

6 April 2018

Dear Members

## Meeting of the Sentencing Council – 13 April 2018

The next Council meeting will be held in the **Queens Building Conference Suite, 2nd Floor Mezzanine at the Royal Courts of Justice**, on Friday 13 April 2018 at 9:45.

A security pass is not needed to gain access to this building and members can head straight to the meeting room. Once at the Queen's building, go to the lifts and the floor is 2M. Alternatively, call the office on 020 7071 5793 and a member of staff will come and escort you to the meeting room.

### The agenda items for the Council meeting are:

- |                                      |             |
|--------------------------------------|-------------|
| ▪ Agenda                             | SC(18)APR00 |
| ▪ Minutes of meeting held on 2 March | SC(17)MAR01 |
| ▪ Action Log                         | SC(18)APR02 |
| ▪ Manslaughter                       | SC(18)APR03 |
| ▪ Intimidatory Offences              | SC(18)APR04 |
| ▪ Robbery Evaluation                 | No Paper    |
| ▪ Breach                             | SC(18)APR05 |
| ▪ Child Cruelty                      | SC(18)APR06 |
| ▪ Digital Update                     | No Paper    |
| ▪ Seriousness                        | SC(18)APR07 |

Members can access papers via the members' area of the website. If you are unable to attend the meeting, we would welcome your comments in advance.

Best wishes



**Steve Wade**

Head of the Office of the Sentencing Council

Blank page

## COUNCIL MEETING AGENDA

**13 April 2018**  
**Royal Courts of Justice**  
**Queen's Building**

- |               |  |
|---------------|--|
| 09:45 – 10:00 | Minutes of the last meeting and matters arising (papers 1 & 2) |
| 10:00 – 10:30 | Mental Health – presentation by Dr Adrian Grounds              |
| 10:30 – 11:30 | Manslaughter – presented by Ruth Pope (paper 3)                |
| 11:30 – 12:15 | Intimidatory Offences – presented by Mandy Banks (paper 4)     |
| 12:15 – 12:45 | Robbery Evaluation – presented by Sarah Poppleton              |
| 12:45 – 13:15 | Lunch  |
| 13:15 – 13:45 | Breach – presented by Lisa Frost and Amber Isaac (paper 5)     |
| 13:45 – 14:45 | Child cruelty – presented by Eleanor Nicholls (paper 6)        |
| 14:45 – 15:00 | Digital update – presented by Phil Hodgson                     |
| 15:00 – 16:00 | Seriousness – presented by Ruth Pope (paper 7)                 |

# Sentencing Council

## **COUNCIL MEETING AGENDA**

Blank page

## MEETING OF THE SENTENCING COUNCIL

2 MARCH 2018

### MINUTES

---

<u>Members present:</u>	Colman Treacy (Chairman) Mark Castle Rosina Cottage Rebecca Crane Julian Goose Martin Graham Heather Hallett Tim Holroyde Maura McGowan Sarah Munro Julian Roberts
<u>Apologies:</u>	Alison Saunders Jill Gramann
<u>Representatives:</u>	Chief Constable Olivia Pinkney for the police  Neil Moore, Legal Advisor to DPP for the CPS  Sophie Marlow for the Lord Chief Justice (Legal and Policy Adviser to Sir Brian Leveson, Head of Criminal Justice)  Phil Douglas for the Lord Chancellor (Director, Offender and Youth Justice Policy)
<u>Members of Office in Attendance:</u>	Steve Wade (Head of Office) Mandy Banks Vicky Hunt Eleanor Nicholls Pamela Jooman Ruth Pope

## **1. MINUTES OF LAST MEETING**

- 1.1. The minutes from the meeting of 26 January 2018 were agreed.

## **2. MATTERS ARISING**

- 2.1 The Chairman noted that this would be the last meeting for both Julian Roberts and Jill Gramann. Julian has been on the Council since its inception and the Chairman thanked him for his enormous contribution to the work of the Council. The Chairman also thanked Jill Gramann for her hugely energetic commitment during her three years on the Council.

## **3. DISCUSSION ON TERRORISM – PRESENTED BY VICKY HUNT, OFFICE OF THE SENTENCING COUNCIL**

- 3.1 The Council considered the terrorism drafts for a final time and signed them off ready to be published.
- 3.2 The main changes included amendments to the culpability factors in the Preparation for Terrorism guideline as well as a change to the harm model to capture the likelihood of harm, and to separate out harm which is likely to cause multiple deaths. This was intended to ensure that this type of case receives the highest sentence. As a result of these changes the Council agreed to a number of amendments to the sentence table. Similar amendments were made to the Explosive Substances guideline, which largely mirrors the Preparation guideline.
- 3.3 The Council also agreed to reduce the highest sentence within the sentence table of the Funding guideline. The sentences in this guideline had previously gone up to the statutory maximum. By reducing the highest sentence this leaves 'headroom' for sentencers to sentence outside of the guideline in exceptional cases. The Council made changes to the harm models in the Possession and Collection guidelines so that they also considered the 'likelihood of harm'.
- 3.4 The Council agreed that the guidelines should be published at the end of March and come into force at the end of April.

## **4. DISCUSSION ON MANSLAUGHTER – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**

- 4.1 The Council discussed the consultation responses to the Manslaughter by Reason of Loss of Control guideline and noted that these were broadly positive. The Council agreed to make some changes to the culpability and aggravating factors in the light of comments made by respondents. The Council will discuss sentence levels at its meeting in May 2018.

**5. DISCUSSION ON CHILD CRUELTY – PRESENTED BY ELEANOR NICHOLLS, OFFICE OF THE SENTENCING COUNCIL**

- 5.1 The Council discussed the approach to the assessment of harm, harm factors, and aggravating and mitigating factors in the guidelines for the Cruelty to a Child and Causing or Allowing offences. Sentence levels for these offences and the guideline for the Failure to Prevent the Risk of FGM offence will be discussed at future meetings.
- 5.2 The Council considered comments made in responses to consultation regarding how to assess different types of harm (physical and psychological) particularly relation to the Causing or Allowing offence. The Council agreed some changes to harm factors, in particular relating to psychological/developmental harm, to ensure that all types of serious neglect were clearly covered, and giving clearer guidance on assessing the risk, or likelihood, of serious harm. The Council also agreed some minor changes to aggravating and mitigating factors in the light of consultation responses.

**6. DISCUSSION ON INTIMIDATORY OFFENCES – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL**

- 6.1 The Council discussed sentence ranges across all of the five offences contained within the guideline, noting the comments made by consultation respondents regarding the proposed ranges and considering updated pre-guilty plea sentencing data. As a result of the discussion, the Council agreed that there should be some small increases to some of the ranges.
- 6.2 The Council also considered and agreed a revised structure for the assessment of harm for the controlling and coercive behaviour offence, following a discussion at the previous meeting.

