Equality and diversity
in the work of the Sentencing Council

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This information is available on the Sentencing Council website:
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1. Summary

The Sentencing Council for England and Wales has responsibility for developing sentencing guidelines, assessing the impact of guidelines on sentencing practice, and promoting public confidence in the criminal justice system through sentencing guidelines.

In 2021, the Council published its strategic objectives for 2021-2026, including a commitment to "explore and consider issues of equality and diversity relevant to our work and take any necessary action in response within our remit". The University of Hertfordshire was therefore commissioned to conduct research into equality and diversity in the work of the Sentencing Council.

Using a multi-method approach, comprising three inter-linked elements (Crown Court Sentencing Survey (CCSS[1]) data analysis, analysis of text in sampled guidelines, and co-production (engaging with civil society organisations, defence lawyers and sentencers)),[2] the research aimed to identify and analyse any potential for the Council's work to cause disparity in sentencing outcomes across demographic groups, and to make recommendations. It explored aspects such as the language, factors and explanatory text used in guidelines, as well as their structure, the guideline development processes, the relationship with stakeholders, and communications, and considered how these aspects might be improved.

The research examined these areas in relation to three groups of offence specific guidelines currently in operation in England and Wales - robbery, theft (theft from the person, theft from a shop or stall, theft in breach of trust, and handling stolen goods), and harassment and stalking (fear of violence) - as well as the Sentencing children and young people guideline. The reported results are significant at the level of $p<0.05$. See Section 3 for full details of the methodology.

1.1   Key findings

The stepped approach in adult sentencing guidelines

The adult sentencing guidelines examined in this research use a stepped approach. Sentencers begin by determining the offence category at step 1 based on the offenders' culpability and the harm caused. On the basis of this they identify a sentence starting point and then adjust this sentence within the category range after taking into consideration any aggravating and mitigating factors (step 2). They then apply other steps as relevant, for example, reduction for a guilty plea.

CCSS[3] data analysis explored the impact of various guideline factors on two sentencing outcomes: the likelihood of receiving immediate custody and the length of the custodial sentence. Where data existed, analysis found that, as would be expected, the seriousness of the offence was associated with the largest change in sentencing, followed by upward

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[1] Please see Annex A for a glossary of terminology used in the report.
[2] Full details can be found in Section 3.
[3] Please note: There are a number of limitations to take into account when interpreting data based on analysis of the CCSS; see Section 3 for further details.

factors, while downward factors were associated with the lowest change in sentencing. In this research, 'upward factors'[4] refer to all factors that might be associated with a more severe sentence, for example, high culpability factors, greater/medium harm factors and aggravating factors. 'Downward factors' refer to all factors that might be associated with a less severe sentence, for example, low culpability factors, lesser harm factors and mitigating factors.

The CCSS finding was supported by the results of text analysis, which revealed that the sampled guidelines devote more words to describing upward factors than downward factors. In line with these findings, civil society partners were generally concerned about the stepped approach, arguing that mitigating factors might not have a sufficient impact on sentencing outcomes as they are only considered at step 2. Defence lawyers agreed. Co-production partners suggested it might be worthwhile to add a final step to the current approach in adult sentencing guidelines so that sentencers have an additional opportunity to consider downward factors, especially those relating to personal mitigation.

Upward factors: group membership, previous convictions, failure to comply with current court orders, and offence committed on bail or licence[5]

In discussion, co-production partners expressed concern that the upward factors listed above might lead to disparity in sentencing due to racial bias, age bias and other equality, diversity and inclusion (EDI) related issues.

Text analysis showed that some concerns raised by co-production partners regarding these factors have been addressed by guidance ('expanded explanations' to accompany factors) inserted into guidelines by the Sentencing Council. However, the co-production partners are not necessarily familiar with the expanded explanations that cover these issues.

CCSS data analysis showed mixed results regarding the upward factors examined. For example, while group membership was associated with a change in sentencing for adult robbery offences (this was associated with longer custodial sentences) and receiving stolen goods (a significant predictor of receiving immediate custody), it did not have an association for other sampled offences. Similarly, while previous convictions were associated with higher odds of receiving immediate custody for robberies committed by both adults and those under 18, and for all theft offences, it had a mixed association with the length of custodial sentence across the offences examined. In addition, while 'offence committed on bail/licence' or 'failure to comply with current court orders' had an association for offences of adult robbery (there were higher odds of receiving custody and they were associated with a longer custodial sentence), for all theft offences (an association with immediate custody only), and for harassment offence (higher odds of receiving immediate custody and associated with a shorter custodial sentence), it did not for robberies committed by children and young people.

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[4] The terminology used to define 'upward' and 'downward' factors refers to factors used on the CCSS forms. Some of these factors were not in the guidelines in force at the time of the CCSS data collection and some do not appear in the revised guidelines. In addition, at the time of the CCSS data collection, offence 'seriousness' was recorded as a separate element on the form, while the sections for aggravating and mitigating factors incorporated culpability and harm. Guidelines have since been revised, with culpability and harm now forming step 1, while mitigating and aggravating factors are part of step 2.

[5] In the CCSS, the factor of 'failure to comply with current court orders' was used on the harassment form, while 'offender was on bail or licence' was used for the theft and robbery forms.

Downward factors: determination to address addiction or offending behaviour, remorse, and mental disorder and/or learning disabilities

Some civil society partners raised concerns that the use of these downward factors may lead to disparities in sentencing. Some commented that people from certain ethnic groups may be less likely to disclose mental health problems, have limited access to substance misuse services or are hesitant to express remorse, for example.

However, CCSS data analysis rebuts the co-production partners' hypotheses that these downward factors might lead to racial inequality and in fact they mitigated against receiving immediate custody and the length of custody for some offences. For example, all three factors were associated with a reduction in the likelihood of receiving immediate custody for robbery (adults), all theft offences, and harassment, and the length of custody in adult robbery offences. Findings were inconclusive for other EDI-related disparities.

Offence specific issues

For all offences included in the research, there were far more upward factors than downward factors identified as significant in the CCSS data analysis. This further confirms that upward factors have a stronger impact on sentencing outcomes than downward factors. Moreover, almost all the significant downward factors were generic downward factors.[6] The only significant offence specific downward factors were 'unplanned or opportunistic crime', 'currently in, or prospects of work or training', and 'loss of job or reputation'. 'Unplanned or opportunistic crime' was associated with reduced odds of immediate custody in robbery committed by adults. It was also a significant predictor of shorter custodial sentences in robbery committed by children and young people. 'Currently in, or prospects of work or training' was a significant predictor of shorter custodial sentences in robbery committed by children and young people, as well as for all types of theft. 'Loss of job or reputation' was a significant predictor of shorter custodial sentences for theft in breach of trust.

Sex/gender[7]

CCSS data analysis showed that men were more likely than women to receive immediate custody for offences of robbery and all types of theft. The association between gender and the length of sentence was, however, less consistent across the different offences and there was no evidence that certain upward or downward factors might have a differential association with the likelihood of receiving immediate custody or the length of custody for male and female offenders.

Regardless of gender, analysis showed that the downward factor of 'main carer' was associated with lower odds of immediate custody for robbery and theft. However, it is worth noting that a previous study has come to a different conclusion in this area (Kane and Minson, 2022). This study found no strong relationship between carer status and non-custodial sentences.

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[6] Generic downward or upward factors refer to factors that are shared by many different offences, for example remorse and previous convictions. Offence specific downward and upward factors refer to factors that are specific to one offence or certain types of offences.

[7] Please note: in the Equality Act 2010, the terminology used is sex, but in the CCSS dataset, the term used is gender. In the following discussion, 'gender' is therefore used when discussing the CCSS data analysis.

The finding that men were more likely to receive immediate custody than women for these specific offences was also contrary to the views of some of the civil society co-production partners who believe that women are treated more harshly than men.

Race/ethnicity[8]

Based on analysis of the CCSS data for the guidelines sampled in this research, there was no strong or consistent evidence of sentencing disparities for different ethnic groups, either directly, or through the impact of upward or downward factors. However, this does not mean that disparity does not exist in other settings or for other offences. For example, Isaac (2020) found an association between an offender's ethnicity (and sex) and the sentence imposed for drug-related offences. Another study by Uhrig (2016) also found racial disparity in the sentencing of sexual offences.

Age

Analysis of CCSS data supported the co-production partners' assertion that younger offenders receive more favourable sentencing outcomes, controlling for a range of factors. For example, the younger the age of the offender, the lower the likelihood of them receiving immediate custody, and those who did receive custody had a higher chance of receiving a shorter custodial sentence. The research found that age as a downward factor was not used extensively for offenders older than 60.

Defence lawyers and sentencers commented positively on the Sentencing children and young people guideline, with some sentencers commenting that sentencing young people is 'a more individualistic approach', taking the capabilities and vulnerabilities of children and young people into account.

Other EDI issues and intersectionality[9]

CCSS data showed that adult offenders with a 'physical or mental illness' downward factor were less likely to receive immediate custody for all offences explored, and for robbery (adult) offences only, they were also more likely to receive a shorter custodial sentence, when compared to those without this factor identified. There was no equivalent finding for children and young people. After accounting for upward and downward factors, there was no significant difference in sentencing outcomes for offenders deemed to be from a 'difficult/deprived background' compared to those where this factor was not recorded.

There was no difference in the length of custodial sentence or the probability of a custodial sentence between men and women of different ethnic groups. There was also no difference in sentencing outcomes between men and women relative to their socio-economic background ('difficult/deprived background' was used as a proxy measure)[10] or offenders of different ethnic groups relative to their socio-economic background.

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[8] Please note: in the Equality Act 2010, the terminology used is race, but in the CCSS dataset, the term used is ethnicity. In the following discussion, 'ethnicity' is therefore used when discussing the CCSS data analysis.
[9] The term intersectionality in this report can be understood as the co-existence of two or more protected characteristics in the Equality Act 2010, and/or other factors of marginalisation, such as economic deprivation.
[10] While proxies were selected to enable exploration of areas that would otherwise not be possible with the data, they are not perfect matches.

Civil society partners and defence lawyers raised concerns that travellers (people with a frequent change in residential space, such as caravan dwelling households of gypsies and Irish travellers) are perceived to be an ignored group and disadvantaged in sentencing, but it was not possible to analyse this using the available data.

Broader work of the Sentencing Council

Some sentencers criticised the switch to electronic guidelines, because they felt that electronic versions (which insert expanded explanations for factors as drop-downs on the Sentencing Council website) were harder to use in court. Some defence lawyers and sentencers conceded that they were not familiar with the content of the expanded explanations and some of the sentencing guidelines. Text analysis also indicated that some of the expanded explanations are quite long: for some sentencers, lengthy explanations were not ideal; they felt they should be prescriptive and practical.

There was a general lack of awareness among civil society groups of the role of the Sentencing Council and sentencing guidelines, and many of the problems they identified have already been addressed in the guidelines. Many of the civil society partners said that they would like to contribute to the guideline development process, particularly those working in EDI areas such as sex, pregnancy and maternity, race, and religion or belief.

Based on the findings of this research, a number of recommendations are put forward for consideration by the Council. These are included at the relevant places in the text and listed in Section 6.

2. Introduction

2.1 Introduction and aims of research project

The Sentencing Council for England and Wales is an arm's-length body of the Ministry of Justice (MoJ). It was set up by Part 4 of the Coroners and Justice Act 2009 to promote greater transparency and consistency in sentencing, while maintaining the independence of the judiciary.

It has responsibility for developing sentencing guidelines, assessing the impact of guidelines on sentencing practice, and promoting public confidence in the criminal justice system. The guidelines are intended to help ensure a consistent approach to sentencing, while preserving judicial discretion. Courts must follow sentencing guidelines unless it is in the interests of justice not to do so.

One of the Council's main overarching objectives is to promote a fair approach to sentencing, thus placing equality, diversity and inclusion (EDI) at the heart of its work. On the occasion of its 10th anniversary in 2020, the Sentencing Council reviewed its achievements and sought views on its future priorities. Following a public consultation, it identified five Strategic objectives for the period 2021-2026, including a commitment to "explore and consider issues of equality and diversity relevant to our work and take any necessary action in response within our remit". It also included a specific action to "explore the potential for the Council's work inadvertently to cause disparity in sentencing across demographic groups by commissioning independent external contractors to undertake a project to review a sample of key guidelines and processes".

The Sentencing Council has set up a dedicated working group to progress this objective, which has taken a number of actions thus far as evidenced in its report What next for the Sentencing Council? Response to consultation and its June 2022 update on Achieving our strategic objectives. Further guidance is already being incorporated into specific guidelines where potential evidence of disparities has been found (as has been done for the Firearms offences guideline, and revised Drug and Assault offences guidelines).

In addition, in October 2021, the Sentencing Council commissioned the University of Hertfordshire to conduct research into equality and diversity in the work of the Sentencing Council.

While the disproportionate effect of policies and laws has been studied extensively in the criminal justice system in England and Wales (Ministry of Justice, 2020a, 2020b; Roberts and Bild, 2021), the current research focused on the aspect of sentencing for offences. The research aimed to identify and analyse any potential for the Council's work to cause disparity in sentencing outcomes across demographic groups, and to make recommendations to the Council. It examined the role of the sentencing guidelines for their impact on certain groups of offenders, and presented perceptions about equality and diversity in the application of the sentencing guidelines, through exploration of the language, factors and explanatory text used in selected guidelines, as well as their structure, the guideline development process, the relationship with stakeholders, and communications, and considered how these aspects might be improved.

This work is relevant in the context of section 149 of the Equality Act 2010, which lays out the public sector equality duty (PSED) requiring public bodies to have due regard to the

need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities. It took into consideration the Equality Act 2010 protected characteristics groups: age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership, and pregnancy and maternity. There was a specific focus on the protected characteristics that are more relevant to sentencing, and those where sufficient data exist, namely race, age and sex, as well as considering other potentially relevant issues such as the socio-economic background of offenders and primary carer status.

The research examined these areas in relation to three groups of offence specific guidelines currently in operation in England and Wales - robbery, theft (theft from the person, theft from a shop or stall, theft in breach of trust, and handling stolen goods), and harassment and stalking (fear of violence) - as well as the Sentencing children and young people guideline. Full details of the methodology are in Section 3.

2.2   Development of sentencing guidelines

The Council approaches the delivery of its objectives by adopting a guideline development cycle, as outlined in Figure 1 below. For further information, see the Sentencing Council Business Plan 2022/23.

The Council develops draft guidelines, following the criteria for developing or revising guidelines, based on one or more of the following factors:
- the Lord Chancellor or the Court of Appeal formally requests the review of sentencing for a particular offence, category of offence or category of offender **and** the Council considers that the production or revision of one or more guidelines is justified.
- existing guideline(s) have become significantly out of date because of amendments to legislation or other external factors.
- new legislation or other external factors have created a demand for new guideline(s) among court users, and the Council considers that the necessary evidence is available to develop such guideline(s).
- there is evidence (from the Council's own research or evaluations, interested groups or other sources) of issues relating to sentencing **that the Council considers could be addressed by the development or revision of one or more guidelines**. Such issues may include but are not limited to:
    - evidence of inconsistency in the sentencing of an offence or group of offences;
    - evidence of inequality in sentencing between different demographic groups;
    - evidence of sentencing being too high or too low for a category of offence of category of offender; and/or
    - evidence relating to the effectiveness of different sentences.

Council members discuss the draft guideline, bringing to bear their expertise in sentencing and the criminal justice system. They refine the approach and agree on the broad structure and detail, which in turn, forms the basis for further research and analysis to assess any practical, behavioural or resource implications of draft guideline proposals.

Draft guidelines are then issued for public consultation. The Council consults the statutory consultees, criminal justice professionals, subject experts and the wider public, generally over a 12-week period. The Council also produces a draft resource assessment which

considers the likely effect of its guidelines on the resources required for the provision of prison places, probation resources and youth justice services, where relevant. The work includes consideration of issues related to equality and diversity in line with the PSED, as set out above. The Council reviews the responses to the consultation and develops a definitive version of the guideline and publishes a response paper and final resource assessment.

The Council has an ongoing programme of research and analysis to monitor the use and impact of the guidelines post implementation, which forms the basis of feedback to the Council. Decisions are then made regarding whether there is a need to revisit a guideline.

Figure 1. Guideline development cycle[11]
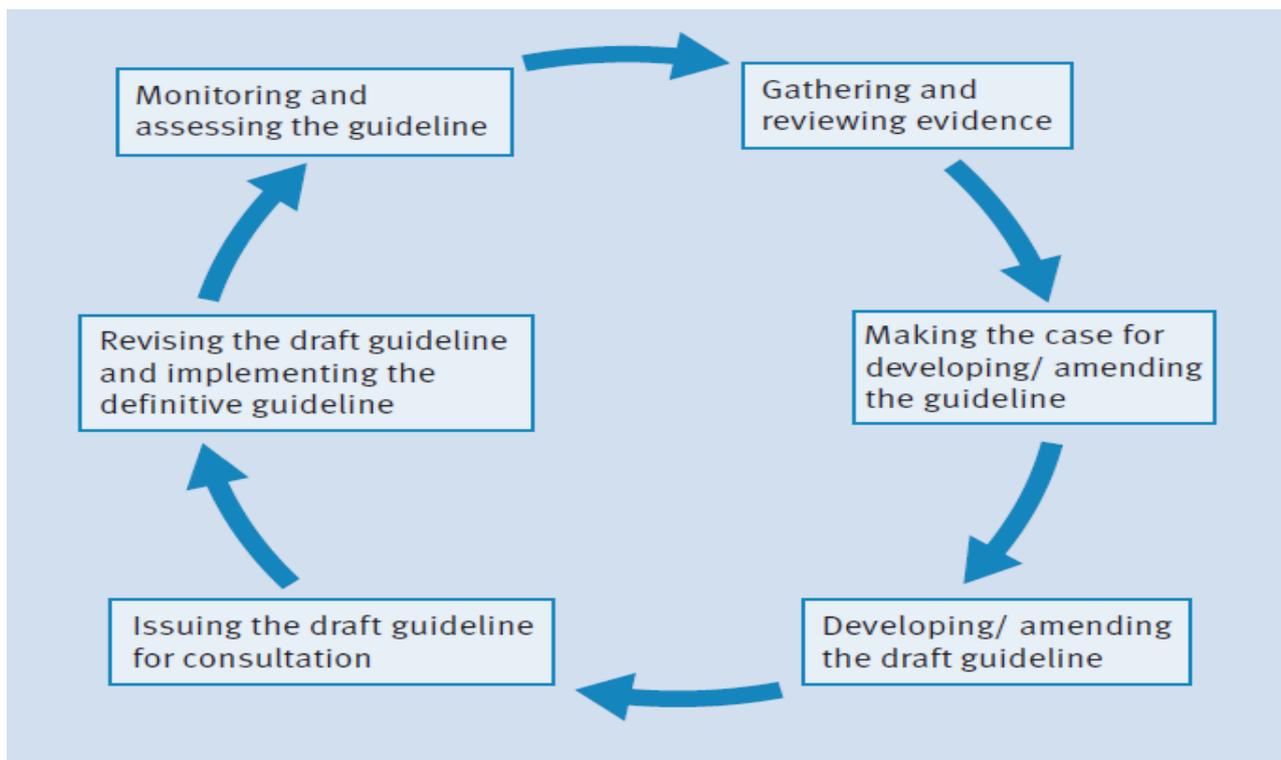
2.3   Types of sentencing guidelines

The Council produces offence specific guidelines and overarching principles guidelines. There is also a General guideline, which can be used where no specific guideline exists for a certain offence (for example, where it is new or less common), to provide further guidance.

