

# Sentencing Council

**Sentencing Council meeting:** 25 September 2015  
**Paper number:** SC(15)SEP07 – Dangerous Dogs  
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## 1 ISSUE

1.1 This is the first consideration of the guidelines post consultation, and will consider the responses to all the guidelines on the approach to culpability and harm.

1.2 Over two further meetings the Council will also be asked to consider the approach to the aggravating and mitigating factors, sentence levels and finally the coherence of the guidelines as a whole and the response to the consultation paper.

1.3 The timetable is for the guidelines to be signed off by December, and published by the end of the 2015/16 financial year.

## 2 RECOMMENDATION

The Council is asked to agree the following:

- Changes to the culpability factors as discussed **at para 3.6, page 3 onwards**
- Changes to the harm factors, as discussed at **para 3.27 page 9 onwards**

## 3 CONSIDERATION

### *Consultation*

3.1 The Council received 70 responses to the consultation, mainly by hard copy or email, with 28 using the online questionnaire. Some small scale research with sentencers took place to assist in developing the guidelines prior to consultation, no road testing of the guidelines was conducted during the consultation. Three consultation events on the guidelines were held, as below:

- Portsmouth magistrates and legal practitioners, chaired by Sarah Munro
- Worcestershire, Shropshire and Herefordshire magistrates, chaired by Jill Gramann

- Welsh magistrates, chaired by Richard Williams.

3.2 The reaction to the draft guidelines has been positive, the Association of Lawyers for Animal Welfare (ALAW) commented '*ALAW would firstly like to commend the Sentencing Council for the care that has clearly been taken in drafting the new proposed Dangerous Dog Offences Guidelines.*' The Council of HM Circuit Judges stated '*We (therefore) welcome the introduction of guidelines for these new offences that may be unlikely to come frequently before the Crown Court but will raise considerable public concern when they do. We find ourselves in broad agreement with the proposals.*'

3.3 Balanced against this general support for the proposals were comments made by a few attendees at consultation events and a few other organisations who expressed surprise that the Council had decided to completely revise the existing guideline, given the current pressure of work. However, this view was expressed by a very small number of people, compared to the strong support expressed for the revised guideline.

#### *Structure*

3.4 The guideline contains five separate guidelines, the first four are offences causing death, offences causing injury, attacks on assistance dogs and the non-aggravated offence of a dog dangerously out of control, and are all very similar. The fifth guideline is for the offence of the possession, breeding, selling or advertising of a prohibited dog, and is specifically tailored to that offence. The guidelines<sup>1</sup> can be viewed at: <https://www.sentencingcouncil.org.uk/publications/item/dangerous-dog-offences-consultation-2/>.

3.5 There were two general questions asked in the consultation, the first regarded the separate guideline for offences causing death:

Q1. Do you agree that guidance for this offence should be contained within a separate guideline, and not in a combined guideline which includes other offences?

96 per cent of respondents agreed that this offence should be contained within a separate guideline. The second question regarded the separate guideline for offences resulting in injury:

Q16. Do you agree that guidance for this offence should be contained within a

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<sup>1</sup> Hard copies of the guidelines will be available at the Council meeting.

separate guideline, and not in a combined guideline which includes other offences?

93 per cent of respondents agreed that that this offence should be contained within a separate guideline. No other concerns were raised regarding the proposed structure of the guidelines therefore it is recommended that the structure of five separate guidelines is maintained.

#### *Culpability - cross cutting issues*

3.6 For three of the guidelines (offences causing death, offences causing injury and the attack on assistance dogs), the approach consulted on was to assess culpability as high, medium or lesser, and the culpability factors are identical within the three. The culpability levels were developed to reflect offenders in higher culpability, who have acted deliberately and the offence occurs because of an action on their part, to offenders in medium culpability who have been negligent or failed to act in a way which could have prevented an incident, to offenders in lesser culpability who have generally acted responsibly, but nevertheless an unforeseen incident has occurred.

