of 56%.

Detection and cautioning

23. Only 16% (45,922) of the 284,445 offences of burglary in a dwelling recorded by the police in 2008/09 resulted in detection and sanction for the offender, in comparison with an overall sanction detection rate of 28% (1,335,777) of all offences recorded by the police (4,703,814).³⁴ 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.³⁵

³¹ Maguire, Mawby; see fns.16 and 26

³² L. Dugan, 'The effect of criminal victimization on a household's moving decision', *Criminology* (1999) pp.903–928. This study found that violent crime had a lesser impact on the likelihood of moving home

³³ Mawby, p.47, see fn.26

³⁴ *Crime in England and Wales 2008/09*, p.138. '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

³⁵ *Crime in England and Wales 2008/09*, Home Office Statistical Bulletin 11/09; www.homeoffice.gov.uk/rds

³⁶ this is significantly lower than the number of detections and sanctions because it relates to offenders rather than offences, because the figure is based on the 'principal offence' and because of the likelihood that an offender will be sentenced for more than one offence and may have others taken into consideration

SECTION TWO: CURRENT SENTENCING PRACTICE AND EXISTING GUIDANCE

The sentencing framework

Sentencing of adults

25. The maximum penalty for an adult offender convicted of domestic burglary 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 the indictable only offence of aggravated burglary.
26. Section 111 of the Powers of Criminal Courts (Sentencing) Act 2000 provides for a presumptive minimum³⁷ sentence of three years imprisonment for an adult convicted of domestic burglary for a third time,³⁸ not including attempted burglary. Any reduction for a guilty plea must not take the sentence below 28.8 months (80% of the minimum).³⁹

Existing guidance on sentencing for domestic burglary

The previous advice of the Panel

27. Prior to publishing its advice on sentencing for domestic burglary in 2002, the Panel commissioned a detailed survey of public attitudes to sentencing in such cases.⁴⁰ Drawing on the findings of this research, the Panel identified the features of a 'standard' domestic burglary, which was assumed to

³⁷ see further in para. 83 below

³⁸ this applies where the offender has been convicted of two other domestic burglaries committed on separate occasions after 30 November 1999

³⁹ Criminal Justice Act 2003, s.144

⁴⁰ *Sentencing of Domestic Burglary*, Neil Russell and Rod Morgan (2001); www.sentencing-guidelines.gov.uk

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 factors were divided into those considered to be of 'high relevance' or of 'medium relevance'.

28. Four levels of seriousness were defined: 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.

Mclnerney and Keating

29. In the subsequent guideline judgment in *Mclnerney and Keating*,⁴¹ 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 between high and medium relevance factors is helpful "as

⁴¹ [2003] 2 Cr App R (S) 39

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

30. 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.
31. This approach accords with the views of the public ascertained by the Panel in its recent research on *Public Attitudes to the Principles of Sentencing*.⁴² It was clear from the responses received that the presence of previous convictions was a significant factor in increasing the assessment of the seriousness of an offence with 82% of the sample considering that previous convictions always or often increased seriousness and 76% considering that the absence of previous convictions should result in a more lenient sentence in some or all cases.⁴³ When asked to consider a scenario of a domestic burglary that would fall within Level 3 of the proposals in this advice (the least serious form of burglary involving minimal loss or damage and no raised culpability or harm) and to which the offender pleaded guilty, most selected a non-custodial sentence for an offender with no convictions but substantial custodial sentences for an offender with many 'recent and relevant' convictions.⁴⁴

The Magistrates' Court Sentencing Guidelines (MCSG)

32. In May 2008 the Council published definitive guidelines covering most of the offences regularly coming before magistrates' courts.⁴⁵ The guideline for burglary in a dwelling in the MCSG is based on the *McInerney* 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.⁴⁶
33. 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 *McInerney* 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; the starting point is committal to the Crown Court.

⁴² published 16 June 2009: www.sentencing-guidelines.gov.uk

⁴³ *ibid.*, pp.27 and 37

⁴⁴ *ibid.*, pp.21, 28 and 29

⁴⁵ *Magistrates' Court Sentencing Guidelines*: www.sentencing-guidelines.gov.uk

⁴⁶ this was noted by the Court of Appeal in *Saw and others* [2009] EWCA Crim 1; see para. 34 below

Saw and others (Saw)

34. In *Saw*,⁴⁷ the Court of Appeal considered six unrelated cases in which it was argued, on the basis of *McInerney*, that the sentences that had been imposed for offences of domestic burglary were excessive. Rejecting each appeal, the Court described *McInerney* as "difficult of application"⁴⁸ and noted that "misunderstandings about its effects still persist".⁴⁹ 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 relevance, which the Court considered to be insufficiently flexible in practice.

35. For these reasons, the Court re-examined *McInerney* and offered fresh guidance. Apart

⁴⁷ [2009] EWCA 1

⁴⁸ *ibid.*, [4]

⁴⁹ *ibid.*, [3]

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.

Current sentencing of adults

36. The number of adults sentenced for burglary in a dwelling has fallen significantly, from 12,864 in 1998 to 9,952 in 2008. 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 1998 and 2008. Since the trends were stable between 1998 and 2001, the intervening years are not shown.

Sentences imposed on adults in magistrates' courts for domestic burglary 1998–2008

Sentence imposed	1998	2002	2003	2004	2005	2006	2007	2008
Discharge	8%	7%	7%	6%	7%	6%	5%	5%
Fine	7%	5%	4%	4%	3%	3%	3%	3%
Community sentence	50%	49%	54%	55%	51%	45%	46%	44%
Suspended sentence	0%	0%	1%	1%	3%	13%	15%	15%
Immediate custody	33%	37%	34%	33%	33%	29%	27%	26%
Other	2%	1%	1%	1%	2%	4%	3%	8%
Total sentenced	2,965	1,877	2,385	2,255	2,145	2,365	2,652	2,603
Average custodial sentence	3.7 months	3.9 months	3.9 months	3.9 months	3.9 months	3.8 months	3.7 months	3.4 months

Sentences imposed on adults in the Crown Court for domestic burglary 1998–2008

Sentence imposed	1998	2002	2003	2004	2005	2006	2007	2008
Discharge	1%	0%	1%	1%	1%	0%	0%	0%
Fine	0%	0%	0%	0%	0%	0%	0%	0%
Community sentence	21%	22%	29%	30%	29%	20%	17%	15%
Suspended sentence	1%	1%	1%	1%	2%	10%	15%	15%
Immediate custody	77%	76%	69%	68%	67%	68%	66%	69%
Other	0%	1%	0%	0%	1%	1%	1%	1%
Total sentenced	9,899	9,243	8,768	7,961	7,100	6,547	6,818	7,349
Average custodial sentence	20.9 months	23.9 months	24.5 months	24.9 months	24.9 months	24.9 months	24.2 months	24.8 months

37. 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:

- for adults, the proportion of domestic burglaries sentenced in the Crown Court peaked at 83% in 2002 and fell to 72% in 2007 before increasing slightly to 74% in 2008;
- 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;⁵⁰ 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 2008.