Offence specific guidelines relate to particular offences or sets of offences. They generally follow a step-by-step approach as follows:
- sentencers consider the offender's culpability and the harm caused by the offence, which determines the offence 'category'.
- based on the category, sentencers then determine the starting point and range of applicable sentences.

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[11] Updated guideline development cycle. The research team discussed a previous, similar, version of the cycle with the co-production partners; see Section 4.10.

- the court takes into account aggravating factors that may make the offence more serious, and mitigating factors which may reduce seriousness or reflect personal mitigation.
- the court then considers whether there should be a reduction in sentence for a guilty plea.
- where applicable, courts also consider a range of other issues, which may include the dangerousness of the offender for certain offences, the totality principle, compensation and ancillary orders. Sentencers then give their reasons for the sentence they deliver.

Overarching principles guidelines provide guidance on cross-cutting areas that can be applied across a range of offences - for example, sentencing children and young people, cases where there is a domestic abuse element, or offenders with mental health conditions or disorders. There are also overarching guidelines on reduction in sentence for a guilty plea, the allocation of offences to courts, offences taken into consideration, and totality. The Sentencing Council has also published expanded explanations which are embedded in the guidelines. These provide sentencers and other court users with useful information relating to commonly used factors in guidelines and how to apply these to sentencing, and also improves transparency for victims, defendants, offenders and the wider public.

Most Sentencing Council guidelines apply to adults only. However, the Council has produced a Sentencing children and young people guideline. This contains principles for sentencing those under the age of 18, which state that the court must have regard to the principal aim of the youth justice system (to prevent offending by children and young people) and the welfare of the child or young person. It also emphasises that custodial sentences for young people should be a measure of last resort and that the sentence should focus on rehabilitation where possible.

There are also three offence specific guidelines for children and young people, covering offences for robbery, bladed articles and offensive weapons (possession and threats), and sexual offences. These follow a similar structure to the adult guidelines, however, they include a final step in the stepped approach above, that requires sentencers to 'review the sentence' to ensure it is the most appropriate one for the child or young person. This report will examine the stepped approach in more detail later.

As of 1 December 2022, the Council has produced 184 separate guidelines covering 302 offences, as well as 9 guidelines relating to overarching topics.

3. Methodology

A multi-method approach was adopted in this research, consisting of three inter-linked elements: Crown Court Sentencing Survey (CCSS) data analysis[12], text analysis and co-production. A small number of guidelines were reviewed as part of the work, in addition to other relevant documents published by the Council. The research team also consulted with the equality and diversity policy lead of the Office of the Sentencing Council.

3.1 Crown Court Sentencing Survey (CCSS) data analysis

From 1 October 2010 to 31 March 2015, the Council conducted the CCSS, a census survey on sentencing practice in the Crown Court that achieved an overall response rate of between 58 per cent and 64 per cent.

The CCSS was completed by sentencing judges for the principal offence for every new criminal case sentenced at the Crown Court[13] and recorded information on factors such as the seriousness and harm and culpability of an offence, aggravating and mitigating factors, any guilty plea reductions applied and the final sentence outcome. The CCSS also collected information on the gender of an offender and their date of birth; it did not collect data on ethnicity, but it was possible to obtain ethnicity data[14] by matching[15] it to an extract of the Court Proceedings Database (CPD) provided by MoJ.[16] The CCSS dataset provided for analysis in this study therefore included variables for age, gender and ethnicity (although age was not provided for the robbery (children and young people) dataset, due to disclosure issues).

It should be noted that the terminology used here (i.e. 'gender', 'ethnicity', 'main carer/has responsibilities', 'physical or mental illness', and 'difficult/deprived background') will be applied throughout the report when discussing the CCSS data analysis, because this is the nomenclature used on the CCSS forms and the dataset. It is important to note, however, that this may differ from the terminology used in the discussion of other findings (e.g. co-production partners used the term 'disability' instead of 'physical or mental illness'; and the Equality Act 2010 uses the terms 'sex' not 'gender', and 'race', not 'ethnicity').

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[12] The CCSS was used as it is the most complete dataset the Council has, having run on a continuous basis from October 2010 until March 2015. Although the Council do have some data on sentencing practice in the magistrates' courts, at the time of the study, this was limited to one published dataset (containing data on theft from shops and stalls) which does not contain a comparable sample size to the CCSS. In addition, while other sources of data could be used to explore some of the issues examined within the current research (such as through the Ministry of Justice's Data First programme), the CCSS dataset enabled exploration and control of multiple factors simultaneously.

[13] When an offender has been found guilty of two or more offences, the principal offence is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the principal offence is the offence for which the statutory maximum penalty is the most severe.

[14] Ethnicity is the self-identified ethnicity as defined by the individual, categorised into 'Asian', 'Black', 'Mixed', 'Other', 'White' and 'Not recorded/not known'.

[15] CCSS data were matched to the CPD by the Office of the Sentencing Council using variables such as offender name, date of birth, sentence date and court. It is important to note, however, that matching might have led to further attrition of the sample.

[16] Data in the CPD have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, care should be taken to ensure data collection processes and their inevitable limitations are taken into account when those data are used.

The research focused on a small number of groups of offence specific guidelines:
- robbery (covering guidelines for adults and for children and young people);
- theft (covering theft from the person, theft from a shop or stall, theft in breach of trust and handling stolen goods); and,
- harassment and stalking (fear of violence).

The offence specific guidelines were chosen as they include higher volume offences where there were sufficient CCSS data for analysis. They also include guideline factors and expanded explanations that apply across a number of guidelines and that could be explored as part of the research. One overarching guideline, the Sentencing children and young people guideline, was also included to ensure both types of Sentencing Council guideline were covered.

The CCSS analysis focused on data for the offence specific guidelines covering the period between 1 January 2013 and 31 March 2015. Table 1 below indicates the relevant sample sizes.

Table 1. Number of offences analysed

Offence	Sample Size
Robbery (adults; all offences)	6,262
Theft from the person[17]	1,662
Theft from shops and stalls	1,924
Theft in breach of trust	1,957
Receiving stolen goods[18]	2,032
Harassment[19]	841
Robbery (children and young people)	702

A breakdown of the sample by the key demographics of ethnicity, gender and age, can be seen in Tables 2, 3, and 4 respectively, below. Please note: the percentages in these tables might not add up to 100 due to rounding; and where demographics are 'unknown', these have been removed from the samples in Tables 2, 3 and 4 so therefore do not always tally with the overall sample sizes in Table 1.

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[17] These offences reflect the names of the guidelines at the time of the data collection, but they are now covered under the Theft – general guideline.

[18] This was the title at the time of the data collection, but it is now titled Handling stolen goods.

[19] This was the title at the time of the data collection, but it is now titled Harassment and stalking (fear of violence).

Table 2. Number and proportion of offences analysed by ethnicity

Ethnicity	Robbery (adult)	Theft from the person	Theft from shops and stalls	Theft in breach of trust	Receiving stolen goods	Harassment	Robbery (children and young people)
White	4,026 (71%)	1,133 (77%)	1,502 (87%)	1,441 (85%)	1,505 (81%)	629 (83%)	325 (52%)
Black	903 (16%)	170 (12%)	116 (7%)	94 (6%)	147 (8%)	49 (6%)	179 (28%)
Asian	427 (8%)	93 (6%)	67 (4%)	129 (8%)	135 (7%)	56 (7%)	75 (12%)
Mixed	225 (4%)	32 (2%)	28 (2%)	15 (1%)	36 (2%)	15 (2%)	42 (7%)
Other	80 (1%)	43 (3%)	19 (1%)	27 (2%)	28 (2%)	11 (1%)	10 (2%)

Table 3. Number and proportion of offences analysed by gender

Gender	Robbery (adult)	Theft from the person	Theft from shops and stalls	Theft in breach of trust	Receiving stolen goods	Harassment	Robbery (children and young people)
Female	401 (6%)	310 (19%)	437 (23%)	616 (31%)	199 (10%)	50 (6%)	36 (5%)
Male	5,861 (94%)	1,352 (81%)	1,487 (77%)	1,341 (69%)	1,833 (90%)	791 (94%)	666 (95%)

Table 4. Number and proportion of offences analysed by age

Age	Robbery (adult)	Theft from the person	Theft from shops and stalls	Theft in breach of trust	Receiving stolen goods	Harassment	Robbery (children and young people)
Younger than 18	Not applicable (N/A)	N/A	N/A	N/A	N/A	N/A	702 (100%)
18-20	1,701 (27%)	196 (12%)	116 (6%)	57 (3%)	241 (12%)	45 (5%)	N/A
21-24	1,500 (24%)	277 (17%)	232 (12%)	176 (9%)	362 (18%)	128 (15%)	N/A
25-29	1,229 (20%)	308 (19%)	377 (20%)	309 (16%)	438 (22%)	163 (19%)	N/A
30-39	1,274 (20%)	486 (29%)	717 (37%)	565 (29%)	623 (31%)	237 (28%)	N/A
40-49	452 (7%)	286 (17%)	339 (18%)	484 (25%)	266 (13%)	172 (20%)	N/A
50-59	97 (2%)	87 (5%)	106 (6%)	267 (14%)	79 (4%)	65 (8%)	N/A
60 and over	<10*	12 (1%)	37 (2%)	99 (5%)	23 (1%)	31 (4%)	N/A

* The true count is not reported to avoid potential disclosure.

The CCSS data contained a range of variables and the purpose of the analysis was to estimate the impact of these (where possible) on sentencing outcomes. The dataset did

not include direct measures of other EDI variables over and above those covered in Tables 2, 3 and 4. Therefore, for the purpose of the analysis, 'downward factors'[20] and 'upward factors' that were collected in the CCSS survey were used as proxies of selected EDI characteristics.

'Downward factors' are factors that might lead to a more lenient sentence (e.g. low culpability factors, lesser harm factors and mitigating factors), while 'upward factors' are those that might lead to a harsher sentence (e.g. high culpability factors, greater/medium harm factors and aggravating factors). The downward factor 'physical or mental illness' was used as a proxy of mental disorder and/or learning disabilities, the downward factor that the offender is a 'main carer/has responsibilities' was a proxy of maternity, and the downward factor of coming from a 'difficult/deprived background' was used as a proxy of socio-economic background.[21] The terms 'upward' and 'downward' factors were used both for simplicity and for the consistency between text analysis results (see section below) and CCSS data analysis results.

The selection of the upward and downward factors[22] and the EDI-related characteristics for the analysis outlined below, was based on the co-production partners' comments and issues that they raised, as well as the findings of the text analysis. However, due to small subsamples (e.g. there were only a few female Black offenders who were sentenced for theft in breach of trust), it was not always possible to explore all relationships of interest.

The CCSS data were analysed using regression analysis, which took into consideration differences that may exist among offenders, including in terms of the seriousness of the offence, previous convictions, guilty plea, level of reduction for guilty plea, as well as a range of other upward and downward factors. Seriousness of the offence was entered by judges on the CCSS survey form as levels (from the most serious to least serious). The number of previous convictions was categorised into four levels (none, one to three convictions, four to nine convictions, and 10 convictions or more). The presence of a guilty plea was used in the analysis of the likelihood of receiving immediate custody, while the reduction for the guilty plea (as a percentage) was analysed in the context of the length of immediate custody. To explore how the effects of these upward and downward factors on sentencing outcomes depend on the EDI-related factors, a method called tests of marginal

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[20] The terminology used to define 'upward' and 'downward' factors refers to factors used on the CCSS forms. Some of these factors were not in the guidelines in force at the time of the CCSS data collection and some do not appear in the revised guidelines. In addition, at the time of the CCSS data collection, offence 'seriousness' was recorded as a separate element on the form, while the sections for aggravating and mitigating factors incorporated culpability and harm. Guidelines have since been revised, with culpability and harm now forming step 1, while mitigating and aggravating are part of step 2.
[21] While the proxies were selected to enable exploration of areas that would otherwise not have been possible with the data, they are not perfect matches.
[22] The following upward factors were included: Offender under the influence of alcohol or drugs (all offences), Member of a gang/group, Targeting vulnerable victim, Offender on bail or licence, More than one victim (all offences except harassment), Use of weapon, Degree of force or violence, Wearing of a disguise, Offence committed at night (adult and youth robbery), Value of items taken (adult robbery), Victim particularly vulnerable (theft offences and harassment), High value, High level of gain, Pre planning (theft offences), Offence motivated by race/religion, Significant degree of premeditation, Location, Timing, Ongoing effect on victim, Failure to comply with court orders, Previous violence or threats (harassment).
The following downward factors were included: Age and/or lack of maturity, Genuine remorse (all offences), Addressing needs/addiction (all offences except youth robbery), Offence out of character (all offences except harassment), Co-operation with authorities (robbery (adult) and theft offences), Unplanned/opportunist offence, Responds well to current order (robbery (youth)), In work or training, Loss of job or reputation, Desperation or need (theft offences), No previous relevant convictions, and Good character (harassment).

effects was used. These tests can, for example, show whether ethnicity has a differential association with sentencing outcomes for male and female offenders.

Logistic regression analysis was used to explore whether the selected factors listed above were associated with one's likelihood of receiving a custodial sentence, as opposed to other types of sentences. Linear regression was used to investigate whether the factors were associated with the length of immediate custody.[23],[24]

Limitations

There are a number of limitations to take into account when interpreting data based on analysis of the CCSS. First, the data do not capture the full range of considerations made by a judge nor the relative 'weight' of these factors on the final decision; it only captures the information that the judge formally recorded on the relevant CCSS form. Likewise, not all protected characteristics or factors associated with them were explored because they were not available in the data (e.g. sexual orientation, religion or belief). Second, the sentencing outcome is recorded on a principal offence basis, which means that when an offender has been found guilty of two or more offences, only the offence for which the heaviest penalty is imposed would be recorded on the survey. Where the same disposal is imposed for two or more offences, the offence recorded on the survey was the offence for which the statutory maximum penalty is the most severe. This means that if there was a secondary offence that had an impact on the final sentencing outcome, it was not possible to take it into account in the analysis. Third, it is important to note that when offenders in the dataset are referred to as, for example, 'carers' or individuals with 'physical or mental illness', this relates to those cases where judges ticked the relevant box on the survey form. There may also have been other offenders to whom this applied but either the factor was not recorded by the judge or it was not relevant to the sentence: the analysis can only include those cases where it was formally recorded. Additionally, some factors that were on the forms were not factors in the actual guidelines. This means that the data do not fully reflect the sentencing practices during the period when they were collected.

Fourth, the research was unable to account for the court where offenders were sentenced, nor for the judge who sentenced the offender (factors that may have an influence on outcomes). Additionally, the survey was only conducted in the Crown Court, so it was not possible to undertake any analysis based on offenders sentenced in the magistrates' court or youth court. This is important to keep in mind, as in 2020, 92 per cent[25] of all adult offenders sentenced were sentenced in magistrates' courts. For robbery committed by children and young people, only 23 per cent of all offenders sentenced during the data collection period were sentenced in the Crown Court. This means that the robbery

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[23] Regression analysis is used when researchers want to account for multiple factors that could influence outcomes, such as sentencing, at the same time. For example, in the analysis of the relationship between sex and sentencing, regression analysis can account for differences in the seriousness of the offence between male and female offenders. Linear regression is used when the outcome has a continuous numeric value, such as the number of months of immediate custody, while logistic regression is used when the outcome is binary such as receiving immediate custody as opposed to not receiving it.

[24] The variable measuring length of immediate custody was transformed using logarithmic transformation (natural log). This was done to reduce the skewness of the data and ensure more robust results.

[25] This includes offenders aged 18 and over, and excludes companies. Source: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063887/sentencing-2020-revised.xlsx

(children and young people) cases analysed in this research are likely to be more serious than an average robbery committed by children and young people.[26]

Furthermore, the research was unable to analyse or draw conclusions about some relationships or interactions between variables because certain characteristics were present only in a small proportion of offenders (e.g. there were only a few offenders where the primary/sole carer status had been ticked in the harassment dataset). Relatedly, some variables had missing values where sentencers had not completed certain fields in the survey: the statistical method called multiple imputation with chained equations (MICE) was used to address this limitation.[27] MICE is a technique that replaces missing values based on the information from non-missing values available for that variable. However, missing values on the ethnicity variable could not be replaced because it is possible that values on the ethnicity variable were not missing at random (e.g. offenders of certain ethnic groups may be less likely to disclose their ethnicity).

It is also important to note that because hundreds of statistical tests were conducted in this research, the emphasis is put on emerging patterns in the findings rather than on individual results. Finally, the data are more than seven years old and some sentencing guidelines have changed for the offences analysed. Findings might therefore differ if the analysis was rerun with more recent data, if and when such data become available.

3.2   Python-aided text analysis

Text analysis is a broad term. In methodology, it can refer to the semantic interpretation of text by the researcher themselves. It can also refer to a machine learning process where software divides sentences into words, and identifies key themes and topics based on word frequency. In this research, both versions of text analysis were applied to examine the structure and language of the sampled guidelines.