Blank page



## ACTION AND ACTIVITY LOG – as at 6 April 2018

	Topic	What	Who	Actions to date	Outcome
<b>SENTENCING COUNCIL MEETING 20 November 2015</b>					
1	Assault	Council to review decision to postpone assault work in June/ July 2016.	Lisa Frost	The Council discussed and agreed at the March meeting to bring assault back to the September meeting.	<b>ACTION ONGOING:</b> This timetable will now slip as a result of expediting the terrorism guidelines and now likely to be scheduled for Spring 2018
<b>SENTENCING COUNCIL MEETING 15 December 2017</b>					
2	Release of Professor Bottom's report	Bottoms' report to be published January 2018 together with a summary outlining the broad areas of work that the Council is taking forward as a result. Prof. Bottoms to be informed in advance.	Steve Wade	<b>ACTION ONGOING:</b> Report is now amended and Tony Bottoms has agreed content. Emma is finalising the summary of what we are doing in response after receiving comments from Council members and we will be publishing shortly.	
<b>SENTENCING COUNCIL MEETING 26 January 2018</b>					
3	Manslaughter	Ruth to circulate suggested factors for 'obviously dangerous' cases to Council members for comments. Revised version to be road-tested with judges who considered the consultation version	Ruth Pope/ Council members		<b>ACTION CLOSED:</b> A revised draft has been used by judges to 'sentence' a case. The results of this exercise will be discussed at the May Council meeting.

Blank page

**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**13 April 2018**  
**SC(18)APR03 - Manslaughter**  
**Tim Holroyde**  
**Ruth Pope**  
**0207 071 5781**

## **1 ISSUE**

1.1 This is the first consideration of the diminished responsibility manslaughter guideline post consultation; there will be a final consideration of all four guidelines including checking the sentence levels at the May meeting.

1.2 Dr Adrian Grounds will address the Council about mental health and sentencing and will take questions from Council members. He has been asked in particular to address the following questions:

- What is the relevance of treatability?
- How far can psychiatric evidence address the issue of the degree of responsibility retained by offenders with diminished responsibility?
- Mental health disposals: what are the implications of the approach taken in Vowles to the treatment and release of prisoners with mental disorders?
- What is the relevance of mental disorders on remorse?

1.3 The aim is to publish the guidelines early in September 2018 in time for training to be delivered at the Serious Crime Seminar in September which Sarah Munro has kindly offered to deliver.

## **2 RECOMMENDATION**

2.1 The Council is asked to consider the amendments to diminished responsibility guideline as shown at **Annex A** (additions are underlined and deletions are struck through).

## **3 CONSIDERATION**

### *General*

3.1 Only ten of the 44 respondents to the consultation directly addressed the diminished responsibility guideline. Responses were received from the CPS, the Law Society, the Criminal Law Solicitors Association (CLSA), the London Criminal Courts Solicitors Association (LCCSA), the Criminal Bar Association (CBA), Council of HM Circuit Judges (CHMCJ), the Royal College of Psychiatrists (RCP), a clinical nurse specialist at the Central Criminal Court, an academic and a charity. The majority were broadly supportive of the approach taken by the guideline although some respondents had serious reservations.

3.2 The draft diminished responsibility guideline was 'road tested' with eight judges, seven of whom re-sentenced their own cases and one of whom sentenced a scenario based on a 2014 case. This research revealed some reluctance to consider alternatives where a hospital order had been recommended by doctors.

*Assessing the degree of responsibility retained*

3.3 The CHMCJ supported the approach:

We think that this is a good way of distinguishing between the levels of responsibility. We think that this is a far better way of assessing responsibility than assessing the relevant sentence for murder had diminished responsibility not applied. As is recognised, manslaughter by reason of diminished responsibility arises in very many ways and is usually fact-specific.

3.4 Hundred Families (a charity supporting families who have lost loved ones as a result of killings by people with mental illness) supported the approach and suggested that 'all the relevant information' should include statements from the family of the offender who may have reported their concerns prior to the killing. The Law Society agreed with the approach but said it should be made clear that the judge must be sure of any factors that make the offender's responsibility greater.

3.5 In contrast the CLSA commented:

The draft guideline gives no guidance as to when or in what general circumstances the level of responsibility retained is high medium or low. This is understandable given the fact sensitive nature of these sentencing exercises but the lack of guidance (and in addition the inclusion of step 5) renders the guideline of limited assistance either to sentencing judges or to those advising an offender as to what to expect in sentence. It is difficult to see how the guideline will achieve any consistency in sentencing.

We take the view that there should be no guideline for this offence

3.6 The RCP stated that the psychiatrist should not be expected to comment on the degree of responsibility retained directly; rather that the assessment should be made by the judge based on the psychiatric evidence and the circumstances. It is hoped that Dr Grounds can assist the Council with the issue of the limitations of the psychiatric evidence in this regard.

3.7 Charles De Lacy, a clinical nurse specialist at the Central Criminal Court, suggested:

It will be important that psychiatrists who are preparing reports are properly instructed so as to address the issues at the heart of any sentencing exercise and which also fall within their expertise, and that requires them to have a good grasp of any proposed guideline and the application of its principles to the case in hand. The Court may therefore need to be fairly prescriptive as to what is to be addressed.

3.8 The Criminal Procedure Rules (at 19.4) specify what an expert's report must contain (in terms of setting out the expert's qualifications, the information relied on, giving reasons for

opinions etc) and (at 28.8 (2)) what a court must serve on the person from whom a report is sought:

a note that—

- (a) specifies the power exercised by the court;
- (b) explains why the court seeks a report or information from that person; and
- (c) sets out or summarises any relevant information available to the court.

3.9 The Council may wish to consider whether it would be helpful for either the guideline or the Rules to require that the attention of the expert be drawn to the guideline in diminished responsibility cases.

*The offender exacerbating the mental disorder*

3.10 The draft guideline states:

- where an offender exacerbates the mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice this will increase responsibility.

3.11 The LCCSA suggests that those with a mental illness cannot necessarily be expected to know what is in their best interests and allowance should be made for this. The Council has already considered this issue in relation to other manslaughter guidelines and as part of the 'seriousness' guideline. This suggested additional wording is provided at Annex A:

- In considering the extent to which the offender's actions were voluntary, the extent to which a mental disorder has an impact on the offender's ability to exercise self-control or to engage with medical services will be a relevant consideration.

3.12 De Lacy suggests that psychiatrists could be asked to comment on the extent to which the offender's mental disorder will have impacted upon their ability to make informed judgments and to exercise the necessary self-control. See also comments from the RCP at 3.17 below.