38. 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 20.9 months in 1998 to 23.9 months in 2002, 24.5 months in 2003 and 24.9 months in 2006; a fall to 24.2 months in 2007 has been followed by an increase back to 24.8 months in 2008. 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 and then to 3.4 months in 2008. The proportion of sentences of three years and over has increased since the presumptive minimum sentence became available, but the limited data available indicate that, in 2008, about half of third-time domestic burglars received a sentence below the presumptive minimum.⁵¹

⁵⁰ available from April 2005

⁵¹ Police National Computer data indicates that 730 offenders met these criteria in 2008 and 610 of these (83 per cent) were given a custodial sentence. Where a custodial sentence was given in 2008 almost half received a sentence of 28.8 months or more: *Sentencing Statistics 2008*, Chapter 6; www.justice.gov.uk

SECTION THREE: SERIOUSNESS OF THE OFFENCE

39. In both *McInerney* and *Saw*, the Court endorsed the words of the previous guideline judgment of *Brewster*.⁵²

"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...."

40. In *Saw* the Court described domestic burglary 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 noted above,⁵³ most victims are emotionally affected and some suffer considerable distress. For these reasons, the maximum penalty for domestic burglary is higher than that for other burglary⁵⁴ 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.⁵⁵

41. Offences of domestic burglary 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 research⁵⁶ and the findings of the BCS summarised above.⁵⁷ 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".

42. 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.

43. 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

⁵² [1998] 1 Cr App R (S) 181

⁵³ see paras. 21 and 22

⁵⁴ however, it should be noted that non-dwelling burglary includes outbuildings and garages, and is not purely commercial

⁵⁵ however, it should be noted that theft in a dwelling is often aggravated by a breach of trust

⁵⁶ see para. 27

⁵⁷ see para. 19 above

unusual"⁵⁸ 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.

44. In its consultation paper, the Panel sought to describe a base level of culpability against which the factors identified in *Saw* could be considered as indicative of raised culpability; the same approach was taken in relation to harm. In the interests of consistency, the Panel used the term "harm" rather than "impact" since culpability and harm are the two parameters of offence seriousness identified in statute⁵⁹ and are now widely accepted and understood. The Panel intended 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*. **This approach commanded the broad support of those who responded to the consultation.**
45. The Panel also examined the issue of previous convictions in light of the presumptive minimum sentence for a third conviction of burglary in a dwelling seeking to ascertain whether further guidance would be helpful regarding the sentencing of an offender after a second qualifying conviction. Although there were many who supported the need for further guidance, the stronger arguments suggested that nothing beyond the current statutory provisions was needed, not least

because of the very restricted circumstances in which the statutory presumption applies.⁶⁰

Culpability

46. In relation to offences generally, the *Seriousness* guideline⁶¹ 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. In its Consultation Paper, the Panel proposed that the base level of culpability should be defined as an offence involving no significant planning or professionalism; **the responses supported that approach.** The factors set out below will assist a court in determining the extent to which culpability is increased or decreased from this base level.
47. 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."⁶²

⁶⁰ see further at para. 83 below

⁶¹ www.sentencing-guidelines.gov.uk. The Panel has recently consulted on *Overarching Principles of Sentencing* (consultation paper published July 2008, advice published March 2010), and this guideline may be revised as a result

⁶² [2009] EWCA Crim 1 at [7]

⁵⁸ [2009] EWCA Crim 1 at [25]

⁵⁹ Criminal Justice Act 2003, s.143(1)

Factors indicating raised culpability

Violence used or threatened against the victim

48. Where a burglary involves violence or the threat of violence, the offence is triable only on indictment;⁶³ it may also lead to the offence being charged as robbery which is subject to separate guidelines from either the Sentencing Guidelines Council or the Court of Appeal.⁶⁴ 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

49. 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.⁶⁵ 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 domestic burglary should be preferred, possibly with an additional charge of possession of an offensive weapon or bladed instrument. 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 be an aggravating factor for the offence of burglary and thus make it more serious.

Planning

50. The more an offence is planned, the greater culpability is likely to be. 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 recovered) 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.⁶⁶ 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.⁶⁷ Some of these elements might also indicate that the offender is a 'professional' and that element is explored further in paragraph 55 below.

Victim targeted

51. 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.⁶⁸ Selecting a property

⁶³ Magistrates' Courts Act 1980, sch.1

⁶⁴ 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

⁶⁵ see para. 9 above

⁶⁶ 'Afonso Alves becomes 15th footballer to be targeted by burglars', *The Telegraph*, 16 March 2009; <http://www.telegraph.co.uk>

⁶⁷ in 2008/09, 7% of domestic burglaries involved the theft of a vehicle compared with 6% in 2007/08; car keys were stolen in 8% of domestic burglaries where entry was effected: *Crime in England and Wales 2008/09*; www.homeoffice.gov.uk/rds

⁶⁸ see, for example, Nee and Meenaghan (2006); see fn.18

for such reasons is different from targeting a particular victim, and the latter will indicate greater culpability.⁶⁹ 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.⁷⁰ 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.⁷¹ 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.⁷² According to the BCS, of the offences where the victim was able to say something about the offender, 30% of burglars were "known well" by the victim and a further 19% were known to some extent either by sight or by name.⁷³