3.7 For two of the guidelines (the non-aggravated offence of no injury caused, and the offence of possessing a prohibited dog) there were two levels proposed, higher and lesser. This was because there was not thought to be the range of offending behaviour within those offences to necessitate three levels of culpability. For the non-aggravated offence, the same higher and lesser culpability levels are used as the first three guidelines, just the medium level is omitted. For the offences of possessing a prohibited dog, specific factors that were present in the existing guideline were used.

3.8 Respondents to the consultation largely supported the approach taken to culpability within the guidelines; a small number of issues were raised regarding the culpability issues across the guidelines, which are discussed below.

3.9 A number of respondents, including the police, some magistrates, HM Circuit Judges, Battersea Dogs Home and legal practitioners, requested that '*dog known to be prohibited*' (included as an aggravating factor in all of the guidelines except the possession of a prohibited dog guideline where it is a high culpability factor) should be moved to high culpability. Most respondents did not specifically articulate why the factor should be moved but it seems that people feel an attack committed by a known prohibited dog makes an offender more culpable, as they should have taken greater care and safety measures than other dog owners.

3.10 Battersea Dogs Home stated that section one of the Dangerous Dogs Act requires all owners of banned breed dogs to apply for their dogs to be exempted legally and certain control measures to be affected, such as muzzling in a public place. If an attack took place and the owner was aware that their dog was a banned breed and had not applied for exemption, or adhered to the required control measures, then they have also contravened this law and should be considered more culpable.

***Question one - Does the Council wish to place 'dog known to be prohibited' in culpability A within the offences of causing death, injury, attack on assistance dogs and the non- aggravated offence?***

3.11 A number of respondents including the police, the Kennel Club, the RSPCA, a barrister and the ALAW questioned the wording of the factor in high culpability of *'dog bred or trained to be aggressive.'* Respondents suggested that it is misleading to suggest a dog can be bred to be aggressive as although some dogs are born with inherited tendencies that might, if not controlled, make aggressive behaviour more likely, it is a dog's upbringing, treatment or training, rather than its heritage at birth, which dictates whether or not a dog will be aggressive and any dog in the wrong hands has the potential to cause harm. The police were also concerned that the guideline should be able to differentiate between dogs who had legitimately been trained to bite such as police dogs, security dogs, or dogs trained for certain sports, and those trained for the purpose of aiding criminality, otherwise they believed there was a risk that the guideline would result in higher sentencing than was intended.

3.12 This factor was developed following early research with Judges, to capture the criminal context in which some dangerous dogs are kept (to enforce certain criminal activities). Respondents suggested a number of ways to reword this factor, such as *'using or attempting to use the dog to attack upon command,' 'dog used in a confrontation or aggressive circumstances,' 'dog bred or trained such that they are more likely to be aggressive,'* and *'dog trained to be aggressive for unlawful purposes.'* If the Council wish this culpability factor to differentiate between dogs trained for lawful purposes, as opposed to unlawful purposes, then the last factor listed would be the most appropriate.

3.13 Alternatively, to avoid unnecessary complications, the existing factor within high culpability of *'dog used as a weapon or to intimidate people'* may be sufficient to capture this criminal context, and may avoid the need to reword the *'dog bred or trained to be aggressive'* factor by removing it.

**Question two- Does the Council wish to reword the factor of ‘Dog bred or trained to be aggressive’ to ‘dog trained to be aggressive for unlawful purposes?’ Or, should this factor be removed as ‘dog used as a weapon or to intimidate people’ may be sufficient within high culpability?**

3.14 The other high culpability factor of ‘*failure to respond to official warnings or to comply with orders concerning the dog*’ was designed to reflect offenders who have ignored court orders regarding the dog, such as requiring it be muzzled etc. This factor as currently worded does not reflect an offender who has ignored court orders regarding themselves, such as an order which banned them for life from owning a dog. This was recently highlighted in the case of Craig Greve<sup>2</sup> who had been banned for life from owning a dog, a ban which he subsequently ignored, and his dog then went on to kill his grandmother. Accordingly, the factor could be reworded to ‘*Failure to respond to official warnings/orders, or to comply with orders concerning the dog.*’