Through semantic interpretation, the analyst was able to grasp the key textual features of the sentencing guidelines. First, all the offence specific guidelines follow a very similar structure that contains steps, categories, ranges, and aggravating and mitigating factors. Secondly, cross-references are an important feature of the guidelines. Sentencers are often directed to other relevant guidelines and sources of guidance, for example the [Equal Treatment Bench Book (ETBB)](). Finally, there are expanded explanations which add extra information to aggravating and mitigating factors to make it easier for courts to maintain consistency and transparency in sentencing. Questions and hypotheses were formed based on these textual features, which were discussed in co-production meetings (see below). For example, do the categories and ranges in the stepped approach allow for sufficient flexibility? Do sentencers refer to the ETBB when faced with equality and diversity issues? Are the expanded explanations effectively incorporated into the sentencing guidelines? And most importantly, do co-production partners interpret the key

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[26] To note, this figure includes the offences of robbery and assault with intent to rob. Sources: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063888/magistrates-court-2020-revised.xlsx
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063889/crown-court-2020-revised.xlsx

[27] The variables with missing values that had to be imputed included: length of immediate custody, seriousness, discount, and previous convictions. With the exception of ethnicity, all other variables were complete and were used to estimate the missing values. The imputation process was completed 40 times and the analysis was conducted on a sample that combined all those imputations.

terms and factors in sentencing guidelines in the same way as intended by the expanded explanations?

When it comes to more detailed examination of individual words and phrases, software was used to aid the semantic interpretation. To avoid potential omissions caused by human error and bias, Python, a programming and data processing software package, was used to sweep all the words in the sampled sentencing guidelines. Python divided all sentences in a guideline into individual words and phrases. Individual words and phrases were then grouped into 'thematic clusters' (Kuckartz, 2014). A thematic cluster is a group of words and phrases that can be classified under the same theme. For example, a 'downward cluster' contains words and phrases describing factors that might lead to a less severe sentence, for example, 'good character', which appears in all sampled offence specific guidelines. An 'upward cluster' contains words describing factors that might lead to a more severe sentence, for example, 'balaclava' and 'hood', which appear in the Street robbery and less sophisticated robbery guideline. The 'suitability' (Kuckartz, 2014) of these words and phrases were then examined in relation to the themes as part of the discussions in the co-production meetings. For instance, is it suitable to include 'good character' in the downward cluster? Is it too general and underdefined as a justification for lower sentences? Similarly, is it suitable to include 'hood' in the upward cluster? Is this expression more easily associated with young people?

Python also counts the frequency of words and phrases. This information can be relevant in semantic interpretation too. The repetitive mention of certain words in one cluster might highlight a special focus of guidelines. For example, if 'weapon' is mentioned frequently in the robbery guidelines, it might indicate the Council's intention to target armed robbery.

Limitations

It is worth noting that text analysis was not used as a stand-alone method in this research as it often did not generate direct findings. Instead, this method was mainly used to draw out hypotheses and identify potential opportunities for changes in the sampled guidelines. The hypotheses and proposals for changes were then discussed in co-production meetings. This is why in Section 4 the findings of text analysis and co-production are sometimes grouped together.

Some hypotheses drawn from text analysis were also tested in CCSS data analysis. However, this was not always possible, because as mentioned above, the CCSS data used in this research dates back to 2013, 2014 and 2015, while the sampled guidelines are newer.[28] Factors included in the CCSS datasets do not always therefore mirror factors in current guidelines. As will be discussed later, some of the factors included in the upward and downward factors have also been changed since the CCSS data collection. Consequently, some of the hypotheses identified in text analysis cannot be tested in CCSS data analysis.

3.3   Co-production with partner organisations

Co-production methodology was chosen for this project because it promotes knowledge exchange and equal contribution, beyond that which would be found using interviews and focus groups (Banks, Hart, Pahl and Ward, 2019). Instead of serving solely as the source

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[28] Theft and robbery guidelines were released in 2016. The Intimidatory guideline was released in 2018.

of data, co-production partners bring their knowledge and expertise of various different contexts and diverse backgrounds to contribute to the formation of inquiries and provide feedback and recommendations.

Throughout the co-production process, the research team worked closely with representatives of 14 civil society organisations, 33 sentencers (ranging from magistrates, district judges, Crown Court judges, to High Court judges), and 20 defence lawyers. Invitations were sent to organisations to cover protected characteristics in the Equality Act 2010, i.e. civil society partners were selected based on EDI factors such as sex, age, race, disability and sexual orientation, as well as other factors such as transgender identity. Representatives from all relevant EDI-related areas took part in the research. Invitations were also sent to all sentencers in England and Wales, with representation secured from sentencers in different regions and with diverse professional backgrounds. The sample of defence lawyers was more London-based, but from diverse gender, age and ethnic backgrounds.

As civil society representatives work closely with individuals from protected groups, more time was devoted to co-production with them. In total, four meetings were held with civil society partners, and two meetings each with sentencers and defence lawyers. Each group met separately, but the comments of every group were fed back to participants in other groups, to facilitate cross-group discussion and maximise the benefit of diverse input. Ten individual meetings were also held for civil society partners, lawyers and sentencers who wished to contribute but could not join the group discussions. In co-production meetings, partners mainly discussed the sampled guidelines, but they also made references to other guidelines and broader issues in sentencing and criminal justice, where relevant, as reported below.

The diverse backgrounds of co-production partners benefited this research tremendously. As partners' opinions are shaped by individual experiences, professional identities and perceived priorities, the discussions with them were not only informative but also context-rich.

Limitations

While invitations to take part in the research were sent out to a range of civil society organisations, sentencers in England and Wales, and defence lawyers, organisations and individuals chose whether or not they wished to take part, which therefore introduces self-selection bias into the research. In addition, as mentioned above, co-production partners were from different occupations. As a result, their opinions often conflicted with each other due to varying experiences, perceptions, and focuses. Sometimes individual partners' perceptions might also be coloured by personal and professional biases. The research team respects all input equally, but it does not rely solely on individual opinions. Findings of co-production have therefore been triangulated with CCSS data analysis and text analysis. Recommendations have been made after balancing the findings obtained from all three methods.

3.4   Bringing the three methods together

In this research, the three methods were integrated to form a two-direction knowledge exchange process. The flow chart in Figure 2 shows how this process works. Research questions and hypotheses were first drawn from text analysis, to inform discussions with

the co-production partners. In the initial co-production meetings, partners were invited to raise more specific EDI issues that they thought might also be worth exploring. These insights were used to refine the initial research questions and hypotheses. At the second stage, the research team reported the findings of text analysis and CCSS data analysis to co-production partners. Partners evaluated these findings from their own perspectives and in different professional contexts. Based on the input of co-production partners, the research team conducted further analysis and reported back to the partners. The knowledge exchange process repeated itself until the final report was completed.

Figure 2. Knowledge exchange process
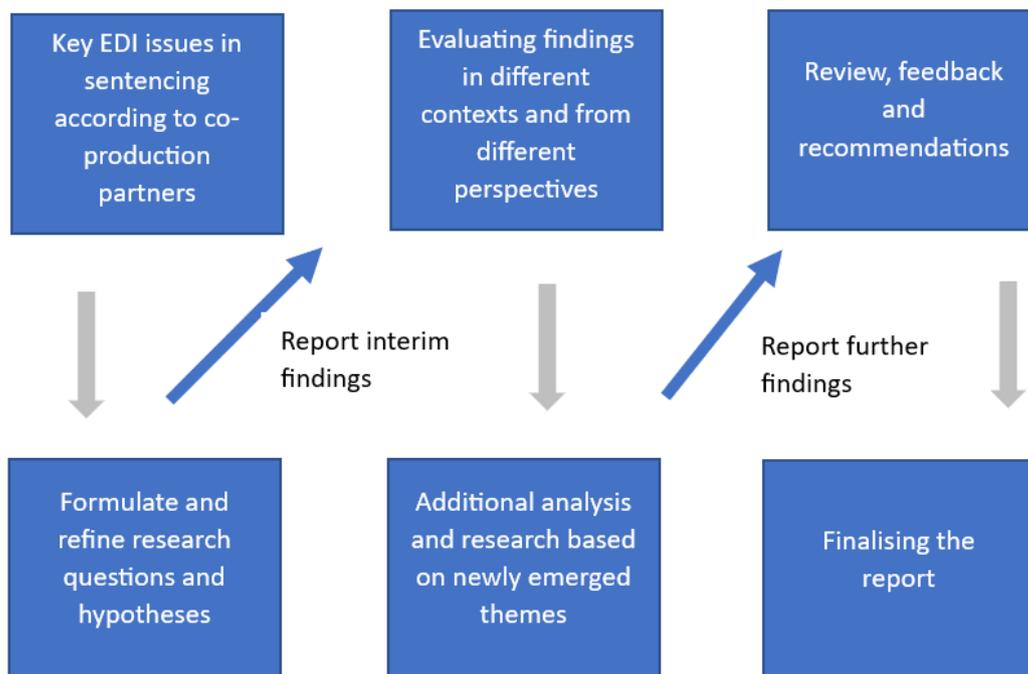
In Section 4, findings drawn from this knowledge exchange process are reported.

4.   Findings

In this part, findings drawn from text analysis, CCSS data analysis and co-production are reported. The findings are divided into ten sections: the stepped approach, upward factors, downward factors, offence specific issues, sex/gender, age, race/ethnicity, intersectionality, other EDI factors, and the broader work of the Sentencing Council. Findings specific to the sampled guidelines are also discussed where appropriate. At the end of the report, a summary of recommendations is provided.

4.1   The stepped approach in adult sentencing guidelines

As mentioned in the introduction, the adult sentencing guidelines for robbery, theft and harassment offences were examined. These guidelines adopt a stepped approach for sentencing. This approach requires sentencers to first determine the offence category based on the offender's culpability and the harm caused by the offence. At this step, sentencers evaluate the overall seriousness of the crime by considering the high/medium/lesser culpability factors and greater/medium/lesser harm factors. Based on the offence category, sentencers are able at step 2 to identify the starting point and category range of a sentence. At this step, they can increase or decrease a sentence from the starting point based on the aggravating and mitigating factors in each case.[29]

The purpose of this section is to investigate whether this stepped approach in the offence specific guidelines might lead to disparity in sentencing for particular groups.

The overarching Sentencing children and young people guideline was also examined. Other offence specific guidelines relating to children and young people were not the focus of discussion here. They will, however, be referenced in discussion where relevant.

Co-production findings

Civil society partners were generally concerned about the stepped approach in offence specific guidelines. They argued that mitigating factors might not have a sufficient impact on sentencing outcomes, because they are only considered at step 2, and asked whether it is possible to move the consideration of these factors to an earlier stage. In addition, in their view, the insufficient consideration of mitigating factors might have a bigger impact on disabled offenders, offenders from ethnic minority groups, and offenders from deprived backgrounds, because compared to other offenders, it can be even harder for these groups to evidence and advocate mitigation at court.

Defence lawyers also felt that mitigating factors have very limited impact on sentencing outcomes, and that this might impact offenders from deprived backgrounds more than others. They also argued that it can be difficult to apply the step 1 offence category to some specific cases: for example, in drugs cases, they reported that it is sometimes the case that an offender's role in the crime does not fit neatly in the 'leading role, significant role and lesser role' categories prescribed within the culpability step in the guidelines. In

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[29] There are further steps after the consideration of aggravating and mitigating factors, which include reduction for assisting the prosecution, reduction for guilty plea, special provision for dangerous offenders (where relevant), the totality principle in cases of multiple offences, consideration of compensation and ancillary orders, giving reasons for sentencing, and considering time spent on bail. These additional steps are not evaluated in this research as the project focused on the main steps.

many 'county lines' cases (Bonning and Cleaver, 2020), a young or female offender might be coerced into drug dealing, but still play a significant role in the 'business'. They reported that it is difficult to decide their level of culpability using the current offence category.

These comments received a mixed reception among sentencers. Some sentencers (mainly magistrates) admitted that they could have made the final sentencing decision before reaching the mitigation stage. According to them, the step 1 factors carry more weight in the decision-making process, because "seriousness should be the most important determinant of sentence". Other sentencers disagreed. They argued that although the stepped approach appears rigid, "sentencers are not robots". In practice, they learned about offenders' backgrounds from pre-sentence reports, and personal mitigation factors were always there, "at the back of their mind", when a sentence was passed. Despite the divide, almost all sentencers were against moving mitigating factors to an earlier step. They held the strong belief that sentences should first be based on the seriousness of crime, because this is how consistency is achieved. From this perspective, the current approach is appropriate.

An alternative suggestion was discussed in co-production meetings: adding another step to the current stepped approach and requiring sentencers to review the sentence they have arrived at with mitigating factors and the offender's personal circumstances in mind. Defence lawyers and civil society partners generally agreed that this is a better approach, because it allows the sentencer to reflect on the sentence at the final stage and see the offender as a 'person' and an 'individual'. Most sentencers also supported this suggestion. Some of them specifically pointed out that "sentencing at the youth court is more individualised" and "sentencing at the adult court should be more like sentencing at the youth court". Nevertheless, there were minor concerns about resources. Some sentencers argued that the adult court might not have the resources to use this approach in the same way as the youth court does, due to not having pre-sentence reports for all adult offenders, for instance.

CCSS data analysis

Where data existed, the CCSS data analysis revealed that, as would be expected, the seriousness of the offence had the strongest association with a change in sentencing outcomes.[30] There was a strong and largely consistent relationship between the seriousness of the offence and immediate custody and the length of custodial sentences for adult robbery offences and three of the four theft offences (theft from the person, theft from shops and stalls, theft in breach of trust): the higher the level of seriousness, the more likely an offender was to be sentenced to immediate custody, and for longer periods of time. However, in the case of robbery committed by children and young people, seriousness was not a significant factor in predicting immediate custody after controlling for a range of upward and downward factors. Also, the seriousness variable was not included in the analysis of receiving stolen goods and harassment offences as there was no existing guideline in the Crown Court for either of these offences during the data collection period, which resulted in a high volume of missing data for this variable.

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[30] It should be noted that the CCSS forms dealt with the current guidelines' step 1 and step 2 factors differently. There were sections on 'seriousness' of the offence, which was entered by judges as levels (from the most serious to least serious). There were also sections (depending on the specific form in question) that covered aggravating factors/factors increasing seriousness/indicating higher culpability and harm and mitigating factors/factors reducing seriousness/reflecting personal mitigation/indicating lower culpability and harm.

Across different offence types, the strength of upward factors in explaining sentencing outcomes was on average lower than for the seriousness of the offence. This is expected, as these factors do not determine the offence category, rather, they only define the range of the final sentence. However, upward factors generally had a stronger association on sentencing outcomes than downward factors, which had among the weakest association with sentencing of all variables. The only exception to this finding is in the case of theft from shops and stalls where certain downward factors were stronger predictors than upward factors (for example, 'addressing needs/addiction', 'currently in work/training'[31]). It is important to note, however, that because the data were collected at a single timepoint, the analysis is unable to account for the order in which judges considered the factors. This means that the analysis was not able to explore whether, and to what extent, judges completed the steps in the order listed in sentencing guidelines.

Finally, the analysis revealed that there were factors outside of those measured that can further explain sentencing outcomes. Even when the highest number of different upward and downward factors were considered, they only explained about 50 per cent of the variance in the length of sentence, leaving the remaining 50 per cent unexplained. Other research shows that extra-legal factors such as the location of the court (Pina-Sánchez and Grech, 2018) or judges' experience (Burrow, 2008) can also influence sentencing.

Text analysis

Text analysis confirms some of the findings above. Table 5 shows the total words[32] in the sampled guidelines, what percentage of these words are devoted to describing upward factors (termed as 'weighting of the upward cluster' in this research), and what percentage is devoted to describing downward factors (termed as 'weighting of the downward cluster'). It also highlights the three most frequently used (MFU) words or phrases in each cluster.

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[31] This terminology was used on the CCSS forms.
[32] Excluding stop words such as 'the', 'this', 'that', etc.

Table 5. Weighting of different clusters

Guideline	Total words	Weighting of the upward cluster	MFU words or phrases in the upward cluster (top 3)	Weighting of the downward cluster	MFU words or phrases in the downward cluster (top 3)
Street and less sophisticated commercial robbery guideline	1,025	12.1%	firearm (10)[33] weapon (5) violence (4)	4.5%	guilty plea (3) assistance to prosecution (3) learning disability (2)
Theft – general guideline	1,152	10.9%	additional harm (9) loss (5) high value (4)	5.8%	guilty plea (3) assistance to prosecution (3) low value (2)
Harassment and stalking (fear of violence) guideline	1,310	13.5%	distress (12) racial or religious aggravation (6) aggravated nature (5)	3.9%	guilty plea (3) assistance to prosecution (3) learning disability (2)

As Table 5 shows, in all three sampled guidelines, the weighting of the upward cluster far exceeds the weighting of the downward cluster. The finding suggests that the offence specific guidelines place more emphasis on upward factors than downward factors. Moreover, the most frequently used words or phrases in the upward cluster differ between guidelines. In the Street and less sophisticated commercial robbery guideline, they are 'firearm' (10 citations), 'weapon' (5) and 'violence' (4); in the Theft general guideline, it is 'additional harm' (9), 'loss' (5) and 'high value' (4); while in the Harassment and stalking guideline, it is 'distress' (12), 'racial or religious aggravation' (6) and 'aggravated nature' (5). In contrast, the most frequently used words or phrases in the downward cluster are almost the same for all three guidelines. It seems that the upward factors are more offence specific in sentencing guidelines, whereas the downward factors are more 'generic'.[34]

This finding, that the upward cluster contains more terms which are more bespoke to specific guidelines and which are also used more frequently when compared to the downward cluster, provides another potential explanation as to why some sentencers feel that upward factors are more prominent than downward factors. As the different offence guidelines often have different upward factors, sentencers have to evaluate them in the context of each specific type of offence which may make the task more complicated, demanding more time and attention from sentencers. In contrast, multiple offences share the same downward factors such as guilty plea and assistance to the prosecution. As a

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[33] Numbers in brackets indicates term frequency.

[34] Generic upward or downward factors refer to upward or downward factors that exist for many different offences, for example remorse and previous convictions. In contrast, offence specific upward and downward factors refer to factors that are peculiar to one offence or a specific type of offence.

result, sentencers might find the evaluation of generic downward factors more straightforward, thus taking less of their time and attention.
<u>Recommendation</u>

The research team wishes to be cautious when giving recommendations on the stepped approach. For the sake of consistency and fairness, sentences should firstly reflect the seriousness of crime, as the sentencers stressed. However, there is a possibility that the current approach places more emphasis on aggravation than mitigation. The findings of all three methods highlight this possibility. In light of this, the recommendation for the Sentencing Council is:

Recommendation 1: To consider adding an extra step to the existing approach in adult guidelines. In this step, sentencers would review the sentence they have arrived at with mitigating factors and the offender's personal circumstances in mind.