52. In *McInerney*, 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,⁷⁴ as is religiously motivated conduct⁷⁵ or conduct motivated by the (presumed) disability or sexual orientation of the victim.⁷⁶

Vulnerable victim targeted

53. Older adults may be targeted because the offender anticipates that they will be less likely to be reliable witnesses or will be more susceptible to distraction. As mentioned above,⁷⁷ just over 3% of offences are distraction burglaries and research suggests that the majority of victims of such offences are older adults.⁷⁸ There is also concern that a large number of such burglaries are not reported and so statistics compiled from crime recorded by the police significantly under-represent the extent of distraction burglaries. There are particular concerns regarding the reporting of such offences where the victim is part of an ethnic minority group.⁷⁹ Research suggests that 'loneliness' and 'isolation' increase the risk of being targeted.⁸⁰
54. The deliberate targeting of vulnerable victim(s) is a generic aggravating factor.⁸¹ In the light of the vulnerability of older adults, the presence of this factor in an offence of domestic burglary will make the offence particularly serious.

⁶⁹ targeting a property also may indicate greater culpability where it involves planning: see para. 50 above

⁷⁰ Mawby, pp.53–55; see fn.26

⁷¹ 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) pp.269–279

⁷² see para. 68 below

⁷³ Table 1.9, *Crime in England and Wales 2008/09*; www.homeoffice.gov.uk/rds

⁷⁴ Criminal Justice Act 2003, s.145

⁷⁵ *ibid.*

⁷⁶ *ibid.*, s.146

⁷⁷ see para. 18

⁷⁸ *Distraction burglary amongst older adults and ethnic minority communities*, Home Office (2003); www.homeoffice.gov.uk/rds/pdfs2/hors269.pdf

⁷⁹ *ibid.*, pp.2 and 41–42

⁸⁰ *ibid.*, p.3

⁸¹ see Annex A

'Professionalism'

55. 'Professional' offending is a generic aggravating factor.⁸² Past research has suggested that the majority of offences of domestic burglary do not involve a great degree of skill or rational planning,⁸³ but a small number of offenders have been described as 'professional' or 'high-level' burglars, whose working methods involve a degree of organisation.⁸⁴ As described in paragraph 50 above, the degree of planning will make an offence more serious.
56. The term 'professionalism' has sometimes been used to describe offenders who have committed burglary *persistently*, rather than with any particular degree of skill or organisation.⁸⁵ However, since the implementation of the Criminal Justice Act 2003, it has become clear that previous convictions may make an offence more serious and **the Panel considers it to be appropriate for that aspect to be clearly separated from the degree of planning in any particular offence.**

Previous convictions

57. 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.

58. Research suggests that most convicted burglars have previously committed a range of offence types, although these are usually property-related and rarely violent offences.⁸⁶ 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 domestic or non-domestic burglaries and distraction thefts⁸⁷ from the homes of elderly occupiers, should aggravate an offence of domestic burglary.⁸⁸ Where the offender has a previous conviction for domestic burglary, this may warrant special consideration; see paragraphs 80–87 below.

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

59. 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

⁸² see Annex A

⁸³ 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.26

⁸⁴ Maguire; see fn.16

⁸⁵ Ashworth, pp.219–220; see fn.17

⁸⁶ Mawby, pp.61–63; see fn.26

⁸⁷ 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. 18

⁸⁸ for a more detailed discussion of the impact of relevant previous convictions, see the Panel's advice *Overarching Principles of Sentencing*, paras. 94–108, published March 2010, www.sentencing-guidelines.gov.uk

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 57 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

60. In *Saw* the Court confirmed that where a domestic burglary 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.

Offender played a subsidiary role in the offence

61. Past research indicated that burglars often worked together, but that there was little evidence of hierarchy or leadership.⁸⁹ This is in contrast to offences such as those arising from the importation and supply of prohibited drugs where there will often be a delineation of role sufficient for the nature of that role to be one of the determinants of seriousness.⁹⁰ More recently it has been suggested that most burglars work alone,⁹¹ 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,⁹² for example by acting as a lookout or driving a 'getaway' vehicle.

62. In most cases, whatever the precise role played, each offender will have had the same intention to do the acts necessary for the offence committed and will bear equal responsibility for the harm that resulted (or could have resulted). Indeed, where an offence is committed by more than one offender, the role of each is likely to be integral to the commission of the offence.

63. In its Consultation Paper, the Panel sought views on the extent to which culpability could be said to be different depending on the role played. It was clear from the responses that the significance of the role played by the offender was far from straightforward and the approach needs to reflect the nuances of a wide variety of situations if it is to provide principles that are just and balanced.

64. Even though culpability will be equal (in the sense that all participants are likely to have intended to do the acts necessary for the offence to be committed), the overall assessment of the seriousness of the offence might differ between individual offenders because of the presence of aggravating or mitigating factors affecting culpability in the wider sense. For example, where an offender played a leading role in an offence committed by several offenders, that is likely to be an aggravating factor; where an offender acts under coercion, that may be a mitigating factor.

⁸⁹ N. Shover, 'The social organization of burglary', *Social Problems* (1973) 499–514

⁹⁰ see the Panel's advice *Sentencing for Drug Offences*, March 2010; www.sentencing-guidelines.gov.uk

⁹¹ Mawby, p.71; see fn.26; of the 45% of victims who were able to say something about the offender as part of the BCS, 65% indicated that there was only one offender involved: Table 1.9 *Crime in England and Wales 2008/09: Supplementary Tables: Nature of burglary etc.*, www.homeoffice.gov.uk/rds

⁹² *Saw* [26]

Offender was exploited by others

65. 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. Where this is established (not merely asserted), it indicates lower culpability.

Harm

66. As noted in paragraphs 39–40 above, domestic burglary is 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 victim(s) is an important factor in determining offence seriousness. The harm caused 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 domestic burglary 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.
67. Most offences of domestic burglary will involve a degree of turmoil in the house, and some distress to the victim(s). The degree of loss and damage involved will vary significantly,⁹³ but offences often will involve minimal loss and minimal or no damage, particularly if there was no forced entry. In its Consultation Paper, the Panel proposed that this should be treated as the base level of harm; **the responses supported that approach.** The factors described in

⁹³ see para. 19 above

the paragraphs below will assist a court in determining the extent to which harm is increased from this level.