3.13 The Law Society suggested two additional mitigating factors:

- Undiagnosed or untreated medical or mental health issues;
- Prior request for help that was unheeded by professionals or others who could have acted.

3.14 Both of these suggestions would be taken into account in the assessment of responsibility at step one (and there is a mitigating factor of 'the offender made genuine and sustained attempts to seek help for the mental disorder'). There could be an argument for covering these factors more explicitly at step one, for example:

- The degree to which the mental disorder was undiagnosed and/or untreated will be a relevant consideration. For example:
  - Where an offender has sought help but not received appropriate treatment this could be a factor which would reduce responsibility.

3.15 In road testing judges were generally happy with the structure of step one and most judges felt able to assess the degree of responsibility retained by the offender by considering the level of mental illness with reference to the medical evidence.

3.16 One judge suggested that additional information would be useful to help with assessing the level of responsibility retained and another commented that where psychiatrists differed in their opinions, the level of responsibility would be difficult to determine.

**Question 1: Does the Council wish to retain the current model for assessing responsibility?**

**Question 2: Does the Council agree to add the suggested additional wording at 3.11 and 3.14?**

**Question 3: Does the Council wish to include any guidance on which issues experts should address?**

*Aggravating factors*

3.17 The RCP query the aggravating factor of 'Commission of offence whilst under the influence of alcohol or drugs' stating that it will need to be reviewed within the psychiatric evidence:

drugs can sometimes be used to 'self-medicate' to try and reduce symptoms. It should also be noted that patients with serious mental illness may have little insight into their disorder which leads them into behaviour that can exacerbate their condition. They may stop their treatment as a consequence of symptoms such as auditory hallucinations or paranoid beliefs leading them to believe they are being poisoned.

Although the Court may wish to consider the role of drugs and alcohol before sentencing, we advocate against enshrining this as an aggravating factor in these circumstances.

3.18 Additional wording is proposed to deal with this concern:

Commission of offence whilst under the influence of alcohol or drugs (the extent to which a mental disorder has an effect on offender's ability to make informed judgments or exercise self-control will be a relevant consideration in deciding how much weight to attach to this factor).

3.19 The Law Society repeated the suggestion made for other guidelines that there should be 'significant impairment' for this factor to apply. The Council has not changed the factor for other guidelines, but it will be possible to include additional information for this factor in the digital version of the guideline.

3.20 In common with the other manslaughter guidelines it is proposed to remove the word 'significant' in the factor 'History of significant violence or abuse towards victim by offender'. The LCCSA criticised the factor, 'Death occurred in the context of dishonesty or the pursuit of financial gain. It was agreed to remove this factor from the loss of control guideline as unlikely

to apply. As aggravating factors are non-exhaustive, it may be preferable to remove the factor from this guideline for the same reason.

3.21 Hundred Families suggested adding ‘a failure to comply with treatment or take medication’ as an aggravating factor. The Law Society also suggest a similar aggravating factor, but as this is already specifically taken into account at step one, this is not recommended.

3.22 In road testing judges were content with the aggravating factors.

#### **Question 4: Does the Council wish to make any changes to the aggravating factors?**

##### *Mitigating factors*

3.23 The RCP challenged the inclusion of remorse as a mitigating factor:

[Remorse] is commonly shown to have no relationship with reoffending and is impossible to determine reliably. Psychotic patients may not show remorse due to their mental disorder and should not be penalised for this. For example, it is quite common, on the contrary, for a person has been driven to the offence by a delusion, for example that s/he is saving someone from a worse catastrophe than death or has been taken over by an alien force, to feel relief after the killing.

3.24 If the objection is that those who do not express remorse will be penalised, this is not a legitimate concern, as the absence of remorse (or any other mitigating factor) would not increase the sentence. There are cases of diminished responsibility manslaughter where the offender (having recovered sufficiently from the mental disorder to understand what occurred) is genuinely remorseful, and this can significantly reduce sentences in some cases.

3.25 In road testing judges were content with the mitigating factors.

#### **Question 5: Does the Council wish to make any changes to the mitigating factors?**

##### *Dangerousness*

3.26 The CPS commented that there may be a rationale for considering dangerousness at an earlier stage than in other guidelines but without explanation it risked a perception of inequity when looking at manslaughter offences in the round.

3.27 The Council has a duty under the Equality Act 2010 to have due regard to the need to eliminate discrimination on the grounds of protected characteristics (which include disability). A mental illness which has a long-term effect on a person’s normal day-to-day activity would be considered a disability. It is important that the guideline is not seen to be treating mentally disordered offenders less favourably than others. The rationale for moving this step forward in the guideline is a purely practical one; it will have a bearing on the consideration of mental health disposals that follow it. Although in practice dangerousness is addressed by the court at an early stage of the sentencing process in all cases, it appears after the reduction for guilty

plea step in the other guidelines to which it applies because the Council took the view that the other steps in the guideline would still need to be followed to arrive at the appropriate extended sentence or minimum term of a life sentence.

3.28 If the Council thought it would be helpful, the following text could be added to step three to make it clear that the later steps still apply:

- Any life or extended sentence will be subject to any considerations, adjustments or reductions required by subsequent steps in this guideline.

3.29 De Lacy comments on the difficulty of asking psychiatrists to comment on the issue of dangerousness:

Psychiatrists tend to think in terms of risk rather than dangerousness. Psychiatrists do not think in terms so much of absence of risk but ranges that run from High Risk through to Low Risk. Dangerousness in terms of the CJA 2003 may well apply in cases on the grounds of the mental disorder alone that the offender suffers from. There is a risk of confusion when evidence is taken because of the difference of language the one being legal the other psychiatric.

**Question 6: Does the Council wish to make any changes to step three?**

*Mental health disposals*

3.30 There were mixed reactions to step four. The Law Society and CHMCJ welcomed the guidance as being helpful, whereas the CLSA commented that judges would apply the steps anyway without being prompted by the guideline. The RCP had more fundamental concerns:

Step 4 is of serious concern. The threshold for a hospital order with restrictions (section 37/41) is so high that this will be unavailable to most mentally disordered offenders. There is a risk, with the increasing use of a section 45A that mentally disordered offenders will not have the mandated psychiatric treatment that is presently directed by the use of a restriction order. In the longer term if a mentally disordered offender is released into the community and their mental health deteriorates, they will not be able to be recalled to a hospital setting. This approach to the supervision, care and treatment of a person whose mental disorder has in some way been associated with the homicide will pose substantial risks to public safety and the health and safety of the offender.

There are concerns about psychiatrists recommending a section 45A because this is essentially a custodial sentence and psychiatrists have generally considered recommending a prison sentence to be ethically prohibited.