3.15 **Question three- Does the Council agree to reword the factor to ‘Failure to respond to official warnings/orders, or to comply with orders concerning the dog?’**

3.16 A small number of respondents questioned the wording of the factor ‘*failure to respond to warnings or concerns expressed by others about the dog’s behaviour*’ in medium culpability. The RSPCA were concerned with the factor in medium culpability, stating that some warnings or concerns expressed could be incorrect due to a lack of knowledge about dog behaviour. Another respondent suggested that the factor in medium culpability should have the words ‘made in good faith’ added, to avoid an increase in culpability due to neighbourly disputes and disgruntled persons expressing unwarranted concerns. The Justices’ Clerks’ Society suggested adding the word ‘unofficial’ to the factor in medium culpability to distinguish it more clearly from the factor in high culpability.

**Question four- Does the Council agree to add the word ‘unofficial’ to the medium culpability factor regarding warnings within the offences of causing death, injury, attack on assistance dogs and the non-aggravated offence?**

3.17 The Magistrates’ Association and a magistrates’ bench suggested that ‘*failure to take adequate precautions to prevent the dog from escaping,*’ which is an aggravating factor within the first four guidelines, should be moved to be a culpability factor instead. From the analysis of dangerous dog cases, this is a reasonably

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<sup>2</sup> He was recently sentenced at Cardiff Crown Court to five and a half years imprisonment (with maximum credit for an early guilty plea), case to be discussed further at the next meeting on sentencing levels.

common scenario in these offences, so there is justification for moving the factor to step one instead. There is currently a factor in medium culpability of *'lack of safety or control measures taken in situation where an incident could reasonably have been foreseen.'* This could potentially cause double counting with two similar factors, so the medium factor could be reworded to *'lack of safety or control measures taken in a situation where an incident could reasonably have been foreseen, including a failure to stop the dog from escaping'* and the aggravating factor removed.

**Question five- Does the Council agree to reword the factor in medium culpability and remove the aggravating factor regarding a dog escaping?**

*Specific culpability issues - offence where an assistance dog is injured or killed*

3.18 A small number of respondents suggested that the culpability factors for this guideline should be more tailored to the specific offence of attacks on assistance dogs resulting in injury or death. It was noted that there is no reference to dogs or the deliberate targeting of assistance dogs or their owners, due to their disability, within this guideline. To this end, Judges at Kingston Crown Court suggested that the words 'or dogs' should be added to the first high culpability factor, so it reads *' Dog used as a weapon or to intimidate people or other dogs'*.

3.19 ALAW, and some participants at consultation events felt that for this offence, the proposed aggravating factor<sup>3</sup> of *'offence motivated by, or demonstrating hostility based on, but not limited to, the victim's age, sex or disability'* (present within the first four offences), was insufficient. They argued that as the high culpability factors focus on deliberate intent, for this offence, if an offender targets someone due to perceptions of their disability and then uses their dog to bully or harass the assistance dog and their owner, leading to an attack on the assistance dog, then this should place them within high culpability.

3.20 There is a factor in high culpability in the existing guideline of *'offence motivated by, or demonstrating, hostility to the victim based on the victim's disability (or presumed disability)*. This factor could be placed in high culpability for this offence only.

**Question six - does the Council agree to amend the first culpability factor as suggested?**

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<sup>3</sup> The wording and placement of this factor needs to be revised and will be considered at the next meeting in the discussion of aggravating /statutory aggravating factors

**Question seven – does the Council agree to place the factor regarding offence motivated by hostility based on disability from the existing guideline in high culpability for this offence only?**

*Dog dangerously out of control, no injury caused (non aggravated offence)*

3.21 A number of respondents (including the RSPCA, some magistrates, Battersea Dogs Home, H.M Circuit Judges) questioned why there were only two levels of culpability for this offence, stating that they thought there should be three levels, like the offences of causing death, causing injury and attacks on assistance dogs. The existing guideline only has two levels, which was replicated in the revised guidelines, as the Council thought that creating three levels would over complicate this offence. However, given the amount of support for three levels the Council may wish to reconsider this decision. The guideline could be amended to add in a medium level of culpability, using the same factors from the other guidelines. This would necessitate changes to the sentencing table, and result in fairly small ranges, given the statutory maximum of 6 months' custody for this offence.