Factors indicating raised harm

Trauma to the victim beyond the normal level

68. 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,⁹⁴ 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 economic terms”,⁹⁵ 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 term⁹⁶ and further increasing the likelihood of the victim(s) moving home.⁹⁷ 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

69. 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 *McInerney*. Where property has been subject

⁹⁴ see paras. 21–22 above

⁹⁵ [2009] EWCA Crim 1 at [7]

⁹⁶ Mawby, p.59; see fn.26

⁹⁷ see fn.32

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 sentimental or personal value

70. 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 the loss of property, a court will need to take into account the financial value relative to the financial resources of the victim(s), the importance of sentimental or personal 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 (perhaps the theft of a student's computer).

Economic value

71. 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 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

72. As mentioned above, the average value of goods stolen in domestic burglaries has been estimated at £450, with damage costing an average of £317 to repair.⁹⁸ 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.⁹⁹ 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 or personal value

73. The sentimental or personal 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 or personal value such as jewellery, watches and records of family memories.¹⁰⁰ Where the items taken or damaged are of significant sentimental or personal 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

74. 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

⁹⁸ see para. 19 above

⁹⁹ Tarling and Davison; see fn.13

¹⁰⁰ Mawby, p.44; see fn.26

detection.¹⁰¹ 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. According to the BCS, 61% of domestic burglaries take place between 6pm and 6am with approximately 25% taking place between midnight and 6am. The proportions are slightly higher for attempted burglary than for those where the offender enters the premises.¹⁰²

75. 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.
76. The Panel's previous research¹⁰³ 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. The Panel's previous advice concluded 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; this was said to be 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.¹⁰⁴ 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.

77. Whilst a number of responses to the Panel's Consultation Paper asserted that night time burglary should be considered a more serious offence, the reasoning given tended to be based on the greater likelihood that the occupier(s) would be disturbed with the increase in fear and in the risk of confrontation. Other responses pointed out that those risks could arise as easily during the day time. Accordingly, the Panel has concluded that it is preferable to identify as aggravating factors both the degree of trauma actually caused (where that is beyond that normally associated with a domestic burglary) and the presence of an occupier in the home when the burglary took place, whether the occupier was present when the offence started to be committed or arrived during its commission. This appears to the Panel to be a more comprehensive way of incorporating the harmful effects of a domestic burglary than a distinction based on whether the burglary occurred at night or during the day.
78. The trauma that follows a domestic burglary is likely to be even greater (and longer lasting) where a child is present and this is likely

¹⁰¹ *ibid.*, p.73

¹⁰² Table 1.1, *Crime in England and Wales 2008/09: Supplementary Tables: Nature of burglary etc.*, www.homeoffice.gov.uk/rds

¹⁰³ *Sentencing of Domestic Burglary*, Neil Russell and Rod Morgan (2001), p.45; www.sentencing-guidelines.gov.uk

¹⁰⁴ 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.16

to increase the level of harm beyond that which would arise where the occupiers are all adults.¹⁰⁵ Accordingly, the Panel has concluded that an offence should be aggravated where a child was present (or likely to be present) in the home.

Recommendation 1:

Offence seriousness should not be distinguished through consideration of whether an offence was committed during the day or at night. Two aggravating factors can be identified:

- i) the degree of trauma actually caused, where that is beyond that normally associated with a domestic burglary; and*
- ii) the presence of an occupier in the home when the burglary took place, whether the occupier was present when the offence started to be committed or arrived during its commission.*

Recommendation 2:

An offence is aggravated where a child was present (or likely to be present) in the home.

Factor indicating a lesser degree of harm

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

79. 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".¹⁰⁶ However, since the Panel is proposing that the base level for sentencing is an offence where there is minimal loss or damage (see paragraph 67 above) **it does not appear necessary to make specific provision for situations where there is no loss.**

Repeat Offending

A second offence of burglary in a dwelling

80. In light of the presumptive minimum sentence for an offender convicted of a third burglary in a dwelling (see paragraph 83 below), the Court in *McInerney* accepted the previous advice of the Panel to provide 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. Since that judgment, Parliament has provided for previous convictions to aggravate the seriousness of an offence where a court considers that to be reasonable.¹⁰⁷ The Panel's research into *Public Attitudes to the Principles of Sentencing* notes that a majority favoured a significant increase in severity when sentencing an offender with two previous convictions compared with an offender with none.¹⁰⁸

81. In light of that statutory change, the Panel 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 sought the views of consultees as to whether, when sentencing for a second offence of domestic burglary, a court should follow the general approach to previous convictions¹⁰⁹ or apply a different approach and, if the latter, what this should be. The issue is further complicated by the fact that

¹⁰⁵ see also the earlier discussions in paras. 21, 22 and 66

¹⁰⁶ [2009] EWCA Crim 1 at [26]

¹⁰⁷ Criminal Justice Act 2003, s.143(2)

¹⁰⁸ at p.29, published 16 June 2009; www.sentencing-guidelines.gov.uk

¹⁰⁹ see paras. 57–58 above

not all offenders convicted of a third domestic burglary 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.

82. Whilst there was majority support for such guidance, the Panel was persuaded by the arguments of the minority that reliance on the statutory principles was sufficient. The Panel agreed that the very restricted circumstances in which an offender became subject to the minimum sentence and the evidence that those convicted of domestic burglary generally have convictions for a range of other offences also, suggested that any guidance would be difficult to construct and unlikely to be of assistance to a court.

Recommendation 3:

No specific guidance is required in relation to circumstances where an offender has a second qualifying conviction; reliance on the statutory principles is sufficient.

A third offence of domestic burglary

83. Where an adult offender is convicted of a third qualifying domestic burglary (i.e. the offender has previously been convicted of two other such burglaries 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).¹¹⁰

84. 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;
- the offender has made real efforts to reform or conquer a drug or alcohol addiction, but some personal tragedy triggers the third offence;
- the first two offences were committed when the offender was under 16.