In this situation it seems inherently unjust as well as unsafe. Is it thought that the person should first serve time in prison until the tariff for punishment is satisfied—because it would obviously be safer to ensure that treatment was provided as close as possible to the return to the community so that the individual could be as well as possible on release, having been ‘tested out’ appropriately first on short, supervised leaves? Or is it envisaged that the person should be made well in hospital – essentially fit for punishment for a crime committed when ill – so that the period of imprisonment is safer, albeit risking deterioration before release?



The review should include in their considerations the rising suicide rate in prisons, the risk elevated by mental disorder and nature of crime as well as inappropriate levels of care for the potentially suicidal. If somehow hospital care can be delivered appropriately and the individual is also appropriately in hospital when ready for release, the costs of fulfilling that through both Mental Health Review Tribunal and parole Board hearings, and the longer period in hospital to facilitate that will be substantial.

3.31 The CHMCJ noted that there is 'a divergence of opinion as to whether in practice psychiatrists will recommend a s45A disposal. It has been suggested that both that successful treatment of a mental health condition is made more difficult by the threat of prison, and that psychiatrists use the stick of prison to enforce compliance with treatment. Time will tell.'

3.32 Hundred Families questioned how courts can know at the outset whether an offender will be dangerous or not once treated. They are concerned that judges will accept optimistic assessments that assume compliance with treatment. They comment:

It appears to us however that the sentence of a section 37/41 Hospital order with restrictions does not meet any objective of punishment. Under this order the offender becomes a 'patient,' with many of the privileges that entails, and is not a prisoner.

Our understanding is that the current official guidance for patients detained under the mental health act, is that they should be subject to the least restrictive form of detention and treatment, and that successful treatment always involves regular amounts of escorted and unescorted leave outside the hospital.

It appears that to us that a sentence to a hospital order effectively means that the responsibility for the killing is extinguished, and not just diminished. We struggle to see that any form of punishment is met by a hospital order, with or without restrictions.

3.33 Hundred Families also noted that the guideline gives no guidance as to when a section 41 restriction order may or may not be required.

3.34 De Lacy notes:

It is common in the light of Vowles for Psychiatrists to be requested to comment on Parole Board and licence processes as well as First Tier Tribunal processes. They will be very familiar with the latter. Their knowledge of the Parole Board and the Licence arrangements may be less informed and therefore there may need to some education with regard to that issue so that any comparisons psychiatrists make in their evidence are knowledge based. Is there a role for the Probation Service in this process might be a question that needs asking? For example does there need to be a report/information from the Probation Service on the issue of managing on licence previously dangerous offenders who suffer from mental illnesses? This would be a departure from the current process where the Court might normally only have psychiatric reports as opposed to any formal input from Probation

3.35 If the Council thought that there was merit in this suggestion reference could be made in the guideline to obtaining input from the National Probation Service.

3.36 In road testing most judges were content with the position and content of step four; some considered it to be a helpful checklist. However, no judge who 'resentenced' a case under the draft guideline reconsidered imposing a section 37/41 order. It is, of course, a very

artificial situation, but it would appear that the requirement to consider a section 45A order first, may not change outcomes where the psychiatric reports recommend a section 37/41 order.

3.37 Some judges expressed a lack of familiarity with s45A orders and thought more information would be helpful. One suggested moving the final bullet point ('There must always be sound reasons for departing from the usual course of imposing a custodial sentence and where a custodial sentence is not imposed, the judge must set out these reasons.')

 to the front.

3.38 The CACD has recently handed down a judgment<sup>1</sup> which considers the guidance on mental health disposals in Vowles. In the light of that judgment some changes are proposed to step four as shown in Annex A.

#### **Question 7: Does the Council wish to make any changes to step four?**

##### *Adjustment to the sentence and case studies*

3.39 There were few specific references to step five in consultation responses. Applying the draft guideline to the case studies in the consultation the CHMCJ felt that the guideline worked well, taking the sentencer through all of the steps; the CLSA in contrast considered that the flexibility in the guideline meant that the guideline was of little assistance.

3.40 In road testing because all of the cases resulted in mental health disposals, judges did not employ step five, but when asked about it, most considered it to be useful and appropriately worded. One judge felt it was unnecessary for experienced judges.

#### **4 IMPACT AND RISKS**

4.1 Several respondents have commented on the very wide range of sentences available under this guideline and the consequent difficulty in achieving consistency. The results from the road testing exercise suggest that the flexibility in the guideline will result in judges imposing similar sentences under the guideline as would have been passed without it.

4.2 The chief risk from this guideline is that it may enshrine in a guideline an approach to mental health disposals that subsequently needs to be reviewed. One mechanism for reviewing the mental health steps (if needed) would be through the mental health overarching principles guideline which the Council will be commencing work on later this year.

4.3 A review of cases sentenced in 2016 is being carried out to enable an accurate assessment of current sentencing practice and the Council will be asked to consider sentence levels at the May Council meeting.

---

<sup>1</sup> R v Edwards and ors [2018] EWCA Crim 595

# **MANSLAUGHTER BY REASON OF DIMINISHED RESPONSIBILITY**

**Common law and Homicide Act 1957 (section 2)**

**Triable only on indictment  
Maximum: Life imprisonment**

**Offence range: 3 – 40 years' custody**

**This is a serious specified offence for the purposes of sections 224 and 225(2) (life sentences for serious offences) of the Criminal Justice Act 2003.**

**This is an offence listed in Part 1 of Schedule 15B for the purposes of section 224A (life sentence for a second listed offence) and section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.**

**The type of manslaughter (and thereby the appropriate guideline) should have been identified prior to sentence. If there is any dispute or uncertainty about the type of manslaughter that applies the judge should give clear reasons for the basis of sentence.**

## STEP ONE

### Assessing the degree of responsibility retained: high, medium or lower

- A conviction for manslaughter by reason of diminished responsibility necessarily means that the offender's ability to understand the nature of the conduct, form a rational judgment and/or exercise self control was substantially impaired.
- The court should reach a determination as to the level of responsibility the offender **retained**:
  - High;
  - Medium; or
  - Lower
- The court should consider the extent to which the offender's responsibility was diminished by the mental disorder **at the time of the offence** with reference to the medical evidence and all the relevant information available to the court.
- The degree to which the offender's actions or omissions contributed to the seriousness of the mental disorder at the time of the offence will be a relevant consideration. For example:
  - where an offender exacerbates the mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice this will increase responsibility.
  - In considering the extent to which the offender's actions were voluntary, the extent to which a mental disorder has an impact on the offender's ability to exercise self-control or to engage with medical services will be a relevant consideration.
- The degree to which the mental disorder was undiagnosed and/or untreated will be a relevant consideration. For example:
  - Where an offender has sought help but not received appropriate treatment this could be a factor which would reduce responsibility.