3.22 How the revised sentencing table<sup>4</sup> might look with three culpability levels can be seen below. There was much less support for three levels of harm (as discussed at paragraph 3.34 below) so this version contains two levels of harm.

| Harm                | Culpability  |  |   |
|---------------------|--|--|---|
|                     | A  | B  | C   |
| <b>Greater harm</b> | <p><b>Starting point</b><br/>Medium level community Order</p> <p><b>Category range</b><br/>Band C fine – 6 months' custody</p> | <p><b>Starting point</b><br/>Band C fine</p> <p><b>Category range</b><br/>Band B fine to Low level community order</p> | <p><b>Starting point</b><br/>Band B fine</p> <p><b>Category range</b><br/>Band A – Band C fine</p>    |
| <b>Lesser harm</b>  | <p><b>Starting point</b><br/>Band C fine</p> <p><b>Category range</b><br/>Band B fine – Low level community order</p>          | <p><b>Starting point</b><br/>Band B fine</p> <p><b>Category range</b><br/>Band A – Band C fine</p>                     | <p><b>Starting point</b><br/>Band A fine</p> <p><b>Category range</b><br/>Discharge – Band B fine</p> |

**Question eight – Does the Council wish to include a medium level of culpability for this offence?**

<sup>4</sup> These are proposed sentence ranges only, sentence levels will be reviewed and the consultation responses regarding sentence levels will be discussed at the October meeting.

### *Possession of a prohibited dog*

3.23 This guideline has two levels of culpability relating specifically to the possession, selling, breeding, exchanging or advertising of a prohibited dog, and as such uses completely different culpability factors from the other offences within the guideline. All the factors were largely taken from the existing guideline, as this offence was mostly unaffected by the changes to legislation. Only one or two respondents suggested that this guideline should have three levels of culpability, instead there was some support for clarification of what would constitute a lower culpability offence, which is currently worded '*all other offences.*' It is therefore recommended that two levels of culpability are maintained.

3.24 A small number of respondents including the police stated that the word '*known*' should be removed from '*Possessing a dog known to be prohibited,*' so it would read '*Possessing a prohibited dog*'. '*Known*' is also referenced in two of the high culpability factors, '*Breeding from a dog known to be prohibited*' and '*Selling, exchanging or advertising a dog known to be prohibited.*' They state that the burden of proof should be on the owner who would have to make their case to the court that they were not aware that the dog was prohibited.

#### ***Question nine – does the Council wish to remove the word 'known' from the high culpability factors in this guideline?***

3.25 The RSPCA stated that as currently drafted, someone who accidentally acquired a prohibited breed would be as culpable as someone who had deliberately done so to use for criminal purposes. There is a mitigating factor of '*unaware that dog was prohibited despite reasonable efforts to identify type,*' and although it is implicit that an offender who did not know the dog was prohibited would fall into lower culpability under '*all other offences,*' there may be justification to further clarify this point, as the responses to the consultation indicated confusion on this issue. The factor could be moved from mitigation at step two to lower culpability at step one.

3.26 A small number of respondents also queried the factor '*offence committed for gain,*' given that the offence is of selling a prohibited dog. For clarity, this factor could be reworded to '*high level of commercial activity for substantial profit*' in high culpability, and a new factor of '*low level of commercial activity for small profit*' could be added to lower culpability.

#### ***Question ten – does the Council agree to the addition of two new factors in lower culpability?***



## *Harm*

### *Offences resulting in death*

3.27 The approach to harm differs between the guidelines. For the guideline dangerous dog offences causing death, only one level of harm was proposed, which reads *'there is no variation in the level of harm caused, as by definition the harm involved in an offence where a death is caused is always of the utmost seriousness.'* This approach was supported by 94 per cent of respondents to the consultation. The National Bench Chairmen's Forum (NBCF) and another magistrate suggested that differentiation could be made between instantaneous deaths, and subsequent deaths, due to infections such as septicaemia or a heart attack following a relatively minor incident. As the vast majority of respondents agreed with the Council's proposed approach to the assessment of harm it is recommended that this approach is maintained.