It is hoped that this additional step will give sentencers another opportunity to consider the mitigating factors in a specific case. Similar provisions are already applied in guidelines for children and young people. For example, in the robbery and sexual offence guidelines for sentencing children and young people, the final step of sentencing is to 'review the sentence'. Sentencers are required to "review the sentence to ensure it is the most appropriate one for the child or young person" while at the same time assessing "the likelihood of reoffending and the risk of causing serious harm"*.

As mentioned above, this suggestion was discussed in co-production meetings and approved by most co-production partners. However, restricted by the duration and scope of this research, the research team were not able to test the impact of this recommendation. **The Sentencing Council might therefore want to run a pilot project with selected courts where sentencers adopt this extra step.** It would be worth examining whether there may be any impact on sentencing outcomes and participants' perceptions before adopting this recommendation in full.

4.2   Generic upward factors: group and gang membership, previous convictions, failure to comply with current court orders, and offence committed on bail or licence

This section explores the generic upward factors in the sampled guidelines - i.e. those that apply across different guidelines such as 'group or gang membership', 'previous convictions', 'failure to comply with current court orders', and 'offence committed on bail or licence'. Other offence specific upward factors, such as the 'use of a weapon' in robbery offences, will be discussed in Section 4.4. Based on co-production, text analysis and CCSS data analysis results, this section explores whether generic upward factors in the current sentencing guidelines have the potential to cause disparity in sentencing.

<u>Co-production and text analysis</u>

Co-production partners were asked to identify the generic upward factors that they think might lead to disparities in sentencing. The following factors were highlighted in the discussion.

Sentencers, defence lawyers and civil society partners all agreed that the word 'gang' indicates too many presumptions and biases, and 'gang membership' is more likely to affect young offenders. Civil society partners and defence lawyers also argued that this expression might lead to racial disparity, although not all sentencers agreed with this argument.

It is worth noting that the Council has replaced the word 'gang' with 'group' in the guidelines that were included in this study. The only guideline reviewed that still contains the word 'gang' is the Sexual offences guideline for sentencing children and young people. In this guideline, the word 'gang' is retained in the discussion of the backgrounds of sexual offences committed by children and young persons. It is not used as a factor that might increase a sentence.

Most co-production partners welcomed the replacement of 'gang' by 'group', although some sentencers pointed out that the scope of 'group' is too broad, and this might affect young offenders more than others because they 'just hang out together' (McCulloch, Stewart and Lovegreen, 2006). Civil society partners expressed similar concerns. They argued that 'group membership' alone should not be seen as a factor that might increase a sentence, because a person (especially young people and women) might be coerced, manipulated or even groomed to join a group. Their vulnerability should be taken into account instead of being used against them.

It seems that the Sentencing Council is proactive in this regard. According to text analysis, none of the sampled guidelines treat group membership per se as a factor which could increase sentences. The expression used is 'a leading role where offending is part of a group activity' or 'a significant role where offending is part of a group activity'.[35] Also, the expanded explanation for 'offence committed as a group' makes it clear that the mere membership of the group should not be used to increase the sentence, but where the **offence was committed as part** of a group it will normally make it more serious.[36]
The upward factor of 'previous convictions' was also highlighted. Civil society partners stressed the impact of 'addiction' and the 'age-crime curve'[37] on re-offending. In their view, sentencers should be reminded, potentially in expanded explanations, that there might be complicated reasons underlying persistent behaviour, and 'previous convictions' should not be taken on face value. In contrast, defence lawyers and sentencers were more concerned with systemic problems in the criminal justice system. For example, young people from ethnic minority backgrounds may be less likely to be diverted from formal criminal justice proceedings, therefore tend to have more previous convictions when they arrive at court. In other words, even if the upward factor of 'previous convictions' has a discriminating effect in sentencing, this is not caused by the sentencing guideline per se, but broader systemic issues.

Text analysis showed that the Council has addressed some of the concerns expressed by co-production partners. For instance, the expanded explanation for 'previous convictions' stresses that:

> Numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in

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[35] Robbery and theft guidelines.
[36] Emphasis in original text.
[37] In criminology, the age-crime curve refers to the phenomenon that criminal behaviour increases in adolescence and decreases in adulthood.

the community and will not necessarily indicate that a custodial sentence is necessary.

This expanded explanation also has a special provision for the 'age-crime curve', which reads:

> The aggravating effect of relevant previous convictions reduces with the passage of time; **older convictions are less relevant**[38] to the offender's culpability for the current offence and less likely to be predictive of future offending.

The only problem is whether sentencers are alerted to the provisions in the expanded explanations. There are two factors to consider here: the length of the expanded explanations and the way they are embedded in the electronic guidelines.

Text analysis indicated that some of the expanded explanations are quite long. For example, the expanded explanation for 'previous convictions' contains 540 words. It is almost half the length of the Street robbery and less sophisticated commercial robbery guideline. For some sentencers, lengthy explanations are not ideal. In their opinion, sentencing guidelines should be prescriptive and practical. Secondly, all the current expanded explanations are inserted as drop-downs on the Sentencing Council's website. The existing research is highly divided over whether hidden text and linked text might cause comprehension loss in online reading (Wei, Evans, Eliot, Barrick, Maust, and Spyridakis, 2005; Tseng, 2010; Fitzsimmons, Weal and Drieghe, 2014). During co-production meetings, some sentencers admitted that they find it hard to use the expanded explanations in court. This finding is explored further in Section 4.10 when discussing the broader work of the Sentencing Council.

Regarding 'failure to comply with current court orders', 'offence committed on bail' and 'offence committed on licence', legal professionals and civil society partners had quite different perceptions. Civil society partners were concerned that judges might be reluctant to take offenders' personal difficulties into account. As a result, offenders might be penalised for non-compliance that is out of their control. For example, a single mother might miss an unpaid work session because they have to pick their children up from school. In contrast, sentencers argued that the judiciary generally adopts a cautious approach to non-compliance. For them, dealing with non-compliance is not a 'blame game'. Instead, it is more about checking whether the current court order is appropriate. Defence lawyers endorsed the sentencers' efforts in this regard. One of them commented, "the judges deal with non-compliance diligently. I don't think this factor is likely to cause disparity in practice".

Relating to the discussion on the current expanded explanation of 'failure to comply with current court orders' and 'offence committed on licence', it is clear that sentencers are under an obligation to consider "the extent to which the offender has complied with the conditions of a licence or order (including the time that has elapsed since its commencement)". When sentencing young adult offenders (typically aged 18-25), sentencers are also required to consider the offender's 'age and/or lack of maturity' when assessing the significance of non-compliance.

CCSS data analysis

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[38] Emphasis exists in the original context.

In this part, results of CCSS data analysis are discussed with reference to the findings above. It is worth noting that the data used for this analysis were collected between 2013 and 2015. Some of the sampled guidelines have been revised since then, therefore the findings may differ if the analysis were re-run with more recent data. Also, because the CCSS only included the factor of 'failure to comply with current court orders' (the factor in the current guidelines) in the harassment form, an alternative factor 'offender was on bail or licence' was used for theft and robbery.

Table 6 below shows whether the three upward factors highlighted in co-production were significantly associated with sentencing outcomes, or not. The two outcomes tested were immediate custody imposed and length of custodial sentence.

In all tables, the strength of the relationship between the factors and whether immediate custody was imposed is represented using the statistic called odds ratio. If an odds ratio for a particular factor is higher than 1, this means that the factor is associated with an increase in the odds of receiving immediate custody. If an odds ratio is between 0 and 1, this means that the factor is associated with a decrease in the odds of receiving immediate custody. The higher the number above 1, or the lower the number below 1, the stronger the association.

The strength of the relationship between the factors and length of custodial sentence is measured using the statistic called standardised coefficient or beta coefficient. If a beta coefficient factor has a positive value, this means that the factor is associated with a longer custodial sentence, but if it is negative, this means that the factor is associated with a shorter custodial sentence. The higher the positive value, or the lower the negative value of the coefficient, the stronger the relationship.

Table 6. Generic upward factors and sentencing outcomes

Types of offences (in the CCSS dataset)	Gang or group membership factor		Previous convictions factor		Offender on bail/licence (for theft and robbery guidelines); failure to comply with current court orders (for harassment guideline)	
	Immediate custody	Length of custodial sentence	Immediate custody	Length of custodial sentence	Immediate custody	Length of custodial sentence
Robbery (adults)	NS	0.04	1-3 convictions: 2.26 4-9 convictions: 4.51 10+ convictions: 3.23	1-3 convictions: 0.05 4-9 convictions: 0.08 10+ convictions: 0.06	4.47	0.06
Robbery (children and young people)	NS	NS	1-3 convictions: 2.47 4+ convictions^: 7.13	1-3 convictions: NS 4-9 convictions: 0.12 10+ convictions: NS	NS	NS
Theft offences	Receiving stolen goods: 1.90 NS in other theft offences	NS in all theft offences	Receiving stolen goods: 1-3 convictions: 1.99 4-9 convictions: 3.63 10+ convictions: 7.14 Theft from the person: 1-3 convictions: 1.59 4-9 convictions: 3.22 10+ convictions: 5.01 Theft from shops and stalls: 1-3 convictions: 2.76 4-9 convictions: 4.06 10+ convictions: 7.67 Theft in breach of trust: 1-3 convictions: 1.96 4-9 convictions: 3.28 10+ convictions: 4.99	Receiving stolen goods: 1-3 convictions: -0.09 4-9 convictions: NS 10+ convictions: NS Theft from the person: 1-3 convictions: -0.11 4-9 convictions: NS 10+ convictions: NS Theft from shops and stalls: 1-3 convictions: -0.12 4-9 convictions: -0.11 10+ convictions: -0.11 Theft in breach of trust: 1-3 convictions: NS 4-9 convictions: NS 10+ convictions: NS	Receiving stolen goods: 2.97 Theft from the person: 2.65 Theft from shops and stalls: 2.16 Theft in breach of trust: 4.71	NS in all theft offences
Harassment	NS	NS	NS	NS	2.03	-0.11

Notes: The reported results are significant at the level of $p<0.05$. NS stands for not significant. For 'immediate custody', figures higher than 1 are associated with increased odds of immediate custody; figures between 0 and 1 are associated with decreased odds; the higher the number is above 1, or the lower below 1, the stronger the association. For 'length of custodial sentence', positive values are associated with a longer custodial sentence; negative values with a shorter custodial sentence; the higher the positive value, or the lower the negative value of the coefficient, the stronger the relationship. The expression 'gang' was used in the CCSS data collection, therefore it is retained here. ^4-9 convictions and 10+ convictions were combined because there were few cases with 10+ convictions and all were correlated with immediate custody. Otherwise, they would have been omitted from the analysis by the statistical software.

As Table 6 highlights, all three upward factors were significant in adult robbery cases, although 'gang or group membership' was only significant in relation to receiving a longer custodial sentence. Having 'previous convictions' and 'offender was on bail/licence' were strong predictors of immediate custody for robbery (adult). For example, for those who had four to nine convictions, the odds of immediate custody for robbery (adult) were 4.51 times greater (or 350 per cent higher), compared to those who did not have previous convictions, while for those who were 'on bail/licence', the odds of immediate custody were 4.47 times greater (or 347 per cent higher) than for those who were not.[39] These factors were also associated with longer custodial sentences although the association was weak.

For robbery committed by children and young people, having 'previous convictions' was also a strong predictor of receiving immediate custody, and for those who had four to nine convictions, for receiving a longer custodial sentence. 'Gang or group membership' was not significant for either, contrary to the co-production partners' perceptions. Offences committed on bail or licence were not significant either, potentially because sentencers take young offenders' lack of maturity into account when evaluating the significance of non-compliance. However, this hypothesis would need to be verified by further research.

For theft offences, 'offender was on bail or licence' was a significant predictor of receiving immediate custody, especially for theft in breach of trust. The odds of a custodial sentence for theft in breach of trust were 4.71 times greater in cases where judges ticked 'offender was on bail or licence', compared to where they did not. By contrast, for receiving stolen goods, theft from the person, and theft from shops and stalls, the odds of immediate custody were 2.97, 2.65, and 2.16 times greater in cases with that factor, respectively. It seems therefore that sentencers can be particularly punitive when an offender, who has breached the trust of the victim, breaches the court's trust again in criminal proceedings. Nevertheless, the 'offender was on bail or licence' factor was not associated with a longer custodial sentence for any of these offences.

Similarly, 'gang or group membership' was not a significant predictor of receiving a custodial sentence for theft from the person, theft from shops and stalls, or theft in breach of trust. However, for receiving stolen goods, it was a significant predictor of custody. A potential explanation is that receiving stolen goods is often linked to other primary offences, and the offender might be processing crime proceeds for a gang or group (Von Lampe, 2004; McIntosh, 1976). This hypothesis would, however, need to be verified in further research.

Regarding 'previous convictions', the findings were not consistent. For receiving stolen goods, 'previous convictions' was a significant predictor of a shorter custodial sentence (for one to three convictions) and for receiving immediate custody (for all levels of convictions). For theft from the person, all levels of 'previous convictions' were predictors of receiving immediate custody, and one to three convictions of a shorter sentence. For theft from shops and stalls, all levels of 'previous convictions' were significant predictors of immediate custody, and of shorter sentences. For theft in breach of trust, this factor was

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[39] Please note that this does not mean that those with four to nine convictions are '350 per cent more likely' than those with no convictions to receive an immediate custodial sentence. This also does not mean that 350 offenders with four to nine previous convictions are sentenced to immediate custody for every 100 offenders without convictions. Odds of immediate custody is defined as the likelihood of receiving immediate custody, expressed as a proportion of the likelihood of not receiving immediate custody. Odds higher than 1 indicate increased occurrence of immediate custody while odds between 0 and 1 indicate decreased occurrence of immediate custody.

only a significant predictor of immediate custody (for all levels of previous convictions); it was not associated with a longer custodial sentence.

In harassment cases, the only significant upward factor was 'offence committed on bail or licence'. The other two factors were not associated with either sentencing outcome.

Finally, analysis was undertaken to investigate the hypothesis raised by text analysis and co-production partners that the application of upward factors leads to more serious sentences for certain ethnic groups. Where possible, upward factors that were highlighted in text analysis and co-production were examined and their impact on the sentencing outcomes for White, Black, Mixed and other ethnic groups was explored.[40] No evidence of disparity was found, which contradicts some of the co-production partners' perceptions about racial disparity in sentencing. The findings about gender and age disparity are more complicated, which will be discussed separately in Sections 4.5 and 4.7.

Recommendations

Based on the findings above, the research team wishes to make the following recommendations:

Recommendation 2: The Council might wish to re-evaluate the potential impact of using group affiliation as a sentencing factor in robbery cases by using more recent data, because there is a clear gap between co-production partners' perceptions and the findings of the CCSS data analysis.

Almost all co-production partners agreed that group affiliation adversely affects young offenders in the sentencing process, but data analysis suggests that this factor is not important in robbery offences committed by children and young people.

Recommendation 3: The Council might also consider a qualitative study on the application of upward factors in theft cases, because the regression findings highlight potential inconsistencies.

There are some exemplary questions to explore, for instance: why previous convictions seem to be important for immediate custody across all theft offences, but have an inconsistent effect on length; why 'group membership' is important in receiving stolen goods but not in other types of theft; is it because of the link between receiving stolen goods and organised crime? Or is it because of other unidentified reasons?; and, do sentencers give more weighting to 'offender was on bail or licence' when dealing with theft in breach of trust?

Recommendation 4: The Council might consider how to make the expanded explanations more visible and digestible to sentencers, defence lawyers and the public.

In co-production meetings, many partners were not aware that their concerns may have already been addressed by the guidelines and the explanations contained within them. This recommendation will be further discussed in Section 4.10. It is also worth noting that

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[40] Sometimes such exploration was not possible due to small sample size and data availability.

the Council has committed to conducting an evaluation of its expanded explanations scheduled as part of its five-year strategy, published in November 2021.

4.3 Generic downward factors: determination to address addiction or offending behaviour, remorse, and mental disorder and/or learning disabilities

This section explores the generic downward factors in the sampled guidelines, for example, 'remorse' and 'learning disabilities'. Offence specific downward factors, such as 'unplanned/opportunistic crime' in robbery offences, will be discussed in Section 4.4. Based on co-production, text analysis and CCSS data analysis results, this section explores whether generic downward factors in the sampled guidelines have the potential to cause disparity in sentencing.

Co-production and text analysis

Co-production partners were invited to give their opinions on which generic downward factors might lead to disparity in sentencing. The following factors were highlighted in the discussions: determination to address addiction or offending behaviour,[41] 'remorse', and mental disorder and/or learning disabilities. In this section, co-production partners' comments are discussed. Text analysis results are also included to contrast the co-production partners' understanding of certain factors with the expanded explanations of these factors.

For determination to address addiction or offending behaviour, both defence lawyers and sentencers pinpointed it as a highly influential factor in sentencing; however, there were different explanations about how this factor might lead to disparity. Some sentencers argued that offenders from ethnic minority backgrounds are more likely to demonstrate determination to address offending behaviour, because they tend to have a strong family culture, which may mean that individual offenders have strong domestic support. White offenders, especially those from deprived backgrounds, might not have such strong family support to help them address offending behaviour and therefore this downward factor might cause disparity in sentencing. Defence lawyers generally endorsed this viewpoint.

Other sentencers argued that it is not racial disparity that is relevant here, but class inequality. Wealthy offenders may be able to more easily access addiction treatment services, but for offenders from less privileged backgrounds, these services are not readily available. Defence lawyers and civil society partners supported this argument. Civil society partners were particularly concerned that sentencers might blame individual offenders for not accessing treatment when it is due to delays in the healthcare system. For example, they might not take into account offenders' efforts to address addiction or offence behaviour when they tried to seek support, but appointments have been delayed by the system. Some civil society partners also argued that offenders with mental health issues may rely on drugs and alcohol for self-medication. It might be difficult for these offenders to demonstrate their determination to address addiction. In their opinion, this problem is more prevalent among women, therefore women with addiction issues are more likely to be impacted (which could result in an intersectionality effect). This could be an important EDI issue for this research, but because co-morbidity is covered in the guideline for sentencing

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[41] The factor in the guideline is 'determination and/or demonstration of steps having been taken to address addiction or offending behaviour'.

offenders with mental disorders, developmental disorders and neurological disorders, it is beyond the scope of this research.