### HARM

For all cases of manslaughter the harm caused will inevitably be of the utmost seriousness. The loss of life is taken into account in the sentencing levels at step two

**STEP TWO****Starting point and category range**

Having determined the level of responsibility retained at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.		
Level of responsibility retained		
High	Medium	Lower
<b>Starting Point</b> 24 years' custody <b>Category Range</b> 15 - 40 years' custody	<b>Starting Point</b> 15 years' custody <b>Category Range</b> 10 - 25 years' custody	<b>Starting Point</b> 7 years' custody <b>Category Range</b> 3 - 12 years' custody

Note: The table is for a single offence of manslaughter resulting in a single fatality. Where another offence or offences arise out of the same incident or facts concurrent sentences **reflecting the overall criminality** of offending will ordinarily be appropriate: please refer to the *Offences Taken into Consideration and Totality* guideline and step eight of this guideline.

Below is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.

**Care should be taken to avoid double counting factors already taken into account in assessing the level of responsibility retained**

**Aggravating factors***Statutory aggravating factors*

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction  
(See step three for a consideration of dangerousness)
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity

*Other aggravating factors:*

- A significant degree of planning or premeditation
- Victim particularly vulnerable due to age or disability
- Significant mental or physical suffering caused to the deceased

- History of ~~significant~~ violence or abuse towards victim by offender
- Commission of offence whilst under the influence of alcohol or drugs (the extent to which a mental disorder has an effect on offender's ability to make informed judgments or exercise self-control will be a relevant consideration in deciding how much weight to attach to this factor).
- Other(s) put at risk of harm by the offending
- ~~Death occurred in the context of dishonesty or the pursuit of financial gain~~
- Actions after the event (including but not limited to attempts to cover up/ conceal evidence)
- Involvement of other(s) through coercion, intimidation or exploitation
- Victim was providing a public service or performing a public duty
- Concealment, destruction or dismemberment of the body.
- Offence involved use of a weapon
- Blame wrongly placed on other(s)
- Offence committed on licence or post sentence supervision or while subject to court order(s)

#### **Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Intention to cause serious bodily harm rather than to kill
- Lack of premeditation
- History of significant violence or abuse towards the offender by the victim
- The offender acted in self-defence or in fear of violence (where not amounting to a defence)
- The offender made genuine and sustained attempts to seek help for the mental disorder
- Belief by the offender that the killing was an act of mercy
- Good character and/or exemplary conduct
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity
- Sole or primary carer for dependent relatives

### **STEP THREE**

#### **Consideration of dangerousness**

- The court should then go on to consider whether having regard to the criteria contained in Chapter 5 of part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a **life sentence** (section 224A or section 225) or an **extended sentence** (section 226A).
- When sentencing to a life sentence the notional determinate term (identified at step two above) should be used as the basis for setting the minimum term.

## STEP FOUR

### Consideration of mental health disposals

Where:

- (i) the evidence of medical practitioners suggests that the offender is currently suffering from a mental disorder,
- (ii) treatment is available, and
- (iii) the court considers that a hospital order (with or without a restriction) may be an appropriate way of dealing with the case,

the court should consider **all sentencing options** including a section 45A direction and consider the importance of a penal element in the sentence taking into account the level of responsibility assessed at step one.

#### Section 45A hospital and limitation direction

- a. Before a hospital order is made under s.37 MHA (with or without a restriction order under s.41), consider whether the mental disorder can appropriately be dealt with by custody with a hospital and limitation direction under s.45A MHA. In deciding whether a s.45A direction is appropriate the court should bear in mind that the direction will cease to have effect at the end of a determinate sentence.
- b. If a penal element is appropriate and the mental disorder can appropriately be dealt with by a direction under s.45A MHA, then the judge should make such a direction. (Not available for a person under the age of 21 at the time of conviction).

#### Section 37 hospital order and s41 restriction order

- c. If a s.45A direction is not appropriate the court must then consider before going further, whether: (1) the mental disorder is treatable, (2) once treated there is no evidence the offender would be dangerous, and (3) the offending is due to that mental disorder. If these conditions are met a hospital order under s.37/41 is likely to be the correct disposal whether, (assuming the conditions in s.37(2) (a) are satisfied), the matters referred to in s. 37(2)(b) would make a hospital order the most suitable disposal. The court should explain why a penal element is not appropriate.

#### Section 47 transfer to hospital

- d. The court must also have regard to the question of whether other methods of dealing with the offender are available including consideration of whether the powers under s47 MHA for transfer from custody to hospital for treatment would, taking in to consideration all of the circumstances, be appropriate.
- ~~There must always be sound reasons for departing from the usual course of imposing a custodial sentence and where a custodial sentence is not imposed, the judge must set out these reasons.~~

## STEP FIVE

**IN ALL CASES consider factors that may warrant an adjustment to the sentence**

Cases of manslaughter by reason of diminished responsibility vary considerably on the facts of the offence and on the circumstances of the offender.

- The court should review whether the sentence as a whole meets the objectives of punishment, rehabilitation and protection of the public in a fair and proportionate way.
- Relevant factors will include the psychiatric evidence and the regime on release.
- An adjustment may require a departure from the sentence range identified at step two above.

**STEP SIX**

**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP SEVEN**

**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline. Note: the limitations on reductions for murder do not apply to manslaughter.

**STEP EIGHT**

**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Offences Taken into Consideration and Totality guideline.

**STEP NINE**

**Compensation and ancillary orders**

In all cases the court should consider whether to make compensation and/or other ancillary orders.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

**STEP TEN**

**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP ELEVEN**

**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.



**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**13 April 2018**  
**SC(18)MAR04 – Intimidatory Offences**  
**Julian Goose**  
**Mandy Banks**  
**0207 071 5785**

## **1 ISSUE**

1.1 This is the final sign-off of the Intimidatory Offences Guideline, ahead of the publication of the definitive guideline in July. The guideline is then due to come into force in October 2018. All the changes discussed at the last meeting have been made so, following a final review at this meeting, the Council is asked to confirm they are content with the guidelines ahead of publication. The consultation response document will be circulated via email in due course.

1.2 This guideline has been in development since May 2016, and included a 13 week consultation period in spring 2017. The response to the consultation was generally positive, so no major reworking of the guidelines was necessary post consultation. Initially the new Domestic Abuse Guideline was part of this project, but the two projects were separated and the definitive Domestic Abuse Guideline was published on 22 February.

1.3 As noted at the last meeting, all the changes to the guidelines (to sentence ranges, harm and culpability factors, and so on) made since consultation have been tested by re-sentencing cases from court case transcripts, to see what sentence the draft guideline would likely give rise to, compared to the actual sentence in a case.