### ***Question eleven- Does the Council agree to maintain the consultation approach to the assessment of harm in offences resulting in death?***

#### *Offences resulting in injury*

3.28 For this offence, three levels of harm were proposed. The majority of respondents, 77 per cent, agreed with this approach. However, a small number of respondents, including the NBCF felt that more examples of what constitutes the levels of harm would be helpful. The PDSA, Justices' Clerks' Society, and a magistrates' bench suggested including *'life changing injury'* and *'permanent disfigurement or disability'* as examples within category one. The RSPCA and a magistrate suggested that categories two and three should incorporate varying levels of psychological harm, as currently only serious psychological harm is listed in category one, which they state is insufficient to assess the harm caused by this offence. One magistrates' bench suggested using the definitions of harm used by the NHS for clarity (the definitions are low, moderate, or severe).

3.29 The Council will recall that the assessment of harm was carefully considered during the guideline development. The rationale used was that category one was for serious harm, category three for minor injuries, and category two for all other cases, allowing courts the discretion to decide on the basis of the facts before them what this constitutes. However, as the responses indicate that some additional detail would be of assistance in order to assess harm, the Council could include some of the additional factors described above, as shown in track changes below. The consultation version already included an example, that of disease transmission in

category one, so this proposal would just be including some further examples. Similar factors to assess harm (*serious, considerable, some*) have been used in other guidelines, for example fraud.

## Harm

**The level of harm is assessed by weighing up all the factors of the case.**

|   |   |
|---|---|
| <p><b>Category 1</b></p> <ul style="list-style-type: none"> <li>• Serious injury (which includes disease transmission)</li> <li>• <u>Life changing injury or permanent disfigurement or disability</u></li> <li>• Serious psychological harm</li> </ul> |   |
| <p><b>Category 2</b></p> <ul style="list-style-type: none"> <li>• <u>Considerable injury</u></li> <li>• <u>Considerable psychological harm</u></li> </ul>   | <div style="border: 1px solid orange; border-radius: 10px; padding: 5px; display: inline-block;"> <b>Deleted:</b> Factors in categories 1 or 3 not present         </div> |
| <p><b>Category 3</b></p> <ul style="list-style-type: none"> <li>• <u>Some injury</u></li> <li>• <u>Some psychological harm</u></li> </ul>   | <div style="border: 1px solid orange; border-radius: 10px; padding: 5px; display: inline-block;"> <b>Deleted:</b> Minor         </div>                                    |

**Question twelve- Does the Council agree to the recommendation to include additional factors within the assessment of harm for this offence?**

*Offences resulting in an attack on assistance dog*

3.30 For this offence, three levels of harm were proposed, to assess both the level of injury to the dog, and the level of impact on the assisted person. This approach was strongly supported by respondents to the consultation, with 92 per cent agreeing. However, a small number of respondents, including Guide Dogs for the Blind, stated that additional clarification or wording, particularly around the *‘impact on the assisted person is severe’* factor would be helpful to aid assessment of harm for this offence. Guide Dogs for the Blind argue that the relationship between an assistance dog and their owner is not one which is well understood by those without close experience, so it might be difficult for people to understand how a severe impact on an assisted person would manifest itself. One magistrates’ bench stated that the text used in the consultation which explained the factors proposed, should be included within the guideline. Similar comments were made at the consultation events.

3.31 Other respondents queried the factors in category three, stating that although the injury to the assistance dog might be minor it could have such an effect that the dog has to be retired and so the impact on the assisted person would be severe. The guideline intends that in such circumstances, harm would be assessed as category one, as although there is a minor injury to the dog, the impact of the offence on the assisted person is severe. There is additional wording in the guideline that states the level of harm should be assessed by weighing up all the factors of the case, but this wording did not necessarily seem that clear to some respondents. To resolve this, the word 'or' could be removed from the first factor in category three, as shown below, to clarify that if the impact on the assisted person is severe, this will fall into category one, regardless if only a minor injury to the dog was caused.