85. It appears to the Panel that the underlying rationale that produced these examples is the recognition that the minimum sentence was designed to be a deterrent for the individual involved in repeated domestic burglaries. The purposes of sentencing¹¹¹ most relevant to the presumptive minimum sentence appear to be public protection and crime reduction, through a combination of deterrence and incapacitation. Accordingly, where a person who had been sentenced for such offences in the past had also demonstrated a commitment to change, that was likely to produce the circumstances in which the minimum sentence was not required. The examples identified in *McInerney* pointed out the most commonly occurring situations – where an offender had committed offences in the past and then had a significant period in which offences had not been committed and where an offender was genuinely seeking to transform an addiction but lapsed because of a crisis beyond that normally expected.

¹¹⁰ Criminal Justice Act 2003, s.144

¹¹¹ *ibid.*, s.142

86. The Panel sought views in its Consultation Paper on whether the examples provided in case law continued to be the most appropriate. A large majority of responses considered that the present examples adequately described situations in which a court was likely to find exceptional circumstances sufficient to justify not imposing the minimum sentence. However, a number of responses expressed surprise at the use of age 16 in the third example (see paragraph 84 above). The suggestion was made that this ought more appropriately to be age 18 (with a few responses suggesting age 24) and that the first and third examples should be combined so that the provision was for individuals whose previous convictions were under 18 **and** where there had been a substantial lapse of time since the second qualifying conviction.

87. **The Panel considers that it would be of assistance to set out the underlying principle on which such a decision should be based as well as providing examples.** Whilst the Panel has been unable to discover any statement of the underlying rationale, it considers that the guideline should state the primary purpose of the minimum sentence which, it presumes, is to deter those involved in repeated domestic burglaries. The guideline should also provide examples which follow the broad approach in *McInerney* but should provide for age 18 in place of age 16 since that is the age at which a court is first required to consider a minimum sentence under these provisions.¹¹²

Recommendation 4:

The guideline should state the principle on which a court should base the decision not to impose the minimum sentence (where it applies) and should provide examples including situations:

- a) where the two qualifying offences were committed when the offender was aged under 18,*
- b) where there had been a long lapse of time between the second and third qualifying offence and*
- c) where the offender was making a real effort to reform or conquer an addiction and the court considers that the offender would best be able to continue that effort in the community (except where the current offence is too serious for a community sentence).*

¹¹² Powers of Criminal Courts (Sentencing) Act 2000, s.111(1)

SECTION FOUR: OFFENDER MITIGATION – factors that affect sentence selection rather than the assessment of the seriousness of the offence

88. 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 such factors: good character, genuine remorse, ready co-operation with police, a positive response to previous sentences, age, and the state of health of the offender. Since these factors are of general application, they are not referred to in detail below or included in the table setting out starting points and ranges.
89. In its Consultation Paper, the Panel identified factors that may be more likely to apply to an offender who has committed domestic burglary, in addition to the generic factors listed in the *Seriousness* guideline.¹¹³ The Panel had previously consulted on these factors in relation to offences of theft and dishonesty and proposed that the principles established in the Council guideline *Theft and Burglary (non-dwelling)*¹¹⁴ could be applied to this offence also. Subject to the observations below, the majority of those who responded strongly supported the proposed approach.

¹¹³ see Annex A

¹¹⁴ December 2008, www.sentencing-guidelines.gov.uk

Voluntary restitution

90. 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 or personal value to the victim.
91. 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 point in time at which, and the determination with which, the offender tried to return the items.¹¹⁵

Dependency of the offender

92. Many offenders convicted of acquisitive crimes are motivated by an addiction, often to illegal drugs, alcohol or gambling. Research has indicated that, of those arrested for domestic burglary, three times more are drug misusers than are not.¹¹⁶
93. A number of responses expressed concern about the inclusion of this factor; however, those concerns appear to have been based

¹¹⁵ see *Sentencing for Fraud – statutory offences*, p.11, 26 October 2009; www.sentencing-guidelines.gov.uk

¹¹⁶ Trevor Bennett and Rae Sibbitt, *Drug Use Among Arrestees* (2000); Home Office

on a desire not to minimise the seriousness of an offence of domestic burglary simply on the grounds of the circumstances of the offender. This is a concern that the Panel strongly endorses – an offender's dependency does not affect the assessment of seriousness of an offence. However, that dependency may properly influence the type of sentence imposed where the offender is making a genuine attempt to address its causes.¹¹⁷ Even if an immediate custodial sentence would otherwise be warranted, in an attempt to break the cycle of addiction and offending it may sometimes be appropriate¹¹⁸ to impose a community order including:

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

In its research into *Public Attitudes to the Principles of Sentencing* the Panel sought views on the significance of dependency in relation to the selection of sentence for an offence of domestic burglary; it was clear that this was a factor that was accepted as being potentially significant.¹¹⁹

94. 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,¹²⁰ making it more suitable for drug-dependent offenders who are highly likely to breach an order whilst adapting 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. A court should always ensure that it will be possible to impose an appropriate custodial sentence where it becomes necessary to revoke a community order imposed in the circumstances described in this section; this is likely to require the imposition of the community order by the Crown Court (even though that order is within the power of a magistrates' court) where the alternative would be a custodial sentence exceeding that available in a magistrates' court.

Recommendation 5:

Where a court is considering the imposition of a community order because of the offender's dependency, in circumstances where the custodial sentence that would otherwise have been imposed would have been longer than that available in a magistrates' court, the 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.

¹¹⁷ *Saw* [27]

¹¹⁸ 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

¹¹⁹ at p.46, published 16 June 2009; www.sentencing-guidelines.gov.uk

¹²⁰ *New Sentences: Criminal Justice Act 2003*, December 2004, p.13; www.sentencing-guidelines.gov.uk

Financial pressure

95. Apart from the cases of dependency discussed above, the primary motive in most cases of domestic burglary 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. Although some responses expressed reservation about making any allowance for financial pressure, the Panel continues to consider that, to the limited extent proposed in the Consultation Paper, this factor is as relevant to this offence as it is to other offences of dishonesty. Accordingly, the Panel proposes that where financial pressure is exceptional and not of the offender's own making, it may in very rare circumstances constitute offender mitigation.

Recommendation 6:

The Panel recommends that the guideline sets out information regarding the relevance to the selection of sentence of voluntary restitution, dependency and financial pressure as described above.