Although co-production partners raised a wide range of issues, the expanded explanation for determination to address addiction or offending behaviour seems to focus on one task: tackling 'the drivers' behind the current offence. As the explanation states, if the current offence is 'driven by or closely associated' with drug or alcohol abuse, the commitment to address addiction may justify a reduction in sentence, and "this will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation". This approach is sensible, because 'the reduction of crime' is a statutory goal of sentencing according to s.57 Sentencing Act 2020. However, as the co-production partners suggested, the relationship between addiction and the offence may be more nuanced than the current expanded explanation recognises, especially when it is intertwined with mental health issues. This point is revisited in the recommendation part.

With regard to the factor of 'remorse', while there was consensus among the co-production partners that this might lead to disparity in sentencing, they offered different explanations of why this might happen in practice. Civil society partners and sentencers stressed cultural differences, arguing that offenders from certain ethnic minority groups might find the expression of remorse challenging due to their cultural beliefs. Lack of maturity and the peer pressure of 'staying tough' were also seen to be highly relevant for young offenders. Defence lawyers also stressed the impact of learning disabilities and communication difficulties. According to them, it is harder for less articulate offenders to appear remorseful in front of probation officers and sentencers.

Some of these concerns are already covered in the expanded explanation for 'remorse'. The current explanation alerts sentencers to the fact that remorse can present itself in many different ways. It also stresses that the offender's demeanour in court could be misleading, due to "nervousness, a lack of understanding of the system, a belief that they have been or will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity etc". This is a comprehensive explanation, although it does not explicitly mention cultural differences, or the situation where learning disabilities hinder the communication of remorse.

Sentencers, lawyers and civil society partners all agreed that offenders from ethnic minority groups are less likely to disclose a mental disorder and/or learning disabilities, due to cultural differences and the fear of social stigma. According to some sentencers, they observe this tendency more frequently among people from African Caribbean and Asian communities. However, others argued that lack of mental health support is becoming a general issue for all offenders, including those from White middle-class backgrounds. In their observation, how to evidence a mental disorder and/or learning disability is becoming a real challenge for all social groups.

As mentioned previously, the Sentencing Council has a separate guideline for sentencing offenders with mental disorders which is outside the scope of the current research. However, it is worth noting that sentencing guidelines can only ensure equal treatment for offenders who disclose a mental disorder and/or learning disability. If offenders cannot, or choose not to, disclose mental disorders and/or learning disabilities, any disparity that might be caused by these situations would be largely beyond the remedy of the guidelines.

CCSS data analysis

With reference to the findings above, this section discusses the results of CCSS data analysis. The limitations mentioned in the 'upward factors' section also apply here: as the sampled guidelines are newer than the CCSS data, the findings reported here may differ if the analysis were re-run with more recent data. Also, due to the design of the CCSS, in certain datasets, the factor 'physical or mental illness' is used as an indicator for mental disorder and/or learning disability.[42] This compromise might also affect the validity of the findings.

Table 7 below shows whether the three downward factors highlighted in co-production meetings were significantly associated with sentencing outcomes. The two outcomes tested were immediate custody imposed and length of custodial sentence.

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[42] It is worth noting that the harassment dataset included three measures of 'physical or mental illness': 'Mental disorder/learning disability where linked to offence', 'Serious medical conditions', and 'Mental disorder/learning disability where not linked to offence'. Because each variable had low counts (3 per cent, 4 per cent and 5 per cent respectively), a new variable was created to indicate any mental disorder or physical condition, which increased the frequency to 11 per cent.

Table 7. Generic downward factors and sentencing outcomes

Types of offences (in the CCSS dataset)	Determination to address addiction or offending behaviour factor		Remorse factor		Physical or mental illness; Mental disorder and/or learning disability factor	
	Immediate custody	Length of custodial sentence	Immediate custody	Length of custodial sentence	Immediate custody	Length of custodial sentence
Robbery (adults)	0.30	-0.03	0.57	-0.04	0.19	-0.03
Robbery (children and young people)	NS	NS	NS	NS	Not tested due to lack of data	
Theft offences	Receiving stolen goods: 0.28 Theft from the person: 0.17 Theft from shops and stalls: 0.13 Theft in breach of trust: 0.37	NS	Receiving stolen goods: 0.48 Theft from the person: 0.54 Theft from shops and stalls: 0.61 Theft in breach of trust: 0.57	NS	Receiving stolen goods: 0.33 Theft from the person: 0.41 Theft from shops and stalls: 0.29 Theft in breach of trust: 0.47	NS
Harassment	0.18	NS	0.51	NS	0.33	NS

Notes: The reported results are significant at the level of $p<0.05$. NS stands for not significant. For 'immediate custody', figures higher than 1 are associated with increased odds of immediate custody; figures between 0 and 1 are associated with decreased odds; the higher the number is above 1, or the lower below 1, the stronger the association. For 'length of custodial sentence', positive values are associated with a longer custodial sentence; negative values with a shorter custodial sentence. The higher the positive value, or the lower the negative value of the coefficient, the stronger the relationship.

As Table 7 highlights, all three downward factors were significant in adult robbery cases, and they were associated with both sentencing outcomes. Among them, 'physical or mental illness'/mental disorder and/or learning disabilities was the strongest mitigator against immediate custody. In contrast, for robbery committed by children and young people, two of the downward factors were not significant for either outcome, and it was not possible to test the third. This point is discussed in Section 4.4 when looking at offence specific issues.

In theft offences, all three factors were significant in mitigating against immediate custody. Among them the factor of 'determination to address addiction or offending behaviour' was the strongest. However, these factors were not associated with shorter custodial sentences. The same applies to harassment. Specifically, the odds of immediate custody for offenders sentenced for harassment who showed remorse was about half the size of the odds of those who did not. The odds of immediate custody for harassment in cases where addressing needs and addiction was relevant were about one fifth the size of the odds where that factor was not present.

Finally, the CCSS data analysis did not confirm the hypotheses raised by text analysis and co-production that the application of downward factors of mental disorder and/or learning disabilities and remorse leads to more favourable treatment of certain ethnic groups. The factors raised through these strands were explored in terms of their impact on the sentencing outcomes for White, Black, Mixed and 'Other' ethnic groups. This found no evidence of disparity. However, this finding needs to be interpreted with caution. The data analysis can only ascertain whether sentencers treat offenders whose mental disorder and/or learning disability and remorse are recognised equally. If, as the co-production partners suggest, individuals from ethnic minority groups are less likely to disclose mental disorder and/or learning disabilities, and are less likely to be recognised as remorseful, the disparity caused by these elements will not be picked up by the analysis here. Findings about gender and age are more complicated. They are reported in Sections 4.5 and 4.7.

Recommendations

Based on the findings above, the following recommendations are put forward:

Recommendation 5: The Council might wish to extend the expanded explanation for 'remorse' and include learning disability, communication difficulties and cultural differences as influential factors in the evaluation of remorse.

Recommendation 6: The Council may wish to consider further research into why some of the downward factors do not seem to have an impact on sentencing outcomes in robbery cases involving children and young people.

Recommendation 7: The Council might wish to consider a qualitative study on the lived experience[43] of offenders with mental health issues and chronic addictions. The findings might lead to a better understanding of how sentencing can be used to enable the desistance of offenders with multiple needs.

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[43] Lived experience refers to "the experiences of people on whom a social issue or combination of issues has had a direct impact." (Sandhu, 2017, 5). This concept is explained further in Section 4.10.

This could supplement a literature review published by the Council, which brought together the evidence on [The Effectiveness of Sentencing Options on Reoffending](#) to support the Council's statutory duty in this area.

4.4   Offence specific issues

Section 4.4 explores whether offence specific upward and downward factors have the potential to cause disparity in sentencing. Findings in this section are mainly based on CCSS data analysis. Results of text analysis and co-production are discussed when relevant.

Robbery offences: upward factors

The sentencing guideline for robbery offences was revised in 2016. As a result, the factors listed on the CCSS survey form and explored in this analysis do not always mirror the factors included in the new guideline. The discrepancy mainly lies with the downward factors. Upward factors remain largely the same.

Some of the generic factors have been discussed, for example, 'previous convictions', 'group or gang membership', and 'offender was on bail or licence'. Offence specific factors for the guideline examined in this study include 'targeting vulnerable victim(s)', 'use of weapon', 'significant degree of force or violence', 'wearing of a disguise', and 'high value of items taken'. According to CCSS data analysis, almost all of the upward factors mentioned above were significant predictors of receiving immediate custody in adult robbery cases. The only exception was 'gang or group membership'. Similarly, almost all upward factors were associated with longer custodial sentences, except 'offender under the influence of alcohol or drugs'. The strongest offence specific factors in predicting immediate custody and the length of sentence were 'use of weapon' and 'high value of items taken'. The size of the odds of immediate custody for those who used a weapon were 3.8 times the odds of those who did not use a weapon; and for 'high value of items taken', this was 3.7 times the size of the odds.

In contrast, fewer upward factors were significant in robbery committed by children and young people. The only factors that were significantly associated with longer custodial sentences were: 'use of weapon', 'degree of force or violence', and 'wearing of a disguise', with the 'use of weapon' factor having the strongest effect on length. There were two more factors associated with a greater likelihood of receiving immediate custody, namely, 'targeting vulnerable victim(s)' and 'more than one victim', although 'degree of force or violence' had the strongest association with immediate custody. The significance of victim-related factors for immediate custody suggests that the consideration of the victim might be more important for sending children and young people to prison, but once the decision to imprison has been made, it may not additionally lengthen the custodial sentence.

Moreover, it is worth noting that 'wearing a disguise' has a greater impact on sentencing outcomes than the majority of upward factors in robbery committed by children and young people. In the new guideline, an example of 'disguise' is described as "wearing a balaclava or hood". One hypothesis drawn from text analysis is whether the word 'hood' is more easily associated with young people from certain subgroup cultures such as 'rap gangs' (Maxwell, 1991). In co-production meetings, some sentencers agreed that this might be the case, but opposing voices also existed. For instance, one sentencer argued that, "it is not the clothes that matter here, it is whether the defendant used the clothes as disguise".

Due to the limitation of the CCSS dataset, it was not possible to further explore whether 'wearing a disguise' affects young people from ethnic minority groups more than young people from White backgrounds. This point is revisited in the recommendations.

Co-production partners also raised concerns about the 'use of weapon' factor in robbery cases. Both civil society partners and defence lawyers argued that this upward factor affects young people from ethnic minority backgrounds more than others, because they are often labelled as 'violent' and 'gang members'. CCSS data analysis can only partially test this argument. The upward factor 'use of weapon' was the strongest factor in predicting the length of custody for robbery committed by children or young people. The odds of immediate custody for children and young people who used a weapon were three times the size of the odds for those who did not, which indicates a slightly lower importance of this factor compared to adult robbery cases. This finding contradicts the co-production partners' perception, as they argued that 'use of weapon' might affect young offenders more than the adults. More cases of offenders from ethnic minority groups would be needed to ascertain whether the 'use of weapon' factor affects individuals from ethnic minority groups more than others.

Robbery offences: downward factors

As mentioned above, the sentencing guideline for robbery offences was revised in 2016. As a result, the factors listed on the CCSS survey form do not always mirror the factors outlined in the new guideline. The discrepancy mainly lies with the downward factors. The CCSS survey form for robbery offences contained a range of downward factors, for instance, (offender) 'currently in, or prospects of work/training', 'loss of job or reputation', and (offender from) 'difficult/deprived background'. However, these factors are not featured in the new or old guideline for robbery offences. Considering that robbery is usually committed for financial gain, it is worth asking why the guidelines exclude these factors from the mitigating list, considering that employment and training would improve the offender's financial status thus potentially preventing future offences. One explanation is that the list in the current guideline is non-exhaustive, therefore sentencers can still take these factors into account at their discretion. Also, during the consultation on the draft new robbery guideline, between 76 per cent and 87 per cent of respondents felt that no additional mitigating factors were necessary. Based on the results, the Council retained the list of mitigating factors as presented in the consultation documents.

According to the results of CCSS data analysis, 'currently in, or prospects of work/training' was associated with lower odds of immediate custody and shorter custodial sentences in robbery offences committed by children and young people. It was not possible to analyse 'in work or training' in adult robbery cases, nor 'loss of job or reputation' in both adult and children and young people robbery cases, due to a relatively low proportion of cases having these factors ticked. For 'difficult/deprived background', adult offenders with this characteristic ticked on the form (approximately 11 per cent of the sample) seemed to have shorter sentences imposed and were less likely to get immediate custody. The average length of sentence for robbery for those from a 'difficult/deprived background' was 37.3 months, while for those without, it was 45.9 months: this difference is statistically significant. However, after accounting for other upward and downward factors, 'difficult/deprived background' was no longer associated with the length of sentence nor with a lower likelihood of receiving a custodial sentence. In the youth robbery data, two per cent of cases were deemed to be from a 'difficult/deprived background' and had this factor taken into account in the sentencing decision. The average length of sentence for

these offenders with a 'difficult/deprived background' was 26.6 months, while for those without, it was 27.1 months: this difference is not statistically significant. This impact of a 'difficult/deprived background' will be further discussed in Section 4.8 on other EDI factors and in Section 4.9 on intersectionality.

In adult robbery, none of the offence specific downward factors were significant predictors of shorter custodial sentences. All the downward factors that were closely associated with shorter custodial sentences were generic downward factors, namely, 'age', 'genuine remorse', 'offender addressing needs or addiction' and 'co-operation with authorities'. Among them, 'age' had the strongest predictive power, and it will be separately discussed in Section 4.7. 'Genuine remorse' and 'offender can/is addressing needs/addiction' have been discussed in Section 4.3. 'Co-operation with authorities' was proven to be important in CCSS analysis, but its relevance in EDI was never mentioned by any co-production partners, therefore is excluded from the discussion in Section 4.3. However, it is worth noting that U.S. based research suggests that those from ethnic minorities are less likely to receive a reduction in sentence for assisting the prosecution (Hartley, Maddan and Spohn, 2007).

In terms of a reduction in the odds of immediate custody, the most significant factor was also a generic downward factor: 'physical or mental illness'/mental disorder and/or learning disabilities. 'Offence out of character' and 'unplanned/opportunistic' were also significant. It is worth noting that 'offence out of character' is no longer included as a mitigating factor in the new guideline; it was substituted by 'good character and/or exemplary conduct'. However, some criticism of 'good character and/or exemplary conduct' was raised in co-production meetings. This point will be further discussed in Section 4.9 on intersectionality and other EDI factors.

For robbery committed by children and young people, fewer downward factors were significant. Only the factors 'unplanned or opportunistic crime' and 'currently in, or prospects of work/training' were associated with a shorter custodial sentence. 'Unplanned or opportunistic crime' was not significantly associated with a reduction in the odds of receiving immediate custody, while 'offender responding well to existing order/sentence' was significant. Compared to cases where this factor was not present, the odds of custody for these cases was one tenth the size of the odds for those without that factor. However, this downward factor was also not included in the new, or old, guideline.

Theft offences

The current guideline for theft offences was released in 2016. At the time the CCSS data were collected, several theft offences were included within the Sentencing Guidelines Council's Theft and burglary in a building other than a dwelling guideline. This included a guideline for theft in breach of trust, theft from the person and theft from shops and stalls. In addition, the Magistrates' Court Sentencing Guidelines (MCSG) included a guideline for handling stolen goods, although no guideline was available for this offence for use in the Crown Court. The CCSS dataset contains information about four different types of theft offences: theft in breach of trust, theft from the person, theft from shops and stalls, and receiving stolen goods. In the new guidelines, theft from the person and theft in breach of trust are covered by the Theft – general guideline, while theft from a shop or stall and handling stolen goods are covered by separate guidelines.

Theft offences: upward factors

As in the case of robbery offences, there are limited differences in upward factors. The factors of 'more than one victim' and 'victim particularly vulnerable' that appeared in the dataset are not in the current guideline, while 'targeting of vulnerable victim(s)' is retained, elevated to a high culpability factor and rephrased as 'deliberately targeting victim on basis of vulnerability' in the Theft – general guideline. The old aggravating factor of 'high level of gain' is quantified in the new guidelines and listed as a harm factor. The new guidelines also include two additional aggravating factors, namely, 'prevalence' and 'established evidence of community/wider impact', although it is worth noting that in the guideline for handling stolen goods, 'prevalence' is excluded.

One hypothesis drawn from text analysis is that the two new aggravating factors are more likely to be applied in poor neighbourhoods, thus affecting offenders from deprived backgrounds more than others. However, defence lawyers and sentencers did not support this hypothesis. They outlined two reasons why the hypothesis might not be true in practice. First, in most cases, police and the prosecution have to submit evidence of 'prevalence' and 'established community/wider impact'. Sentencers will not take this factor into account without satisfactory proof. Moreover, thefts such as the 'mugging' of mobile phones tend to be more common in city centres, around transportation links and in affluent neighbourhoods. It is incorrect to presume that the 'prevalence' provision mainly affects deprived neighbourhoods, although it might cause regional inconsistency in practice.

CCSS data analysis cannot verify these arguments, because 'prevalence' and 'community impact' were not included in the survey form for theft offences. Nevertheless, the analysis reveals whether other offence specific upward factors were associated with sentencing outcomes, as can be seen in Table 8. The two outcomes tested were immediate custody imposed and length of custodial sentence.

Table 8. Offence specific upward factors in theft cases

Theft offence	Pre-planning or premeditation		Targeting of vulnerable victim(s)		Victim particularly vulnerable		High value (including sentimental value) of the property to the victim or substantial consequential loss		High level of gain	
	Immediate custody	Length of custodial sentence	Immediate custody	Length of custodial sentence	Immediate custody	Length of custodial sentence	Immediate custody	Length of custodial sentence	Immediate custody	Length of custodial sentence
Receiving stolen goods	2.6	0.14	NS	NS	2.9	NS	1.9	0.20	2.1	0.13
From the person	1.9	0.10	2.2	NS	2.1	NS	2.5	0.08	NS	0.05
From shops and stalls	NS	0.08	5.4	NS	NS	NS	2.0	0.08	NS	NS
In breach of trust	2.6	0.11	1.9	NS	1.7	NS	2.8	0.08	3.0	0.08

Notes: The reported results are significant at the level of $p<0.05$. NS stands for not significant. For 'immediate custody', figures higher than 1 are associated with increased odds of immediate custody; figures between 0 and 1 are associated with decreased odds; the higher the number is above 1, or the lower below 1, the stronger the association. For 'length of custodial sentence', positive values are associated with a longer custodial sentence; negative values with a shorter custodial sentence; the higher the positive value, or the lower the negative value of the coefficient, the stronger the relationship.