3.32 As the Council is aware, providing examples is often not helpful within guidelines, as guideline users tend to see the examples listed as exhaustive. However, as this offence is fairly specific and unique, an option would be to keep the 'impact of the offence on the assisted person is severe' factor as worded, but provide additional text in the form of a footnote or asterisk. This would provide additional explanation regarding the category one factor.

### Harm

**The level of harm is assessed by weighing up all the factors of the case.**

|  |
|--|
| <p><b>Category 1</b></p> <ul style="list-style-type: none"> <li>• Fatality or serious injury to an assistance dog and/or</li> <li>• Impact of the offence on the assisted person is severe*</li> </ul> <p><i>*this can be if the person is very reliant on the dog and the dog is not able to work for any period of time, or emotional distress, fear or severe trauma caused to the person by the attack</i></p> |
| <p><b>Category 2</b></p> <ul style="list-style-type: none"> <li>• Factors in categories 1 or 3 not present</li> </ul>  |
| <p><b>Category 3</b></p> <ul style="list-style-type: none"> <li>• Minor injury to assistance dog and</li> <li>• Impact of the offence on the assisted person is limited.</li> </ul>  |

Deleted: /or

**Question thirteen- Does the Council wish to include additional text regarding the impact on the assisted person is severe factor, and agree to remove the word 'or' in category three?**

*Dog dangerously of control (no injury caused)*

3.33 For this offence, two levels of harm were proposed, greater and lesser harm. The factors used are the ones used in the current guideline, as shown below:

*Greater harm*

- *Presence of children or others who are vulnerable because of personal circumstances*
- *Injury to other animals*

*Lesser harm*

- *Low risk to the public*

3.34 Respondents to the consultation largely supported this approach to harm, 76 per cent agreed with the proposals. Two respondents commented that there should be three levels of harm for this offence. A small number of correspondents suggested that the factor of *'presence of children or others who are vulnerable because of personal circumstances'* should be removed and become an aggravating factor. A few respondents suggested that greater harm should just state, *'high risk to the public.'* A small number suggested that psychological harm should be a factor, although this can be captured under the aggravating factor of *'significant ongoing effect on the victim and/or others.'* As the majority of respondents agreed with the proposals and there was no consensus amongst those who disagreed, it is recommended that the approach proposed in the consultation is maintained.

***Question fourteen – Does the Council agree to maintain the approach to harm proposed in the consultation?***

*Possession of a prohibited dog*

3.35 For this offence, two levels of harm were proposed, greater and lesser harm, as shown below:

*Greater harm*

- *High risk to the public and/or other animals*

*Lesser harm*

- *Low risk to the public*

3.36 The wording was designed to allow courts to decide, in the context of the particular offence before them, whether there was greater or lesser harm based on an assessment of risk. The majority of respondents, 75 per cent, supported this approach. There was no consensus amongst those who disagreed with this approach. One respondent commented that there should be no assessment of harm

at all, as the assessment of risk was hypothetical. The police commented that the risk and welfare to the animal in question should be a harm factor however, this is already an aggravating factor. Another respondent noted the increase in illegal dog fighting and suggested that any association between an offender to illegal dog fighting should represent a higher risk.

3.37 As the majority of respondents agreed with the proposed approach for this offence, it is recommended that it is maintained. The definitions proposed were deliberately designed to be broad to allow courts to assess the harm for this offence based on the facts of each case and providing further examples would not necessarily assist this process.

***Question fifteen – Does the Council agree to maintain the approach to harm proposed in the consultation?***

#### **4 IMPACT/RISKS**

4.1 We are currently analysing figures relating to the number of dangerous dog offences that have been sentenced since the legislation came into force in May 2014. This will allow a more accurate picture of the likely impact of the guideline to be assessed, particularly for the new offences involving assistance dogs where we have no historical data. However, it is important to note that any changes to sentences as a result of the guideline will need to be distinguished from those attributable to the introduction of the legislation.

***Question sixteen – Is the Council content that the impact and risks are being adequately considered? If not, are there any other actions or considerations that should be undertaken at this stage?***

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