SECTION FIVE: SENTENCING

Aims of sentencing

96. Section 142 of the Criminal Justice Act 2003 requires courts to have regard to five purposes when sentencing an offender aged 18 or over at the time of conviction: 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.¹²¹ 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.¹²²

The Panel's proposals

Levels of seriousness

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

98. 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.

99. The Panel anticipated that the Council would expect to follow its established pattern for guidelines, particularly in the light of the provisions in what was then the Coroners and Justice Bill.¹²³ Accordingly, the Panel 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. Respondents agreed with this approach even where there were disagreements over sentence levels.

¹²¹ see the Panel's advice *Overarching Principles of Sentencing*, Section One, March 2010; www.sentencing-guidelines.gov.uk

¹²² Criminal Justice Act 2003, s.143(1)

¹²³ now the Coroners and Justice Act 2009; see s.121 when in force

100. In order for the approach to be developed, the Panel considered it necessary to define a base level for both culpability and 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.

101. In common with the Council's standard approach, the starting points and ranges set out in the table on page 33 below apply to a first-time offender pleading not guilty. This is a consequence of the statutory requirement that each previous conviction should aggravate the seriousness of the offence where the court considers that to be reasonable having taken into account both the nature of the previous offence and when it was committed. In 2008, only 3% of those sentenced in the Crown Court for domestic burglary had no previous convictions whereas 49% had 15 or more previous convictions.¹²⁴

102. It appears from recent judgments of the Court of Appeal that, in some instances, the Crown Court has taken the view that the existence of previous convictions means that the Council guidelines do not apply, especially where the number is large. Since almost all of those convicted of domestic burglary have previous convictions, it may be particularly helpful for the guideline to emphasise the guidance agreed by the Panel and the Council in 2007¹²⁵ that convictions coming within section 143(2) of the Criminal Justice Act 2003 should

affect the identification of the starting point within the range and may justify a provisional sentence above the range.

Recommendation 7:

As a high proportion of offenders sentenced for domestic burglary have convictions that a court will take into account in accordance with section 143(2) of the Criminal Justice Act 2003 when assessing the seriousness of an offence, the guideline should draw attention to the Council's guidance regarding the effect on the starting point and range in its guidelines in such circumstances.

103. At the lowest level, an offence of burglary in a dwelling will involve minimal loss and no or minimal damage; such offences are likely to be relatively rare. Where none of the listed factors indicating greater culpability or harm are present, the Panel proposed in its Consultation Paper that the starting point should be a medium level community order, within a range of a low level community order to 12 weeks custody. It was suggested that a fine is unlikely to be appropriate unless there are significant mitigating factors, though, as the Court stated in *Saw*, genuinely exceptional cases should be treated exceptionally.¹²⁶

104. Whilst there was broad agreement with this approach, some responses expressed grave concern that any starting point for domestic burglary should be non-custodial. However, even those responding in this way seemed to be content for a non-custodial sentence to result following consideration of mitigating factors applying either to the offence or the offender. It does not appear to the Panel to be appropriate to provide a custodial starting point for an offence that falls within the

¹²⁴ *The Sentence* Table 1.5 on page 12, www.sentencing-guidelines.gov.uk

¹²⁵ see Annex B

¹²⁶ see para. 41 above

proposed base definition for domestic burglary which describes an offence where there has been no/minimal loss or damage, no raised culpability, no raised harm and no previous convictions which it is reasonable to take into account in assessing the seriousness of the offence. The issues that concerned those suggesting only a custodial starting point would be factors that would aggravate the seriousness of the offence and so move the starting point within the range so that the provisional sentence would be likely to be a custodial sentence (see paragraph 107 below).

Recommendation 8:

It would not be appropriate to provide a custodial starting point for an offence that comes within the base definition, that is, one where there has been no/minimal loss or damage, no raised culpability, no raised harm and no previous convictions which it is reasonable to take into account in assessing the seriousness of the offence.

105. The Panel found support for its approach from its research into *Public Attitudes to the Principles of Sentencing*¹²⁷ during which the Panel tested the views of the public on a scenario that would fall within Level 1 (the most serious) of the proposals in this advice; it was clear that the public did not consider that even such a serious offence should *always* result in a custodial sentence – 20% indicated that *no or some* offenders should receive a custodial sentence for such an offence with a further 24% concluding that *most* offenders should receive a custodial sentence.¹²⁸

106. One response to the Panel's consultation on domestic burglary expressed concern that the starting point for Level 3 (the least

serious form of burglary involving minimal loss or damage and no raised culpability or harm) was lower than for vehicle interference and handling stolen goods as set out in the *Magistrates' Court Sentencing Guidelines*.¹²⁹ However, in respect of vehicle interference, even though the starting point is the same as for the second level of seriousness (entry to a vehicle but little or no damage caused), the range for domestic burglary provides for a custodial sentence whereas that for vehicle interference does not; the range for this least serious level of domestic burglary is the equivalent of the most serious type of vehicle interference (involving entry to a vehicle and damage being caused). In relation to the handling of stolen goods, the starting point and range for Level 3 for domestic burglary are the equivalent of the second level of seriousness. The Panel considers that this properly balances the relative seriousness of the offences.

107. 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 two years custody. An offence will come within Level 2 where there is one factor indicating either raised culpability or harm even though the loss or damage is minimal.