As Table 8 shows, the upward factors of 'pre-planning or premeditation' and 'high value of the property' consistently predicted longer custodial sentences across all four types of theft. 'High value of the property' was also a significant predictor of receiving immediate custody across all four types of theft, 'high level of gain' was significant in predicting the length of immediate custody for three theft offences, and 'pre-planning or premeditation' was a significant predictor of receiving immediate custody for three theft offences.

In contrast, the two factors relating to victim vulnerability were not associated with a longer custodial sentence, although they were closely associated with immediate custody as an outcome for most theft offences. Most notably, the odds of immediate custody for theft from shops and stalls were 5.4 times greater in cases where judges selected the 'targeting of vulnerable victim(s)' factor compared to where that factor was not considered. Similar patterns were observed in the robbery data. It seems that the consideration of the victim was more important for the decision to imprison, but once the decision had been made, it did not affect the length of the custodial sentence.

Theft offences: downward factors

Regarding downward factors, there is considerable discrepancy between the new theft guidelines and the CCSS survey form. As in the case of robbery offences, the CCSS survey form for theft contained a range of downward factors that are not featured in the new guidelines, for example, 'currently in, or prospects of work/training', 'loss of job or reputation', and 'difficult/deprived background'. In the theft from a shop or stall guideline, there is also one mitigating factor of 'offender experiencing **exceptional** financial hardship'[44], which is similar to the old factor 'offender motivated by desperation or need', but this is not in other guidelines. It is worth considering whether this is the appropriate strategy. As both robbery and theft are property offences, and people commit these often for financial gain, these factors are relevant from the EDI perspective. This is particularly important in cases that fall on the cusp of custody. If aforementioned mitigation factors can be taken into consideration, an offender might receive a community sentence instead of immediate custody. Their financial position will then not be further compromised by imprisonment.

Moreover, some of these factors were not significant in sentencing, according to the results of CCSS data analysis. For example, no downward factors were important for predicting the length of custody for theft from the person and theft from shops and stalls. The only two cases where a downward factor was significant for the length of the sentence were 'currently in, or prospects of work/training' that predicted the length of sentence for receiving stolen goods, and 'loss of job or reputation' that predicted the length of immediate custody for theft in breach of trust. The factor 'currently in, or prospects of work/training' was also the only significant predictor of the likelihood of receiving immediate custody for all theft offences.

Harassment

The guideline for harassment and stalking is the newest among the sampled guidelines. It was released only in October 2018. The CCSS data might therefore be of less use for predicting any problems in current sentencing practice. Moreover, the CCSS did not use a

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[44] Emphasis in original text.

separate survey form for harassment. Instead, a single survey form was used for assault and public order offences, which included harassment.

According to the CCSS data analysis, for the harassment offence, 'failure to comply with current court orders' was associated with a shorter custodial sentence, while 'offence committed under the influence of alcohol/drugs' was associated with a longer custodial sentence. The upward factors 'victim particularly vulnerable', 'failure to comply with current court orders', and 'previous violence/threats' were related to a higher likelihood of immediate custody. All these factors had a similar strength. For example, the odds of immediate custody for harassment were 2.2 times greater in cases where the judge considered 'previous violence/threats', compared to where that factor was not present. This factor was replaced by 'persistent action over a prolonged period' in the new guideline for harassment and stalking.

The new guideline contains the combined upward factor of 'offence motivated by, or demonstrating, hostility based on any of the following characteristics or presumed characteristics of the victim: age, sex, disability, sexual orientation or transgender identity'; a separate uplift can also be applied for racially or religiously aggravated offences. On the CCSS form, however, sentencers could tick separate boxes if the offence was motivated by/demonstrated hostility on the basis of race/religion, disability, sexual orientation or transgender identity. However, this factor was rarely ticked by sentencers in the CCSS dataset, therefore cannot be included in quantitative analysis. In co-production meetings, sentencers and lawyers were asked if equal weighting is given to these protected characteristics in practice. Most co-production partners felt that they were not qualified to answer this question due to the lack of first-hand experience in cases where this factor is relevant.

No downward factors were significant in predicting the length of custody for harassment. However, three generic downward factors were associated with lower odds of immediate custody, namely, 'remorse', 'physical or mental illness'/mental disorder and/or learning disabilities, and 'determination to address addiction/behaviour'. These were discussed in Section 4.3. In addition, 'good character and/or exemplary conduct' was associated with lower odds of immediate custody, although some criticism of this factor was raised in co-production meetings, which will be discussed in Section 4.9.

Recommendations

As stated earlier, the Council could consider adding an extra step to the current stepped approach adopted by adult sentencing guidelines, where sentencers would reconsider the potential opportunities for mitigation. Further evidence for that has been presented here, with the offence specific findings further confirming that upward factors have a stronger impact on sentencing outcomes than downward factors, and that for all offences included in the research, there are far more upward factors than downward factors identified as significant in CCSS data analysis. Moreover, almost all the significant downward factors are generic downward factors. The only significant offence specific downward factors are 'unplanned/opportunistic' (for robbery), 'currently in, prospects of work/training' (for theft), and 'loss of job or reputation' (for theft). The latter two factors are not explicitly mentioned in the current guidelines.

Based on the findings above, other recommendations are:

Recommendation 8: The Council might consider including 'in work or training', 'difficult/deprived background', and 'loss of job or reputation' in the mitigation lists of theft and robbery guidelines, and 'offender experiencing exceptional financial hardship' in more theft guidelines.

As previously mentioned, these factors are highly relevant in crimes for financial gain.[45]

Recommendation 9: The Council might want to explore further the implication of findings about victim-related upward factors from the EDI perspective; existing research suggests that not all victims are equally valued by the criminal justice system (Walklate, 2012).

There were consistent findings about victim-related upward factors such as 'targeting vulnerable victim' and 'victim particularly vulnerable'. In both robbery and theft offences, these factors were significant in the decision to imprison, although they were not always significant in predicting the length of custodial sentence.

In other words, disparity is not always caused by the demographic characteristics of offenders; it might be caused by the characteristics of victims as well. In light of this, it might be worth exploring the relationship between sentencing outcomes and the demographic data of the victims.

Recommendation 10: More recent data are needed to evaluate the impact of 'use of weapon' and 'wearing a disguise' in robbery cases. A larger sample of ethnic minority offenders is also needed to test the hypotheses that these two upward factors affect children and young people from ethnic minority groups more than others.

4.5   Sex/gender

This section focuses on sex and gender-related EDI issues in the sampled guidelines. While the previous sections might have touched on some of these issues, here, a more detailed review is provided. It is important to note that when discussing the results of CCSS data analysis the term 'gender' is used because this was the terminology used on the CCSS forms. 'Gender' is also used when discussing the results of co-production because this is the term that the co-production partners used. 'Sex', however, may be used when the findings are interpreted in the context of the Equality Act 2010.

Co-production and text analysis

The co-production partners expressed quite different opinions on gender and sentencing disparity. Some sentencers argued that women tend to be treated more favourably in sentencing, and this might be a source of inequality. There is research that supports this argument (e.g. Isaac, 2020; Pina-Sánchez and Harris, 2020). Civil society partners view this issue quite differently. First, they do not believe that women are treated more favourably than men in sentencing, because female offenders are often blamed for 'double deviance' (Gelsthorpe and Sharpe, 2015). 'Double deviance' means that female offenders are perceived to be twice as deviant as male offenders, once for breaking the law, and once for deviating from traditional gender norms about how a woman should act. For civil

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[45] Please read this recommendation together with Section 4.8 on other EDI factors and Section 4.9 on intersectionality.

society partners, even if female offenders receive more lenient sentences compared to males, it is not necessarily because of their gender, but because they are less dangerous offenders and often commit less serious crimes. Moreover, their caring roles and special vulnerability[46] deserve recognition in sentencing. This is a matter of 'equity', not 'inequality'.

The difference of opinions was most evident in the discussion about 'being a sole or primary carer for dependent relatives'. Sentencers tended to believe that 'being a sole or primary carer' is a 'striking' downward factor that often helps offenders 'avoid' a prison sentence. They report that in practice, it is women, especially single mothers, for whom this downward factor may be relevant more frequently. Civil society partners had opposite opinions. They were concerned that this downward factor is not applied consistently in practice, and sentencers might give a single mother a harsher sentence, because "she should have known better."[47] Although this concern is supported by the double deviance theory, it was not well received by sentencers. Both judges and magistrates believed that the difficulty facing single mothers is well recognised in sentencing, and they would never punish a mother because "she should have known better". On the contrary, their concern was that because the 'sole or primary carer for dependent relatives' factor is perceived to be related to women and mothers, other carers might be overlooked in practice. Some sentencers argue that this could lead to racial bias in sentencing, because in Asian communities, young men are often responsible for taking care of the extended family. This responsibility is not well understood in the British context. The same can be said of other ethnic minority groups where the family structure is different from the European type.

Defence lawyers expressed similar concerns. They argued that in practice, the relationship between carers and dependants can be very complicated. A child could be the carer for other children because parents are absent. Middle-aged men might take care of older parents. Young adults might care for grandparents, and relatives might care for other relatives. In their view, it is the less typical carers who are often being overlooked in sentencing. However, text analysis suggests that the current expanded explanation of 'sole or primary carer for dependent relatives' does not indicate the carer is necessarily a woman or mother. It is worth considering why co-production partners seem to have a restricted impression. It might be because the expanded explanation explicitly mentions 'pregnant offender ' but does not explicitly mention other less typical carers.

<u>CCSS data analysis</u>

To shed some light on 'equity' versus 'disparity', CCSS data analysis provides an overview of the impact of gender[48] on sentencing outcomes, as can be seen in Table 9:

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[46] For example, being exploited by male co-offenders, etc.
[47] It was not possible to test this hypothesis using the CCSS data because the analysis would have been based on a sample that was too small to draw valid conclusions from.
[48] 'Gender' is used instead of 'sex' here to be consistent with the terminology used in CCSS.

Table 9. The relationship between gender and sentencing

Factors controlled for	Likelihood of immediate custody	Length of immediate custody
Group comparison	Men were more likely to receive a custodial sentence for robbery (adult) and all types of theft.	Men on average received longer sentences for robbery (adult and children/young people) and harassment.
Controlling for primary factors only	Men were more likely to receive a custodial sentence for robbery (adult) (3.10), receiving stolen goods (2.38) and theft from shops and stalls (1.47).	Men received longer custodial sentences for robbery (adult) (0.07), receiving stolen goods (0.07), and harassment (0.11), but this effect was not strong.
Controlling for primary and upward and downward factors	Men were more likely to receive a custodial sentence for robbery (adult) (2.63), receiving stolen goods (2.45), theft from the person (1.54), theft from shops and stalls (1.65), and theft in breach of trust (1.39).	Men received longer custodial sentences for robbery (adult) only (0.04).

Notes: The reported results are significant at the level of $p < 0.05$. Primary factors included age, ethnicity, 'physical or mental illness', 'primary/sole carer' status, coming from a 'difficult/deprived background', seriousness of the offence, previous convictions, and guilty plea or guilty plea reduction. Effect sizes are presented for the regression analysis when controlling for factors, but this would not be appropriate for the group comparison.

In Table 9, the results are separated based on the level of the analysis; the first row shows the findings where only groups (men and women) were compared, without accounting for any differences between the cases. The second row displays the findings when primary factors that might explain differences between genders, were controlled for: age, ethnicity, EDI factors 'physical or mental illness' related factors, 'primary/sole carer' status, coming from a 'difficult/deprived background' as well as the seriousness of the offence, previous convictions, and guilty plea or guilty plea reduction. These factors were included based on prior research that shows that they are associated with a range of criminal justice outcomes (see, for example, Farrington, Gaffney, and Ttofi, 2017). The third row shows the results where, in addition to the primary factors listed above, a range of other upward and downward factors were accounted for.

When simply comparing men and women, the male gender was associated with a higher likelihood of receiving a custodial sentence for robbery (adult) and all types of theft. When primary factors were accounted for, male gender was associated with a higher likelihood of custody for robbery (adult), receiving stolen goods and theft from shops and stalls. For example, compared to female offenders, the odds of a custodial sentence for robbery were 3.1 times greater for men when a range of primary factors were accounted for, such as carer responsibilities, seriousness of the offence and previous convictions. Once a range of other upward and downward factors were accounted for in the analysis, including those that may be more likely to be present among men (e.g. robbery data showed that 'use of a weapon' and 'degree of force or violence' was more prevalent among men), the strength of that effect decreased for those three offences. Controlling for downward and upward factors, gender was a significant predictor of immediate custody in all theft offences as

well. There was no difference in the likelihood of receiving immediate custody between male and female offenders for harassment offences.

The association between gender and the length of sentence was less consistent. Not accounting for any differences between genders, males on average received longer sentences in both robbery samples (adult and children and young people) and harassment offences than women. Controlling for primary factors that could explain differences between genders, male gender remained associated with a longer custodial sentence for robbery (adult), receiving stolen goods, and harassment, but this effect was not strong. After accounting for upward and downward factors, gender was associated with the length of custodial sentences only for robbery (adult) cases; the strength of this association was even lower.

These findings suggest that while there might be some evidence of disparate treatment of male and female offenders, gender was a more salient factor in receiving custody than in receiving a longer custodial sentence. Even so, these effects were not consistent across all offences analysed. Furthermore, while it is true that the seriousness of the offence, previous convictions, and the carer status explain some of the variation in sentencing outcomes of men and women, the differences remain unaccounted for, even after a whole range of factors were considered. It is possible that other, unmeasured, factors influence sentencers' decisions, for example, the perception of 'dangerousness' of the offender or the victim's gender (Curry, Lee, and Rodriguez, 2004; Davidson and Rosky, 2015).

In terms of the association between the carer status and sentencing outcomes, regardless of gender, the analysis found that for robbery (adult) and all theft offences combined, those with the 'is main carer/has responsibilities' status were on average given shorter sentences than those without, and carers were less likely to receive immediate custody than those where this factor was not considered. Controlling for upward and downward factors, the size of the odds of immediate custody for carers was around two fifths the size of (or 60 per cent lower than) the odds for those without the carer status present for robbery (adult), receiving stolen goods, and theft from the person, and one half the size for theft in breach of trust. The 'main carer/has responsibility' factor was associated with a shorter custodial sentence for robbery (adult), but not for any type of theft. This finding also applied regardless of gender. Carer status for harassment and robbery committed by children and young people was not analysed because the number of offenders with that factor ticked was too low.

The research also explored whether specific upward or downward factors have a differential association with sentencing of male and female offenders; however, no evidence of disparity was found in this context. For example, there was no evidence that committing an offence on bail or licence was associated with a higher likelihood of immediate custody for men compared to women who committed an offence on bail or licence. The data also did not support the co-production partners' claim that women who are carers might receive longer sentences (as sentencers might think "she should have known better") or that men are disadvantaged in sentencing because they are less likely to be main carers (in the robbery (adult) sample, three per cent of men and ten per cent of women had the carer mitigating factor ticked).

Recommendations

Taking all results into consideration, the findings show that to some extent, women were treated more leniently for certain offences. These findings contradict some of the co-production partners' perception that women could be treated more harshly by sentencers because of their gender and the concept of double deviance. A possible explanation of this mismatch could be that sentencers do take equity for women into consideration. Indeed, some sentencers in co-production meetings recognised structural and other inequalities that are likely to affect women in general (poverty, abuse, mental health issues). There could be a belief among judges that sentencing can be used to remedy some of the inequalities. However, equity for women does not exclude the possibility of intersectional inequalities, experienced, for example, by Black and Asian men.

As a result of this it is recommended that:

Recommendation 11: The Council considers further exploration of sentencers' attitudes about female offenders to understand the role their perception of equity has in sentencing.

Specifically, further research could examine whether the leniency is applied equally to all women or selectively, and whether the factors such as the perception of blameworthiness, gender roles, and of the paternalistic role of the court influence sentencing of women (see, for example, Steffensmeier, Kramer and Streifel, 1993).

4.6   Race/ethnicity

This section explores race-related EDI issues in the sampled guidelines. While the previous sections might have touched on some of these issues, here, there is also a focus on a widely discussed topic: racial inequality and guilty plea. Following that, a more extensive analysis is provided based on CCSS data analysis. When discussing the results of CCSS data analysis the term 'ethnicity' is used; however, 'race' and 'ethnicity' may be used interchangeably in the discussion of other results, depending on the context and co-production partners' comments. For example, 'race' is retained in the discussion of racial disparities or inequality or where the findings are interpreted in the context of the Equality Act 2010, but 'ethnicity' is used when co-production partners used this term or when discussing the results of the CCSS data analysis.

Co-production and text analysis

In the discussion about upward and downward factors, some of the race-related issues highlighted by co-production partners were covered. For example, co-production partners discussed how factors such as gang membership, carer status, addressing addiction or offending behaviour, expression of remorse, and mental disorder and/or learning disabilities can have a disparate effect on offenders from ethnic minorities. Interestingly, they did not mention guilty plea until the research team brought up this issue and highlighted existing research (for example, Testa and Johnson, 2020) which suggests that offenders from ethnic minority groups are less likely to plead guilty. Sentencers did not rebut this research finding, but they generally believed that although people from ethnic minority groups are less likely to plead guilty due to not trusting the system, when they do enter a plea, the guilty plea reduction applies to them equally. Most sentencers think that it is the offenders who have no legal representation who are adversely affected here, not

necessarily offenders from ethnic minority groups. This argument was supported by defence lawyers.

The discussion was then pushed further, by asking whether offenders from ethnic minority groups who have pleaded guilty late, potentially due to being discriminated against or not trusting the system, are less likely to receive a higher reduction. Sentencers responded that they will evaluate the reason for a late guilty plea in that case. If they think the reason is excusable, then they will take this into account and allow a larger reduction.

Relating the discussion to the text of sentencing guidelines, two provisions are worth a mention here. First, the following is included in the Council's guilty plea guideline:

> Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done, a reduction of one-third **should**[49] still be made.