## **2 RECOMMENDATION**

2.1 That the Council:

- notes the minor changes made following the last meeting to the coercive and controlling behaviour, disclosing private sexual images, and threats to kill guidelines, and
- confirms that it is content with the guideline as it relates to all five offences, ahead of publication of the definitive guideline in July.

## **3 CONSIDERATION**

*Coercive and controlling behaviour -Annex A*

3.1 At the March Council meeting revisions to the harm factors were discussed, following the decision to reword them entirely, and to reduce the amount of harm categories from three to two, at the January meeting. The Council then asked for some minor changes to wording

to be made. These have been done and the final version can be seen on page one of **Annex A**. For completeness, the harm categories are shown below with the changes in red, and the previous wording struck through. If required, the definitions of offences are at **Annex F**, and current sentencing data is at **Annex G**.

<p><b>Category 1</b></p> <ul style="list-style-type: none"><li>• Fear of violence on <b>a number of</b> <del>several</del> occasions</li><li>• Very serious alarm or distress which has a <del>very</del> substantial adverse effect on the victim's <del>usual day to day activities</del></li><li>• Significant psychological harm</li></ul>
<p><b>Category 2</b></p> <ul style="list-style-type: none"><li>• Fear of violence on at least two occasions</li><li>• Serious alarm or distress which has a substantial adverse effect on the victim <del>victim's usual day to day activities</del></li></ul>

3.2 The Council may recall that there had been some speculation as to whether there may be some legislative changes to this offence. It is not yet clear what, if anything, may happen. As part of the recently published Government consultation '*Transforming the response to Domestic Abuse*<sup>1</sup>' a question is asked as to whether there is any further action the Government could take to strengthen the effectiveness of this offence. It presumably will then be some time before any decision is made as to whether to make any changes, and then even longer before anything is implemented. The consultation closes on the 31<sup>st</sup> May. Given this, it is recommended that the Council continues with its planned timescale for the publication of this definitive guideline.

***Question 1: Does the Council agree to continue with the timescale for publication of the definitive guideline, given the uncertainty around if/when there may be any changes to the controlling and coercive behaviour offence?***

3.3 The Council may also be interested to note that the consultation states it welcomes the new domestic abuse guideline but that the Government continues to consider ways to strengthen the law. One of the ways suggested of doing this is to create a statutory aggravating factor, which could be drafted to include behaviour involving, or with particular impact on, a child. However, the consultation notes that a statutory aggravating factor would require the domestic abuse aggravation to be established beyond reasonable doubt, which risks placing additional evidential burdens on the police and CPS (where the factual circumstances are disputed) and increases the potential for more defendants to plead not guilty to the charges.

---

<sup>1</sup> [https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting\\_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf](https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf).

The consultation asks if the new guideline is effective in ensuring sentences imposed reflect the seriousness of domestic abuse offences when it involves children and then whether a statutory aggravating factor is needed for courts to reflect the seriousness of offences involving domestic abuse and children.

3.4 There are also proposals to introduce a new statutory definition of domestic abuse, but this would use the existing definition as the basis, with minor changes, 'financial' abuse is changed to 'economic' abuse, and 'sexuality' is changed to 'sexual orientation'. It would also be accompanied by underpinning statutory guidance for professionals who have safeguarding obligations.

**Question 2: Is the Council content with this final version of the guideline, ahead of publication?**

*Disclosing private sexual images - Annex B*

3.5 At the last meeting the Council asked for a very minor change to be made to a factor in lesser culpability for this offence, that the word 'some' should be replaced with 'limited', so that it reads '*Conduct was intended to cause limited distress and/or humiliation*'. This can also be seen on page two of **Annex B**. This was the only change on the guideline that the Council asked to be made at the last meeting.

**Question 3: Is the Council content with this final version of the guideline, ahead of publication?**

*Threats to Kill- Annex C*

3.6 At the last meeting the Council again only asked for very minor changes to be made to this guideline, that the 's' at the end of the word 'threats' in two factors in high culpability should be placed in brackets, so it reads: '*threat(s) made in the presence of children*' and '*threat(s) with significant violence*'. These changes have been made and can be seen on page two of **Annex C**. This was the only change on the guideline that the Council asked to be made at the last meeting.

**Question 4: Is the Council content with this final version of the guideline, ahead of publication?**

*Harassment and stalking guidelines- Annexes D and E*

3.7 The Council discussed these guidelines at the December meeting, and changes were made following that meeting which were provided for the January meeting. On reviewing these guidelines in preparation for final sign off- one further amendment is proposed. For both guidelines, there is a high culpability factor of '*persistent action over sustained period*'. The

use of the phrase '*persistent action over a sustained period*' did give rise to some inconsistent categorisation during road testing, for example, in one scenario only three out of seven participants felt that harassing behaviour over six months was persistent/ sustained and so placed the offender in high culpability. In addition, several magistrates said they would like more guidance on the meaning of 'sustained'.

3.8 Given that this seemingly straightforward factor gave rise to some confusion, perhaps 'prolonged' could be used instead of sustained. The Council has added a new high culpability factor to the controlling or coercive behaviour offence of '*persistent action over a prolonged period*', so it would be consistent across all the guidelines if 'prolonged' was used in this context. The culpability factors can be seen on page two of **Annexes D and E**, if the Council agree to the suggestion, the change would be made to both guidelines.

***Question 5: Does the Council agree to change the word 'sustained' to 'prolonged' within high culpability for both stalking/harassment guidelines? Is the Council content with this final version of the guidelines, ahead of publication?***

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

4.1 It is likely that the publication of the definitive guideline will generally be well received. Changes have been made following suggestions during consultation, such as including factors within the medium levels of culpability and harm, improving the guidance for the racially or religiously aggravated offences, and making some changes to the sentence ranges, thus showing the Council is genuinely open and consultative in its proposals on draft guidelines. Some of the organisations representing victims of stalking (Paladin, Suzy Lamplugh Trust) however will not be happy that the harassment and stalking guidelines remain combined, as they felt that stalking offences required a separate guideline. Prior to publication this decision will be discussed in detail with the organisations, in the hope of countering any negative public reaction once the guideline is published.

4.2 A final resource assessment will be prepared and circulated to the Council in due course, ahead of the publication of the definitive guideline. The aim of the guideline is to promote consistency of sentencing for the five offences. It is hoped that producing sentencing guidelines for the newer offences of controlling and coercive behaviour and disclosing private sexual images, where no guidance previously existed, in particular will promote consistency of sentencing.

4.3 As discussed in previous meetings, for the newer offences such as coercive and controlling behaviour, and disclosing private sexual images, there has only been limited data on sentencing practice available to develop the guidelines. However, in due course, as with other guidelines, an evaluation of the impact of the guideline will be conducted and published.