108. A community order is included in the range since it may be the most appropriate sentence where it provides the best prospect

¹²⁷ published 16 June 2009; www.sentencing-guidelines.gov.uk

¹²⁸ *ibid.*, p.51

¹²⁹ published May 2008, at pp.66 and 108;

www.sentencing-guidelines.gov.uk

of preventing future offending¹³⁰ 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 (likely to be in relation to illegal drugs, alcohol or gambling), the court may wish to consider whether a community order, particularly one including a treatment programme, might be more effective at addressing the underlying causes of the offending.¹³¹

109. At the highest level, where an offence involves seriously raised culpability and/or serious harm, the proposed starting point is two years custody, within a range of 12 months to four years custody. At this level a community order should be considered only in the most extreme and exceptional circumstances.¹³²
110. Offences of a high level of seriousness involving a combination of aggravating features including significant professionalism may lead to a sentence beyond the range.¹³³ Such offences are likely to involve offenders with relevant previous convictions; this issue is considered separately above.¹³⁴

¹³⁰ *Saw* [2009] EWCA Crim 1 at [31]

¹³¹ see para. 93 above

¹³² *Saw* [2009] EWCA Crim 1 at [32]

¹³³ 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

¹³⁴ see paras. 57–58 above

Summary

111. Subject to the observations noted above, there was broad agreement with the starting points and ranges proposed by the Panel in its Consultation Paper, including those proposed for the least serious type of the offence encompassed within Level 3. Accordingly, the Panel has incorporated those starting points and ranges in this advice, although there has been some elaboration and refinement in relation to the explanatory material and the descriptions of the aggravating and mitigating factors.

Recommendation 9:

The proposed starting points and ranges should be as set out in the table and text at pages 32–33 below.

Community Order

112. As set out elsewhere, the Sentencing Guidelines Council has provided guidance on the level of primarily punitive requirements likely to be included in a low, medium or high community order. For ease of reference, this guidance is set out at Annex C below.

Multiple offences

113. 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, 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.¹³⁵

Ancillary and other orders¹³⁶

Restitution order

114. 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.¹³⁷ 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.

Compensation order

115. The court must consider making a compensation order in any case where an offence has resulted in personal injury (including distress), loss or damage.¹³⁸ 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.¹³⁹ 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

116. 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.¹⁴⁰ If the court makes a confiscation order, it must take account of the order before it imposes a fine or a deprivation order,¹⁴¹ but it must not otherwise take account of the confiscation order in deciding the appropriate sentence.¹⁴² Where a court makes both a compensation order and a confiscation order

¹³⁵ in accordance with section 120(3) of the Coroners and Justice Act 2009 (when in force), the Sentencing Council is required to prepare guidelines on "the application of any rule of law as to the totality of sentences"

¹³⁶ for further detail see the Sentencing Advisory Panel's recent consultation on *Overarching Principles of Sentencing*, paras. 286–289 and advice, para. 213; www.sentencing-guidelines.gov.uk

¹³⁷ Powers of Criminal Courts (Sentencing) Act 2000, s.148

¹³⁸ *ibid.*, s.130

¹³⁹ *ibid.*, s.130(12)

¹⁴⁰ 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

¹⁴¹ *ibid.*, ss.13(2) and (3)

¹⁴² *ibid.*, s.13(4)

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.¹⁴³

Deprivation order

117. 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.¹⁴⁴ 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.¹⁴⁵ However, where the property can be used only for the purpose of crime, a deprivation order should not be taken into account when determining the appropriate sentence.

¹⁴³ *ibid.*, ss.13(5) and (6)

¹⁴⁴ Powers of Criminal Courts (Sentencing) Act 2000, s.143

¹⁴⁵ *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

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 culpability, there was no significant planning;
 - in relation to harm, the offence resulted in minimal loss and damage.
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 (e.g. where the economic, sentimental or personal value of the property stolen is very high).
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 (likely to be on illegal drugs, alcohol or gambling).

Domestic burglary

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 harm <i>(where the level of culpability or harm is extreme, a sentence above the range should be considered)</i>	2 years custody	12 months to 4 years custody
Level 2 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
1. Violence used or threatened against victim. 2. Knife or other weapon carried. 3. Greater degree of planning e.g. as indicated by carrying of housebreaking implement(s). 4. 'Professionalism'. 5. Victim targeted. 6. Offence committed on bail or shortly after imposition of sentence.	1. Offence committed on impulse. 2. Offender exploited by others.
Factors indicating raised harm	Factor indicating lesser degree of harm
7. Trauma to victim beyond normal level. 8. Ransacking or vandalism of property. 9. Theft of/damage to property of more than minimal economic or sentimental/personal value. 10. Occupier at home (or returns home) while offender present. 11. Child at home (or likely to be at home) when offence committed	3. No property stolen

DIVERSITY ISSUES

118. Prior to the preparation of the Consultation Paper, in accordance with its normal practice the Panel 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. No diversity issues specific to domestic burglary were identified. However, the Panel sought views from consultees whether there are any reasons to believe that its proposals might potentially impact unfairly on any individual group.
119. The majority of responses considered there to be no reasons for concern. One response considered that insufficient concern had been given to the particular needs of offenders aged 18–24; whilst the Panel recognised the strength in the arguments put forward, we do not consider that this advice is the means by which any change can be proposed for the reasons set out in paragraph 4 above.
120. One other response expressed a concern that there would be an indirectly disproportionate effect on those from BME communities because of the prevalence of drug dependency and the way in which the response to that dependency is managed. The response to those with a dependency is a very important issue but, since it is beyond the remit of the Council, the Panel does not consider that it can make any recommendations.
121. Accordingly, in the light of the response to both the pre-consultation request and the Consultation Paper itself, the Panel considers that its advice properly balances the seriousness of the offence (and the impact on the victim) with the needs of the offender.

IMPACT ASSESSMENT

122. As acknowledged by the Sentencing Commission Working Group,¹⁴⁶ 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, that is not possible for this offence because of the lack of suitable data.
123. However, it is clear both that most offenders sentenced in the Crown Court currently receive a custodial sentence and that this is likely to continue. In 2008, of the 7,349 offenders sentenced in the Crown Court, 69% received an immediate custodial sentence (average length 24.8 months), 15% were made subject to a suspended sentence order and 15% were made subject to a community order.¹⁴⁷ Only 3% of those sentenced in the Crown Court were recorded as having no previous convictions or cautions;¹⁴⁸ 44% of those offenders received an immediate custodial sentence and 23% were made subject to a suspended sentence order whilst 30% were made subject to a community order.¹⁴⁹

¹⁴⁶ *Sentencing Guidelines in England and Wales: an evolutionary approach*, p.16, para. 5.1; www.justice.gov.uk/docs

¹⁴⁷ see p.10 above

¹⁴⁸ see para. 101 above

¹⁴⁹ *The Sentence Table 1.7* on p.16; www.sentencing-guidelines.gov.uk

124. The Panel considers that the proposals in this advice are consistent with current sentencing practice and unlikely to result in a markedly different use of the resources of the prison or probation services.