Similarly, section 5.16 of the Sentencing children and young people guideline provides that:

> Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the child or young person's ability to understand what was alleged, or otherwise made it unreasonable to expect the child or young person to indicate a guilty plea sooner than was done, a reduction of one-third **should**[50] still be made.

It is worth noting that both provisions use the word 'should', which indicates a strong command for sentencers. If they find reasonable explanations for the late guilty plea, they should apply the one-third reduction. This is not exactly a discretionary power. From this perspective, the Council is quite proactive in addressing potential disparities.

CCSS data analysis

In the analysis of robbery (adult) cases, White, Black and Asian ethnicity was analysed, controlling for other categories combined ('Other' ethnicity and 'Mixed').[51] However, due to a lower number of Asian ethnicity cases for all types of theft, harassment and robbery (children and young people) cases, Asian ethnicity was combined with 'Other' and 'Mixed' in those analyses. Comparing ethnic groups without accounting for differences between them, offenders of Black and Asian ethnicity were found, on average, to be less likely to receive immediate custody than White offenders for robbery (adult) offences, but no significant differences between White and Black offenders were found for other offences, as can be seen in Table 10.

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[49] Emphasis added by the authors.
[50] Emphasis added by the authors.
[51] While the focus of the robbery (adult) CCSS analysis was on White, Black and Asian ethnicity, offenders of 'Other' and 'Mixed' ethnicity were retained in the analysis and treated as a single group.

Table 10. The relationship between ethnicity and sentencing

Factors controlled for	Likelihood of immediate custody	Length of immediate custody
Group comparison	Offenders of White ethnicity were more likely to receive custody for robbery (adult) offences than Black or Asian offenders.	Black offenders received a shorter sentence than White offenders, for receiving stolen goods.
Controlling for primary factors only	Black offenders were less likely to receive a custodial sentence for robbery (adult) than White offenders (0.77).	No significant difference among key ethnic groups.
Controlling for primary and upward and downward factors	Black offenders were less likely to receive a custodial sentence for robbery (adult) than White offenders (0.66).	Asian offenders received a shorter custodial sentence for robbery (adult) compared to White offenders (-0.02).

Notes: The reported results are significant at the level of $p<0.05$. Primary factors included age, ethnicity, 'physical or mental illness', 'primary/sole carer' status, coming from a 'difficult/deprived background', seriousness of the offence, previous convictions, and guilty plea or guilty plea reduction. Effect sizes are presented for the regression analysis when controlling for factors, but this would not be appropriate for the group comparison.

Controlling for primary factors, Black offenders were less likely to receive a custodial sentence for robbery (adult) than White offenders. Specifically, the size of the odds of immediate custody for Black offenders was about three quarters the size of the odds for White offenders.[52] After adding upward and downward factors, the relationship remains significant. However, given that this finding was present in only one offence out of the seven explored, this is not considered to be strong evidence of disparity.

In terms of the length of sentence, on average, and not accounting for any differences in cases, Black offenders received shorter sentences than White offenders, but only for receiving stolen goods. The only other case where ethnicity was associated with the length of sentence was robbery (adult): when accounting for upward and downward factors, as well as primary factors, Asian ethnicity becomes associated with a shorter custodial sentence compared to White ethnicity. It was not, however, a very strong association. Again, this is not considered to be evidence of disparity.

With regards to the disparate effect of upward and downward factors on different ethnic groups, contrary to co-production partners' suggestions, the data did not provide evidence that any factor had a differential impact on sentencing outcomes of different ethnic groups. However, other research has found some evidence of disparity when examining different offences. For example, Isaac (2020), found an association between an offender's ethnicity (and sex) and the sentence imposed for drug-related offences. Roberts and Bild (2021) also found differences in the expected custodial sentence across ethnic groups, but they acknowledged that this varies depending on the type of offence (e.g. the variation across

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[52] Note that in the regression analysis, White ethnicity was used as a reference category. This means that the effect of Black and Asian ethnicity on sentencing is discussed in terms of how it compares to the effect of White ethnicity.

ethnic groups are larger for violent offences). In addition to offence type, differences in sentencing outcomes across a range of studies could be explained by the methodology and ways in which different studies measure ethnicity (Roberts and Bild, 2021).

Furthermore, a study by Hopkins, Uhrig and Colahan (2016) found an association between ethnicity and the odds of immediate custody. According to this study, under similar criminal circumstances the odds of imprisonment for offenders from self-reported Black, Asian, and Chinese or other backgrounds were higher than for offenders from self-reported White backgrounds, although the effect size of ethnicity variables was smaller than presumed. No effect was observed for offenders from a self-reported 'Mixed' background.

<u>Recommendation</u>

Overall, based on the CCSS data analysis on the sampled guidelines, there was no strong nor consistent evidence of sentencing disparities for different ethnic groups, either directly, or through the impact of upward or downward factors. The CCSS data analysis does not reflect co-production partners' perceptions.

However, this does not mean that disparity does not exist in other settings or for other offences. It is worth re-emphasising the point that the data are more than seven years old and that the co-production partners' comments reflect their experiences today. Therefore:

Recommendation 12: For stronger conclusions about racial or ethnic disparities, data that oversamples ethnic minority groups should be collected, to ensure conclusions about ethnic minority groups are robust.

4.7   Age

In this section, age-related EDI issues are considered. The Sentencing children and young people guideline is a core reference point in the discussion of younger offenders; however, other guidelines were considered with respect to older offenders.

<u>Co-production and text analysis</u>

Defence lawyers praised the Sentencing children and young people guideline for considering both the "capability" and the "vulnerability" of young offenders. Civil society partners expressed similar opinions. Sentencers also commended the "more individualistic approach" adopted by the overarching guideline, although some of them argued that 1) the overarching guideline is too long and not prescriptive enough, and that it is not suitable for use in an open court where time is a concern; and 2) the primary goal of the guideline is not clear or consistent enough. Children's welfare and the prevention of reoffending are both emphasised, but no guidance is provided on how to prioritise when necessary.

The main concern of co-production partners lies with the differences between 'emotional and developmental age' and 'chronological age'. These concepts are included in the overarching guideline. Sentencers are urged to take the discrepancy between a child or young person's 'emotional and developmental age' and 'chronological age' into consideration. Although sentencers argued that they are well aware of the differences, some civil society partners were concerned that certain young offenders are treated as adults by criminal justice agencies because of their physical appearance ('adultification'). Defence lawyers raised a different but related issue for young adults. They argued that

young offenders who reached the age of 18 might not be mentally matured, and they might still face similar challenges as they did at the age of 17. According to them, this problem is particularly acute for males, looked-after children, and those leaving care. They do not find removing the protective umbrella from these vulnerable young offenders as soon as they reach 18 a sensible approach. Vulnerability was also discussed in the context of elderly offenders as well, with a few co-production partners mentioning that the vulnerability and special needs of elderly offenders should be considered more.

Sentencers were consulted for their opinions on these concerns. They argued that because age is still a downward factor for young adults, they can use discretionary power to reduce the sentence even if the offender is no longer covered by the overarching guideline. One judge commented, "my sense is that we all now reduce sentences on a sliding scale into the early 20s – that being said it is neither precise nor consistent." There is also an expanded explanation for 'age and/or lack of maturity' in most guidelines and it is worth noting that the Council has an action included in its 2021-2026 strategic plan that is related to sentencing young adults.[53] For these reasons, this report does not probe deeply into this issue.

CCSS data analysis

On average and not accounting for differences across offenders of different ages, the analysis did not reveal a strong relationship between age and sentencing outcomes, as can be seen in Table 11, below. Controlling for primary factors (which included all levels of 'previous convictions')[54] as well as upward and downward factors, older age was significant for custody in only two offences: it was associated with higher odds of custody for robbery (adult) but lower odds for theft from shops and stalls. Specifically, with each additional year of age, the odds of immediate custody for robbery were 1.04 times greater.[55] With each additional year of age, the odds of immediate custody for theft from shops and stalls were 0.98 times lower.[56] Age was not associated with custody for any other offence. The impact of age on sentencing children and young people for robbery was not analysed because age was not provided due to disclosure issues.

In terms of the length of custody, after accounting for primary and upward and downward factors – which includes previous convictions – it was found that the older the age of the offender, the longer the sentence, and that was true for robbery and all four theft offences. Overall, the findings suggest that age has a minimal and inconsistent association with the likelihood of a custodial sentence but has a much stronger association with the length of sentence.

Whether certain upward factors have a differential impact on different age groups was also explored, and unlike co-production partners' suggestions, there was no evidence of such impact.

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[53] Under strategic objective 3: "Consider whether separate guidance is needed for female offenders or young adults by conducting an evaluation of the relevant expanded explanations and, if so, add this to our workplan."

[54] 'none', 'one to three', 'four to nine', '10 and more'.

[55] This finding could also be interpreted as a four per cent increase in the odds of custody with each additional year of age of the offender.

[56] This result could also be understood as a two per cent decrease in the odds of custody for each additional year of age of the offender.

Table 11. The relationship between age and sentencing

Factors controlled for	Likelihood of immediate custody	Length of immediate custody
Average age of the sample	Weak relationship between age and custody.	Weak relationship between age and length of custody.
Controlling for primary factors only	Older offenders were more likely to receive a custodial sentence for robbery (adult) offences (1.05). Older offenders were less likely to receive immediate custody for theft from shops and stalls (0.98).	Older offenders received longer sentences for robbery (adult) offences (0.13), receiving stolen goods (0.14), theft from the person (0.17), theft from shops and stalls (0.11), and theft in breach of trust (0.14).
Controlling for primary and upward and downward factors	Older offenders were more likely to receive a custodial sentence for robbery (adult) offences (1.04). Older offenders were less likely to receive immediate custody for theft from shops and stalls (0.98).	Older offenders received longer sentences for robbery (adult) offences (0.11), receiving stolen goods (0.12), theft from the person (0.13), theft from shops and stalls (0.10), and theft in breach of trust (0.13).

Notes: The reported results are significant at the level of $p<0.05$. In addition to age, primary factors included ethnicity, 'physical or mental illness', 'primary/sole carer' status, coming from a 'difficult/deprived background', seriousness of the offence, previous convictions, and guilty plea or guilty plea reduction. Effect sizes are presented for the regression analysis when controlling for factors, but this would not be appropriate for the group comparison.

Although age was less important for receiving immediate custody, the data showed that when offenders do receive custody, young offenders were more likely to receive a shorter sentence, which seems to be in line with the co-production partners' assertion that sentencing of younger offenders is more welfare-focused. On the other hand, longer sentences for older offenders could also suggest bias against older offenders. This is also supported by the finding that, all else being equal, the probability of custody for robbery (adult) for an offender aged 68 is 11 per cent higher than for an 18-year-old.

Additionally, the analysis found that age as a downward factor was not used extensively for offenders older than 60.[57] For offenders 60 years or older, in almost 40 per cent of the theft cases, 45 per cent of robbery cases, and 87 per cent of harassment cases, age as a downward factor was not applied. It is important to note, however, that the CCSS data analysed here (in relation to robbery and theft offences) measured 'age' as a downward factor, not 'age and/or lack of maturity'; the expanded explanations in sentencing guidelines discuss whether age and maturity have an impact on the offender's culpability rather than the effect of age per se.

Recommendations

The research team, therefore, suggests that there could be:

Recommendation 13: More research exploring any potential bias against older offenders.

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[57] A cut-off of 60 years was used as there were only a few cases at the upper end of the age range (for example, only 30 cases in the robbery (adult) dataset were offenders aged 55 years or older).

Recommendation 14: More extensive use of 'age and/or lack of maturity' as a downward factor for older offenders, which was endorsed by some co-production partners' perceptions.

More extensive use of this factor is also supported by life course theories and the 'age-crime curve' (Sampson and Laub, 2005), which shows that the likelihood of offending for somebody older than 60 is very low (Farrington, 1986).

Finally, given the findings in the co-production meetings, the research team recommend that:

Recommendation 15: The Council considers ways in which more guidance can be issued for sentencing young adults to improve consistency and precision in sentence reduction for young adults.

4.8   Other equality, diversity and inclusion (EDI) issues

Co-production findings

Other EDI factors which count as protected characteristics under the Equality Act 2010 are gender reassignment, marriage and civil partnership, disability, pregnancy and maternity, and religion or belief. Dynamic spatiality as a relevant EDI factor was also raised by co-production partners from all three groups, i.e. sentencers, defence lawyers and civil society organisations. Dynamic spatiality is a way to characterise the frequent change in residential space of traveller groups that adopt nomadism or semi-nomadism as a lifestyle, specifically referring to the caravan dwelling households of gypsies and Irish travellers. It is used in this context to denote negation of a territorial conception of residence.

There was consensus between civil society partners and sentencers that travellers (as a group with unique spatial needs) are an ignored group, and they tend to be disadvantaged in sentencing. This viewpoint was endorsed by some defence lawyers. The civil society partners and sentencers felt that their unique needs can be met by taking it into account when 'no shows' at a hearing are flagged up as an upward factor. For example, they might not have turned up in court due to a need to shift their caravan at short notice, or because they didn't receive the summons in the post due to frequent changes of location.

With respect to pregnancy and maternity, decoupling it from 'medical conditions' is necessary as pregnancy and maternity pose very specific challenges for the criminal justice system, according to a couple of co-production partners. As it is a named Equality Act 2010 category, thus establishing the recognised potential for discrimination to occur for individuals going through pregnancy and maternity, it needs to feature in the sentencing guidelines as a distinct item where medical conditions are mentioned. It is, however, mentioned in the expanded explanation for sole or primary carer.

In relation to issues of socio-economic background, the co-production partners also made comments about offenders from deprived backgrounds. For example, they felt they could be 'lower hanging fruits' for the criminal justice system, and therefore be at a disadvantage because they are more likely to have the aggravating boxes ticked and the mitigating boxes unticked. For instance, an offender with fewer financial resources might find it harder to devote time to charity work and so be less able to draw on mitigation relating to their 'good character'. They might also find it harder to comply with supervision

requirements compared to offenders with more personal resources, and therefore be seen as 'non-compliant', which is an aggravating factor. However, it is worth noting that these perceptions need to be explored in further research.

CCSS data analysis

The CCSS analysis found that robbery (adult) and theft offenders with 'physical or mental illness' on average served shorter custodial sentences and they were less likely to receive immediate custody, not controlling for other factors. In the analysis of harassment offences, instead of a 'physical or mental illness' variable, one measure of mental disorder and/or learning disability was used, which included indicators of 'serious medical conditions', 'mental disorder/learning disability where linked to the commission of the offence', and 'mental disorder/learning disability where not linked to the commission of the offence'. The three variables were combined (and referred to as mental disorder and/or learning disabilities) because the number of cases in each was low. It was found that there was no significant difference in the length of the sentence for harassment offences between those with a mental disorder and/or learning disability and those without, but those with a mental disorder and/or learning disability were less likely to get immediate custody, not controlling for any differences.

After controlling for a range of factors including upward and downward factors, for robbery (adult) offences and all types of theft and harassment offences, 'physical or mental illness' or a mental disorder and/or learning disability variables were associated with lower odds of a custodial sentence. For example, for those with this factor, the odds of immediate custody for robbery were about one fifth the size of (or 80 per cent lower than) the odds for those without. The odds of custody for receiving stolen goods and harassment were both one third the size of the odds in cases where this factor was not present. However, after controlling for a range of factors including upward and downward factors, 'physical or mental illness' was associated with a shorter custodial sentence for robbery (adult) offences, but not for any type of theft or harassment offence.

The research also explored whether certain factors have a disproportionate impact on sentencing outcomes for people with 'physical or mental illness': no evidence was found to support this. Specifically, the research explored the impact of the upward factor 'offender was on licence/bail' on the adult robbery CCSS form, and theft offenders with 'physical or mental illness'. The research also did not find a disproportionate impact of a mental disorder and/or learning disability on sentencing outcomes for harassment for ethnic minority offenders.[58]

The field included on CCSS forms for the downward factor 'difficult/deprived background' was used as an indicator of socio-economic background. This EDI factor was not analysed for harassment because the dataset did not include this measure.

For robbery (adult) and theft overall, those where the 'difficult/deprived background' factor was present, on average, received shorter sentences and were less likely to receive immediate custody. However, after accounting for upward and downward factors,

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[58] When the association of different factors with sentencing for offenders with 'physical or mental illness' was explored, not all relationships were explored across all offences. The choice of relationships was driven by text analysis and co-production results. For example, the research explored whether 'offence committed on bail/licence' is disproportionately associated with people with 'physical or mental illness' for theft and robbery, as co-production partners raised that issue in the context of these offences.

'difficult/deprived background' was no longer associated with the length of sentence nor with a lower likelihood of receiving a custodial sentence for these offences. There was no significant difference in sentencing outcomes for robbery between children and young people with the 'difficult/deprived background' factor and those without.

Recommendations

The research team recommend that the Sentencing Council considers:

Recommendation 16: A downward factor based on dynamic spatiality, giving allowance for lateness and uncertainty in response and presence.

Recommendation 17: Guidance to increase the use of the notion of 'difficult/deprived background' for robbery offences for children and young people, by adding it as a downward factor.

While the youth courts are praised for their success in considering the individual as well as the offence, there is more that can be done for young people and children with difficult or deprived backgrounds.

Recommendation 18: Specifying pregnancy and maternity as a discrete phrase, where medical conditions are referred to, in the guidelines.

4.9   Intersectionality

Co-production and text analysis

While issues of intersectionality featured frequently in co-production meetings, text analysis found no use of the term in the guidelines. The term intersectionality highlights the 'multidimensionality' of marginalised subjects' lived experiences (Crenshaw, 1989,139: Nash, 2008, 2). Multidimensionality can be understood as the co-existence of two or more protected characteristics in the Equality Act 2010, and/or other factors of marginalisation, such as economic deprivation.

Co-production partners also commented on 'good character and/or exemplary conduct'. They mentioned that this factor is more likely to be applied to wealthier offenders, because the example given in the guideline is 'charitable work'. To avoid disadvantaging people from less affluent backgrounds, the Council might want to give more inclusive examples of good character.

CCSS data analysis

In order to analyse data for findings on intersectionality, a large sample size is important, because exploring intersectionality usually means analysing smaller subsamples (e.g. Black women), and the smaller the sample, the greater the risk of sampling error and of falsely concluding that there are no differences between the groups.

Due to the small sample sizes in this research limited analysis was conducted. Where possible, the analysis explored how different characteristics intersected and whether there were any differences in how they affected sentencing outcomes, controlling for a range of factors, including upward and downward factors.