***Question 6: Is the Council content that the impact and risks have been adequately considered in preparation for the publication of the definitive guideline?***

Blank page

# **Controlling or coercive behaviour in an intimate or family relationship**

**Serious Crime Act 2015 (section 76)**

---

**Triable either way**

Maximum: 5 years' custody

Offence range: Community order - 4 years' custody

**Also refer to the *Domestic Abuse: Overarching Principles* guideline**

**STEP ONE**  
**Determining the offence category**

The court should determine the offence category with reference only to the factors in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of **culpability** is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

**Culpability** demonstrated by one or more of the following:

**A - High culpability**

- Conduct intended to maximise fear or distress
- Persistent action over a prolonged period
- Use of multiple methods of controlling or coercive behaviour
- Sophisticated offence
- Conduct intended to humiliate and degrade the victim

**B - Medium culpability**

- Conduct intended to cause some fear or distress
- Scope and duration of offence that falls between categories A and C
- All other cases that fall between categories A and C

**C - Lesser culpability**

- Offender's responsibility substantially reduced by mental disorder or learning disability
- Offence was limited in scope and duration

**Harm**

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

**Category 1**

- Fear of violence on a number of occasions
- Very serious alarm or distress which has a substantial adverse effect on the victim
- Significant psychological harm

**Category 2**

- Fear of violence on at least two occasions
- Serious alarm or distress which has a substantial adverse effect on the victim



**STEP TWO**  
**Starting point and category range**

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

Harm	Culpability		
	A	B	C
<b>Category 1</b>	<p><b>Starting point</b> 2 years 6 months' custody</p> <p><b>Category range</b> 1 - 4 years' custody</p>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> 26 weeks' - 2 years 6 months' custody</p>	<p><b>Starting point</b> 26 weeks' custody</p> <p><b>Category range</b> High level community order – 1 year's custody</p>
<b>Category 2</b>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> 26 weeks'- 2 years 6 months' custody</p>	<p><b>Starting point</b> 26 weeks' custody</p> <p><b>Category range</b> High level community order- 1 year's custody</p>	<p><b>Starting point</b> Medium level community order</p> <p><b>Category range</b> Low level community order- 26 weeks' custody</p>

The court should then consider any adjustment for any aggravating or mitigating factors. Below is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender.

Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

**Factors increasing seriousness**

**Statutory aggravating factors:**

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation, or transgender identity.

**Other aggravating factors:**

- Steps taken to prevent the victim reporting an incident
- Steps taken to prevent the victim obtaining assistance
- A proven history of violence or threats by the offender in a domestic context
- Impact of offence on others particularly children
- Exploiting contact arrangements with a child to commit the offence
- Victim is particularly vulnerable (not all vulnerabilities are immediately apparent)
- Victim left in debt, destitute or homeless due to exploitation of finances
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Offences taken into consideration

**Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- Serious medical condition requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability (where not taken into account at step one)
- Sole or primary carer for dependent relatives
- Determination and/or demonstration of steps having been taken to address offending behaviour

**STEP THREE**

**Consider any factors which indicate a reduction, such as assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR**

**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

#### **STEP FIVE**

##### **Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

#### **STEP SIX**

##### **Compensation and ancillary orders**

In all cases, the court must consider whether to make a compensation order and/or other ancillary orders.

##### ***Compensation order***

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

##### **Other ancillary orders available include:**

##### ***Restraining order***

Where an offender is convicted of any offence, the court may make a restraining order (section 5 of the Protection from Harassment Act 1997).

The order may prohibit the offender from doing anything for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from further conduct which amounts to harassment or will cause a fear of violence.

The order may have effect for a specified period or until further order.

#### **STEP SEVEN**

##### **Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

#### **STEP EIGHT**

##### **Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Blank page

## **Disclosing private sexual images**

### **Criminal Justice and Courts Act 2015 (section 33)**

---

**Triable either way**

Maximum: 2 years' custody.

Offence range: Discharge to 1 year 6 months' custody

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline**

## STEP ONE

### Determining the offence category

The court should determine the offence category with reference only to the factors in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of **culpability** is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

**Culpability** demonstrated by one or more of the following:

#### A- High Culpability

- Conduct intended to maximise distress and/or humiliation
- Images circulated widely/publically
- Significant planning and/or sophisticated offence
- Repeated efforts to keep images available for viewing

#### B – Medium Culpability

- Some planning
- Scope and duration that falls between categories A and C
- All other cases that fall between categories A and C

#### C – Lesser Culpability

- Offender's responsibility substantially reduced by mental disorder or learning disability.
- Little or no planning
- Conduct intended to cause limited distress and/or humiliation
- Offence was limited in scope and duration

## Harm

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

#### Category 1

- Very serious distress caused to the victim
- Significant psychological harm caused to the victim
- Offence has a considerable practical impact on the victim

#### Category 2

Harm that falls between categories 1 and 3, and in particular:

- Some distress caused to the victim
- Some psychological harm caused to the victim
- Offence has some practical impact on the victim

#### Category 3

- Limited distress or harm caused to the victim

**STEP TWO**  
**Starting point and category range**

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

Harm	Culpability		
	A	B	C
<b>Category 1</b>	<b>Starting point</b> 1 year's custody  <b>Category range</b> 26 weeks' - 1 year 6 months' custody	<b>Starting point</b> 26 weeks' custody  <b>Category range</b> 12 weeks' custody -1 year's custody	<b>Starting point</b> 12 weeks' custody  <b>Category range</b> High level community order - 26 weeks' custody
<b>Category 2</b>	<b>Starting point</b> 26 weeks' custody  <b>Category range</b> 12 weeks' - 1 year's custody	<b>Starting point</b> 12 weeks' custody  <b>Category range</b> High level community order - 26 weeks' custody	<b>Starting point</b> High level community order  <b>Category range</b> Low level community order - 12 weeks' custody
<b>Category 3</b>	<b>Starting point</b> 12 weeks' custody  <b>Category range</b> High level community order - 26 weeks' custody	<b>Starting point</b> High level community order  <b>Category range</b> Low level community order - 12 weeks' custody.	<b>Starting point</b> Low level community order  <b>Category range</b> Discharge - High level community order

The court should then consider any adjustment for any aggravating or mitigating factors. Below is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender.

Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

**Factors increasing seriousness**

**Statutory aggravating factors:**

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation, or transgender identity.

**Other aggravating factors:**

- Impact of offence on others, especially children
- Victim is particularly vulnerable (not all vulnerabilities are immediately apparent)
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Offences taken into consideration

**Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions **or** no relevant/recent convictions
- Offender took steps to limit circulation of images
- Remorse
- Good character and/or exemplary conduct
- Serious medical condition requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability (where not taken into account at step one)
- Sole or primary carer for dependent relatives
- Determination and/or demonstration of steps having been taken to address offending behaviour

**STEP THREE**

**Consider any factors which indicate a reduction, such as assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR**

**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.



#### **STEP FIVE**

##### **Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

#### **STEP SIX**

##### **Compensation and ancillary orders**

In all cases, the court must consider whether to make a compensation order and/or other ancillary orders.