SUMMARY OF RECOMMENDATIONS

Recommendation 1:

Offence seriousness should not be distinguished through consideration of whether an offence was committed during the day or at night. Two aggravating factors can be identified:

- i) the degree of trauma actually caused, where that is beyond that normally associated with a domestic burglary; and
- ii) the presence of an occupier in the home when the burglary took place, whether the occupier was present when the offence started to be committed or arrived during its commission.

Recommendation 2:

An offence is aggravated where a child was present (or likely to be present) in the home.

Recommendation 3:

No specific guidance is required in relation to circumstances where an offender has a second qualifying conviction; reliance on the statutory principles is sufficient.

Recommendation 4:

The guideline should state the principle on which a court should base the decision not to impose the minimum sentence (where it applies) and should provide examples including situations:

- a) where the two qualifying offences were committed when the offender was aged under 18,
- b) where there had been a long lapse of time between the second and third qualifying offence and
- c) where the offender was making a real effort to reform or conquer an addiction and the court considers that the offender would best be able to continue that effort in the community

(except where the current offence is too serious for a community sentence).

Recommendation 5:

Where a court is considering the imposition of a community order because of the offender's dependency, in circumstances where the custodial sentence that would otherwise have been imposed would have been longer than that available in a magistrates' court, the 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.

Recommendation 6:

The Panel recommends that the guideline sets out information regarding the relevance to the selection of sentence of voluntary restitution, dependency and financial pressure as described above.

Recommendation 7:

As a high proportion of offenders sentenced for domestic burglary have convictions that a court will take into account in accordance with section 143(2) of the Criminal Justice Act 2003 when assessing the seriousness of an offence, the guideline should draw attention to the Council's guidance regarding the effect on the starting point and range in its guidelines in such circumstances.

Recommendation 8:

It would not be appropriate to provide a custodial starting point for an offence that comes within the base definition, that is, one where there has been no/minimal loss or damage, no raised culpability, no raised harm and no previous convictions which it is reasonable to take into account in assessing the seriousness of the offence.

Recommendation 9:

The proposed starting points and ranges should be as set out in the table and text at pages 32–33 below.

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 12 May 2009 and copies were sent to a wide range of individuals and organisations including the Panel's regular consultees and Resident Judges at each Crown Court Centre in England and Wales. It was also published on the Panel's website. 37 responses were received.

Responses were received from:

Barnardo's
Daniel Benjamin
Bristol Youth Courts
Central Kent Youth Panel
Chair, Barnsley Youth Panel
Chair, Furness Youth Panel
Chair, Gwent Youth Panel
Chair, Harrogate Youth Panel
Chair & Deputy, South East Wiltshire Bench
Chairman, Luton and South Bedfordshire Youth Court
Criminal Justice Alliance
Criminal Justice Group, Ministry of Justice
Criminal Sub Committee of the Council of HM Circuit Judges
Crown Prosecution Service
Peter Fellows
Peter Forrester JP, South Somerset and Mendip Bench
Home Office
Justices' Clerks' Society
Law Reform Committee and the Criminal Bar Association of the Bar Council of England and Wales
Legal Committee of the Council of HM District Judges (Magistrates' Courts)
Magistrates' Association
Nicholas Moss JP
North and South Durham Youth Panel
Northamptonshire Youth Panel
The Hon Mr Justice Openshaw
Douglas Parish JP
Release
J. Stansfield
Stockport Youth Panel
Sutton and Wallington Youth Panel
Richard Theberton
His Honour Judge Tonking, Recorder of Stafford
Transition to Adulthood Alliance
George Tranter, private individual, solicitor and former Justices' Clerk
Walsall Bench
Warley and West Bromwich Benches
West Yorkshire Probation Board

ANNEX A: 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

ANNEX B: 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

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.

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".

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**.

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**.

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

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

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.

ANNEX C: COMMUNITY ORDERS

Extract from *Magistrates' Court Sentencing Guidelines*, p.160–162
Sentencing Guidelines Council, May 2008

Community orders

5. The Council guideline provides that the seriousness of the offence should be the initial factor in determining which requirements to include in a community order. It establishes three sentencing ranges within the community order band based on offence seriousness (low, medium and high), and identifies non-exhaustive examples of requirements that might be appropriate in each. These are set out below. The examples focus on punishment in the community; other requirements of a rehabilitative nature may be more appropriate in some cases.

Low	Medium	High
Offences only just cross community order threshold, where the seriousness of the offence or the nature of the offender's record means that a discharge or fine is inappropriate	Offences that obviously fall within the community order band	Offences only just fall below the custody threshold or the custody threshold is crossed but a community order is more appropriate in the circumstances
In general, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary		More intensive sentences which combine two or more requirements may be appropriate
Suitable requirements might include: <ul style="list-style-type: none"> • 40 – 80 hours unpaid work • Curfew requirement within the lowest range (e.g. up to 12 hours per day for a few weeks) • Exclusion requirement, without electronic monitoring, for a few months • Prohibited activity requirement • Attendance centre requirement (where available) 	Suitable requirements might include: <ul style="list-style-type: none"> • Greater number of hours of unpaid work (e.g. 80 – 150 hours) • Curfew requirement within the middle range (e.g. up to 12 hours for 2 – 3 months) • Exclusion requirement lasting in the region of 6 months • Prohibited activity requirement 	Suitable requirements might include: <ul style="list-style-type: none"> • 150 – 300 hours unpaid work • Activity requirement up to the maximum of 60 days • Curfew requirement up to 12 hours per day for 4 – 6 months • Exclusion order lasting in the region of 12 months

6. The particular requirements imposed within the range must be suitable for the individual offender and will be influenced by a wide range of factors including the stated purpose(s) of the sentence, the risk of re-offending, the ability of the offender to comply, and the availability of the requirements in the local area. Sentencers must ensure that the sentence strikes the right balance between proportionality and suitability. The resulting restriction on liberty must be a proportionate response to the offence that was committed.

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 Andrew Ashworth CBE, QC (Chairman)

His Honour Judge Anthony Ansell

John Crawford OBE

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