Intersectionality was only analysed for adult robbery offenders because this was the largest sample. Overall, for adult robbery, about 81 per cent of all women in the sample were White, 11 per cent were Black, and 3 per cent were Asian. About 70 per cent of all men in the sample were White, 16 per cent were Black, and 8 per cent were Asian. 'Difficult/deprived background' was more frequently ticked on the CCSS form for female offenders compared to male offenders, as well as White offenders compared to Black and Asian ethnic groups.

No difference in the length of custodial sentence or the probability of receiving a custodial sentence between men and women of different ethnic groups was found. There was also no difference in sentencing outcomes between men and women relative to their socio-economic background ('difficult/deprived background'). Finally, there was no difference in sentencing outcomes for offenders of different ethnic groups irrespective of their socio-economic background.

Recommendations

The research team recommend that the Sentencing Council considers:

Recommendation 19: Collecting a larger volume of data than is currently available in order to analyse intersectionality effectively.

Recommendation 20: Providing more inclusive examples of good character and/or exemplary conduct, alongside existing examples.

4.10 Broader work of the Sentencing Council

This section discusses findings on the broader work of the Sentencing Council, namely: accessibility and usability of the sentencing guidelines and their impact on the process of sentencing; the guideline development process; and the achievement of EDI ambitions embedded in the strategic objectives of the Sentencing Council.

Co-production findings

Based on findings from this project, a key focus was on the electronic guidelines as well as the expanded explanations that provide guidance on how to apply the different factors in the guidelines. In addition, discussions on the Equal Treatment Bench Book (ETBB) are presented in this section. The findings from the discussions can be grouped into five areas, as discussed below. This is followed by the discussion on the guideline development process of the Sentencing Council.

1. Electronic guidelines are difficult to use

In previous years, access to guidelines was primarily through a paper copy, but this has now changed. According to the sentencers, the switch to electronic copy makes the guidelines harder to use. Not all information is visible at the same time, and multiple clicks or drop downs are necessary for seeing the content. These problems embedded in electronic copy were compounded when online activity increased during the pandemic (2020-2021). Numerous 'windows' were open on the screen because of virtual trials. Therefore, virtual trials make this problem worse.

2. A better way to increase use of expanded explanations is through 'lived experience' education

The issue of effectively using the expanded explanations is not just at the level of accessibility but goes much deeper. It is about sentencers' awareness about the lived experience that the expanded explanations try to capture and elicit. Lived experience is defined as "the experiences of people on whom a social issue or combination of issues has had a direct impact." (Sandhu, 2017, 5) Phenomenology suggests the benefits of understanding lived experience as being the strengthening of the social purpose of organisations (Sandhu, 2016; 2017). This was a point originally made by civil society partners, concurred with by some sentencers. Therefore, a better way to increase use of expanded explanations is through 'lived experience' education. A final, and a linked point made was on effective communication of their use. The guidelines and the expanded explanations themselves are important; however co-production partners felt that what really matters is how sentencers explain and justify their use or non-use to offenders.

3. Lack of familiarity with expanded explanations by sentencers and defence lawyers

Neither the sentencers nor the defence lawyers in the discussions were familiar with the content of expanded explanations. Some of them were not completely familiar with certain guidelines. The general consensus was that there does not seem to be a need to refer to the expanded explanations, hence their resort to expanded explanations is minimal to non-existent.

Sentencers usually rely on the Probation Service to get information about personal mitigating factors, but they felt that the probation officers are not necessarily familiar with the sentencing guidelines and/or expanded explanations. The Probation Service was not independently involved in this research, and therefore, the above comment needs to be understood as reported by the sentencers.

4. Expanded explanations are not widely known amongst civil society organisations

Sometimes the representatives of civil society were not aware that the issues they are worried about are already addressed in sentencing guidelines and expanded explanations. The same then can be inferred about members of the public.

5. ETBB as an exemplar for equal treatment guidance

Several prompted and unprompted references to the ETBB were made by sentencers during the co-production sessions. It was also sometimes referred to by civil society representatives. Several sentencers used it on a regular basis, while also familiarising themselves with the contents of the full volume, whereas other sentencers used only some sections of it, as and when the situation warranted. Still others did not recall using it much at all. Although not all sentencers use the ETBB, those who have consulted it speak highly of its practicality and comprehensiveness on the subject of fair treatment and the need to avoid disparity amongst different individuals.

The guideline development process

As mentioned in the Introduction to this report, civil society organisations were specifically consulted on the guideline development process. The following iterative process template

(Figure 3) was used in the discussions, which includes: making the case for developing the guideline, developing the guideline, issuing the guideline for public consultation, implementing the definitive guideline, monitoring and assessing the guideline, and feedback. This has since been updated (see Figure 1).

Figure 3. Guideline development process
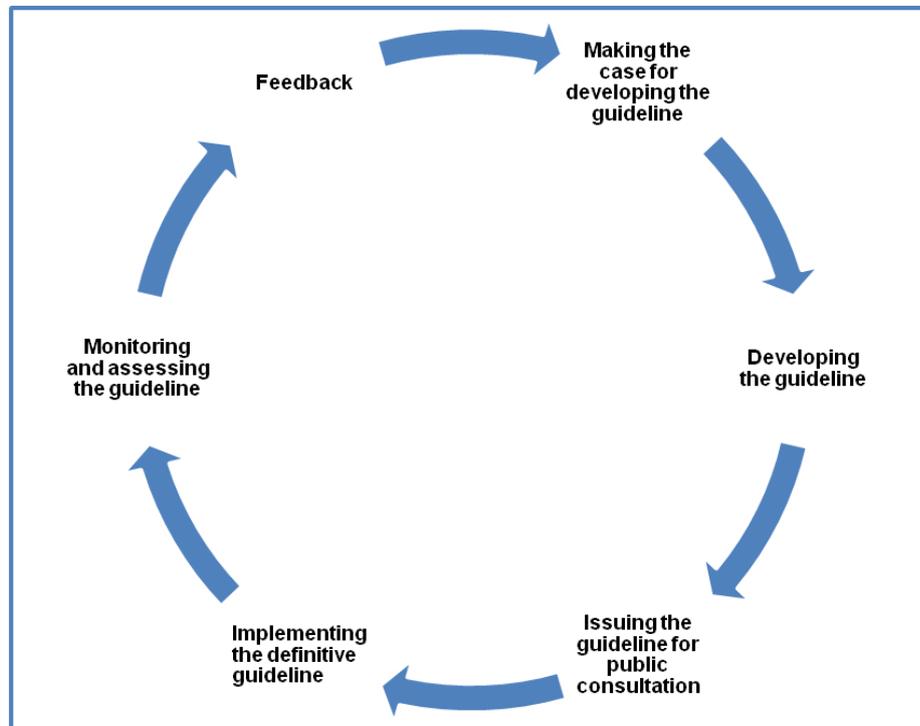
They raised the following points:

- Civil society co-production partners were keen to understand the levers for guideline development, which showed a general appetite to get more involved in the process at various stages. They were interested in who initiated the review of guidelines, the timing, and on what basis. The stages where particular interest was shown were in 'developing the guideline', 'monitoring and assessing the guideline', and 'feedback'. They felt that EDI concerns were not manifested clearly as levers for guideline development, and therefore felt there was a need to develop standards of evaluation for EDI in the guideline development process. The partners wanted to know what criteria were used in guideline evaluation, as well as the standards used for assessing guideline effectiveness (generally and for EDI specifically).

- Increased involvement in developing the guidelines was desired by those who work in EDI areas with a specific focus, such as pregnancy and maternity. Public consultation calls do not reach all of the civil society organisations invited to the co-production sessions, and these include several small organisations. Lack of resources and disruption caused by the pandemic from 2020 onwards has disrupted civil society organisations working in criminal justice issues, and therefore engagement with them on EDI issues in sentencing should be more proactive.

- A number of organisations would welcome one-to-one engagement with the Sentencing Council in their work, in order that it better understands lived

experience. The co-production partners felt that the Sentencing Council's strategic objectives, which are long-term goals, will be best served by more direct engagement with EDI lived experience. In the co-production meetings, lived experience training was a theme that was stressed by both sentencers and civil society organisations. For example, one judge said they used to give young offenders Detention and Training Orders without thinking too much about it. But after seeing what the custodial experience might have done to young offenders and how many of them immediately reoffended after release, the judge changed to the intensive community supervision route. Civil society organisations mentioned similar examples. Drawing on these insights, the research team suggests that it might not be enough to merely stress 'cultural differences' and 'racial equality' on paper. It is better to show sentencers what they mean in real life for real people. In addition, the Sentencing Council should start a wider ranging consultation on EDI factors in sentencing that builds on the discussions included in this research. It can do this in stages, starting with addressing 'neglected' EDI factors in sentencing, such as pregnancy and maternity.

- In the meeting with civil society organisations, some representatives said that they don't know (or believe) that judges actually follow the stepped approach in sentencing. The research team can only infer lower understanding among the general public: the Council's redevelopment of the 'You be the Judge' online sentencing tool using a scenario-based approach, which they can direct audiences to, may help with better understanding the process of application of the stepped approach. Since July 2022, sentencing remarks from Crown Court hearings have been filmed for broadcast. The Council is also already directing website visitors to these videos, which illustrate very clearly the role of guidelines in sentencing. Achieving transparency is crucial for the good reputation of the Council and for improving confidence in the criminal justice system. The public confidence in sentencing strand of work should be more specifically designed for certain groups, such as ethnic minority groups: for example, the 2022 survey on public confidence (Archer, Butler, Avukatu, and Williams, 2022) found that adults from Asian ethnic backgrounds were more likely to say that they were confident in the effectiveness, and fairness, of the criminal justice system compared with adults from other ethnic backgrounds (White, Black and Mixed ethnicity).

Recommendations

Based on these findings, the research team recommend that the Sentencing Council:

Recommendation 21: Considers changing the format of the display of expanded explanations on the webpage, for example by making them automatically displayed and continuous, below the factor.

Recommendation 22: Might consider a more integrated approach to developing sentencing guidelines. Sentencers are not the only participants of the sentencing process, and so the Council should assess if there are better ways to communicate, engage and collaborate with the Probation Service, Youth Offending Teams, prosecutors and defence lawyers, all of whom participate and contribute to the decision making in sentencing.

Recommendation 23: Might want to increase the use of real-life case studies in public communication and education to illustrate how guidelines are interpreted and applied at court, and how they shape the outcome of sentencing through an adversarial procedure.

The Council could provide a fuller picture, so that offenders (especially those with protected characteristics), victims (especially those with protected characteristics), their families, relevant non-government organisations (NGOs) and professionals can better relate their own experience to the guidelines.

Recommendation 24: Considers combining lived experience training with guideline training (it should however be noted that judicial training falls outside the Council's realm of responsibility).

Recommendation 25: Improve the transparency of the guideline development process, clarify the standards used for evaluating existing guidelines, and communicate these standards more effectively to stakeholders, NGOs and professional groups.

This could include clarifying what the criteria are for 'effective' guidelines. How does the Council determine whether a guideline is 'effective' from the EDI perspective? These standards should be communicated more clearly to relevant civil society organisations, NGOs, minority groups, and members of the public. By doing so, greater transparency can be achieved, which is crucial for the good reputation of the Council and for improving confidence in the criminal justice system.

Recommendation 26: Further expands stakeholder engagement, through more diverse means, including more targeted consulting, one-to-one meetings or targeted focus groups.

Recommendation 27: Considers more efficient ways of directing sentencers to the ETBB, which gives sentencers more specific guidance on how to ensure 'fair treatment' and avoid 'disparity' of outcomes for different groups.

5. Conclusion

This research aimed to identify and analyse any potential for the Council's work to cause disparity in sentencing outcomes across demographic groups and to make recommendations to the Council. It focused on three groups of offence specific guidelines currently in operation in England and Wales – robbery, theft (theft from the person, theft from a shop or stall, theft in breach of trust, and handling stolen goods), and harassment and stalking (fear of violence) – as well as the Sentencing children and young people guideline. It explored aspects such as the language, factors and explanatory text used in selected guidelines, as well as their structure, the guideline development processes, the relationship with stakeholders, and communications, and considered how these aspects might be strengthened.

The work has culminated in a set of 27 recommendations for the Council to consider, ranging from options in relation to the content of the guidelines chosen in this research, to the broader work of the Council. This should enable the Council to progress in its strategic objective to explore and consider issues of equality and diversity relevant to its work and take any necessary action in response within its remit.

6.   Summary of recommendations

Below is a summary of the recommendations for consideration by the Council:

Stepped approach:

1. Add an extra step to the existing approach in adult guidelines requiring sentencers to carry out a final review of the sentence, with mitigating factors and the offender's personal circumstances in mind.

Upward factors:

2. Re-evaluate the impact of group affiliation as a sentencing factor in robbery cases by using more recent data to address the gap between practitioners' perceptions and the findings of CCSS data analysis.

3. Commission a qualitative study on the application of upward factors in theft cases to address potential inconsistencies.

4. Determine how to make the expanded explanations more visible to sentencers, defence lawyers and the public to address a lack of awareness highlighted in the co-production meetings.

Downward factors:

5. Extend the expanded explanation for 'remorse', and include 'learning disability and communication difficulties' as well as cultural differences as influential factors in the evaluation of remorse.

6. Conduct further research into why some of the downward factors do not seem to have an impact on sentencing outcomes in robbery cases involving children and young people.

7. Commission a qualitative study on the lived experience of offenders with mental health issues and chronic addictions to better understand how sentencing can be used to enable the desistance of offenders with complicated needs.

Offence specific findings:

8. Include 'in work or training', 'difficult/deprived backgrounds' and 'loss of job or reputation' in the mitigation lists of theft and robbery guidelines, and 'offender experiencing **exceptional** financial hardship' in more theft guidelines.

9. Explore the findings in relation to the impact of 'victim-related' upward factors (significant in both the robbery (adult) and theft offences in the decision to imprison) from an EDI perspective. Explore the findings in relation to the impact of 'victim-related' upward factors from an EDI perspective.

10. Obtain and analyse more recent data, using a larger sample of offenders from ethnic minority backgrounds, to explore the impact of 'use of weapon' and 'wearing a disguise' on sentencing in robbery cases. A larger sample of ethnic minority offenders is also needed to

test the hypotheses that these two upward factors affect children and young people from ethnic minority groups more than others.

Sex/gender:

11. Conduct further exploration of sentencers' attitudes about female offenders to understand the role that their perception of equity might have in sentencing.

Race/ethnicity:

12. Obtain and analyse recent data that oversamples offenders from ethnic minority backgrounds to explore further the disparity between co-production partners' perceptions of racial disparity and the result of regression analysis which concluded that there was no strong nor consistent evidence of sentencing disparities for different ethnic groups in the guidelines explored in this research.

Age:

13. Conduct research exploring any potential bias against older offenders.

14. Encourage use of the 'age and/or lack of maturity' downward factor for older offenders.

15. Consider introducing additional guidance to improve consistency and precision in sentence reduction for young adults.

Other EDI issues:

16. Consider a downward factor based on dynamic spatiality, giving allowance for lateness and uncertainty in response and presence.

17. Encourage the use of the 'difficult/deprived background' downward factor for robbery offences for children and young people.

18. Specify pregnancy and maternity as a discrete phrase, where medical conditions are referred to, in the guidelines.

Intersectionality:

19. Collect a larger volume of data than is currently available in order to analyse for intersectionality effectively.

20. Provide more inclusive examples of 'good character and/or exemplary conduct', alongside existing examples.

Broader work of the Sentencing Council:

21. Change the format of the display of expanded explanations on the webpage by making it automatically displayed and continuous, below the factor.

22. Take a more integrated approach to sentencing guidelines by assessing if there are better ways to communicate, engage and collaborate with the Probation Service, youth

offending teams, prosecutors and defence lawyers, all of whom participate and contribute to the decision making in sentencing.

23. Increase the use of case studies in public communication and education, particularly scenario-based education tools, which show prosecution and defence counsel using the sentencing guidelines, and not just judges applying them.

24. Combine lived experience training with guideline training (it should however be noted that judicial training falls outside the Council's realm of responsibility).

25. Improve the transparency of the guideline development process, clarify the standards used for evaluating existing guidelines, and communicate these standards more effectively to stakeholders, NGOs and professional groups.

26. Expand stakeholder engagement, through more diverse means, beyond consultation.

27. Consider more efficient ways of directing sentencers to the ETBB, which gives sentencers more specific guidance on how to ensure 'fair treatment' and avoid 'disparity' of outcomes for different groups.

Annex A: Glossary and terminology

Age-crime curve: The phenomenon where people commit more crime during adolescence and less crime in adulthood.

Courts Proceedings Database (CPD): administrative data collected by the Ministry of Justice (MoJ) from courts and police forces.

Crown Court Sentencing Survey (CCSS): data collected by the Sentencing Council on sentencing practice in the Crown Court, between 1 October 2010 and 31 March 2015.

Co-production: Multilateral research process where different parties contribute to the production of knowledge and solutions democratically.

Double deviance: The feminist theory arguing that when a woman commits a crime, she violates both the law and the gendered social expectation for a woman.

Downward factors: All factors that might lead to a more lenient sentence.

Dynamic Spatiality: A term used to negate a territorial conception of residence.

Equality, Diversity and Inclusion (EDI): includes protected characteristics as identified by the Equality Act 2010 and other potentially relevant issues such as socio-economic background and primary carer status.

Equal Treatment Bench Book (ETBB): providers sentencers with guidance on how to ensure 'fair treatment' and avoid 'disparity' of outcomes for different groups.

Generic factors: factors that are shared by many different offences, for example remorse and previous convictions.

Lived experience: "The experiences of people on whom a social issue or combination of issues has had a direct impact". (Sandhu, 2017, 5).

Offence specific factors: factors that are specific to one offence or certain types of offences.

Race/ethnicity: The terminology used in the report differs depending on the findings being discussed. For example, the Equality Act 2010 uses the term 'race', while the CCSS data forms collected data on 'ethnicity'.

Regression analysis: statistical method used to explore whether multiple elements are associated with a certain outcome.

Sex/gender: The terminology used in the report differs depending on the findings being discussed. For example, the Equality Act 2010 uses the terms 'sex', while the CCSS data forms collected data on 'gender'.

Text analysis: the examination and analysis of textual data through semantic interpretation and machine learning.

Upward factors: All factors that might lead to a harsher sentence.

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