##### ***Compensation order***

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

##### **Other ancillary orders available include:**

##### ***Restraining order***

Where an offender is convicted of any offence, the court may make a restraining order (section 5 of the Protection from Harassment Act 1997).

The order may prohibit the offender from doing anything for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from further conduct which amounts to harassment or will cause a fear of violence

The order may have effect for a specified period or until further order

#### **STEP SEVEN**

##### **Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

#### **STEP EIGHT**

##### **Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Blank page

## Annex C

### **Threats to kill** **Offences Against the Person Act 1861 (section 16)**

---

**Triable either way**

Maximum: 10 years' custody

Offence range: Community order - 7 years' custody

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline**

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline**

**STEP ONE****Determining the offence category**

The court should determine the offence category with reference only to the factors in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of **culpability** is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

**Culpability** demonstrated by one or more of the following:

**A - High culpability**

- Significant planning and/or sophisticated offence
- Visible weapon
- Threat(s) made in the presence of children
- History of and/or campaign of violence towards the victim
- Threat(s) with significant violence

**B - Medium culpability**

Cases that fall between categories A and C because:

- Factors are present in A and C which balance each other out **and/or**
- The offender's culpability falls between the factors described in A and C

**C - Lesser culpability**

- Offender's responsibility substantially reduced by mental disorder or learning disability
- Offence was limited in scope and duration

**Harm**

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

**Category 1**

- Very serious distress caused to the victim
- Significant psychological harm caused to the victim
- Offence has a considerable practical impact on the victim

**Category 2**

Harm that falls between categories 1 and 3, and in particular:

- Some distress caused to the victim
- Some psychological harm caused to the victim
- Offence has some practical impact on the victim

**Category 3**

- Little or no distress or harm caused to the victim

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles guideline***

**STEP TWO**  
**Starting point and category range**

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

Harm	Culpability		
	A	B	C
<b>Category 1</b>	<b>Starting point</b> 4 years' custody  <b>Category range</b> 2 - 7 years' custody	<b>Starting point</b> 2 years' custody  <b>Category range</b> 1 - 4 years' custody	<b>Starting point</b> 1 year's custody  <b>Category range</b> 26 weeks' -2 years 6 months' custody
<b>Category 2</b>	<b>Starting point</b> 2 years' custody  <b>Category range</b> 1 year – 4 years' custody	<b>Starting point</b> 1 year's custody  <b>Category range</b> 26 weeks' - 2 years 6 months' custody	<b>Starting point</b> 26 weeks' custody  <b>Category range</b> High level community order - 1 year's custody
<b>Category 3</b>	<b>Starting point</b> 1 year's custody  <b>Category range</b> 26 weeks' -2 years 6 months' custody	<b>Starting point</b> 26 weeks' custody  <b>Category range</b> High level community order - 1 year's custody	<b>Starting point</b> Medium level community order  <b>Category range</b> Low level community-High level community order

The court should then consider any adjustment for any aggravating or mitigating factors. Below is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender.

Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

**Factors increasing seriousness**

**Statutory aggravating factors:**

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles guideline***

- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation, or transgender identity.

**Other aggravating factors:**

- Offence committed against those working in the public sector or providing a service to the public
- Impact of offence on others, particularly children
- Victim is particularly vulnerable (not all vulnerabilities are immediately apparent)
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Offences taken into consideration

**Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions or no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- Serious medical condition requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability (where not taken into account at step one)
- Sole or primary carer for dependent relatives
- Determination and/or demonstration of steps having been taken to address offending behaviour

**STEP THREE**

**Consider any factors which indicate a reduction, such as assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR**

**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

**STEP FIVE**

**Dangerousness**

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles guideline***

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose an extended sentence (section 226A)

#### **STEP SIX**

##### **Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

#### **STEP SEVEN**

##### **Compensation and ancillary orders**

In all cases, the court must consider whether to make a compensation order and/or other ancillary orders.

##### ***Compensation order***

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

##### **Other ancillary orders available include:**

##### ***Restraining order***

Where an offender is convicted of any offence, the court may make a restraining order (section 5 of the Protection from Harassment Act 1997).

The order may prohibit the offender from doing anything for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from further conduct which amounts to harassment or will cause a fear of violence

The order may have effect for a specified period or until further order

#### **STEP EIGHT**

##### **Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

#### **STEP NINE**

##### **Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles guideline***

Blank page

**Where offence committed in a domestic context, also refer to the  
*Domestic Abuse: Overarching Principles guideline***



### **Harassment**

**Protection from Harassment Act 1997 (section 2)**

### **Stalking**

**Protection from Harassment Act 1997 (section 2A)**

---

**Triable only summarily**

Maximum: 6 months' custody

Offence range: Discharge - 26 weeks custody

### **Racially or religiously aggravated harassment**

**Crime and Disorder Act 1998 (section 32(1)(a))**

### **Racially or religiously aggravated stalking-**

**Crime and Disorder Act 1998 (section 32(1)(a))**

---

**Triable either way**

Maximum: 2 years' custody

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline**

**STEP ONE**  
**Determining the offence category**

The court should determine the offence category with reference only to the factors in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of **culpability** is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender’s culpability.**

<p><b>Culpability</b> demonstrated by one or more of the following:</p>
<p><b>A - High culpability:</b></p> <ul style="list-style-type: none"> <li>• Conduct intended to maximise fear or distress</li> <li>• High degree of planning and/or sophisticated offence</li> <li>• Persistent action over <u>prolonged sustained</u> period</li> <li>• Threat of serious violence</li> <li>• 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</li> </ul>
<p><b>B - Medium culpability:</b></p> <p>Cases that fall between categories A and C, in particular:</p> <ul style="list-style-type: none"> <li>• Conduct intended to cause some fear or distress</li> <li>• Some planning</li> <li>• Threat of some violence</li> <li>• Scope and duration of offence that falls between categories A and C</li> </ul>
<p><b>C - Lesser culpability:</b></p> <ul style="list-style-type: none"> <li>• Offender’s responsibility substantially reduced by mental disorder or learning disability</li> <li>• Little or no planning</li> <li>• Offence was limited in scope and duration</li> </ul>

**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>• Very serious distress caused to the victim</li> <li>• Significant psychological harm caused to the victim</li> <li>• Victim caused to make considerable changes to lifestyle to avoid contact</li> </ul>
<p><b>Category 2</b></p> <p>Harm that falls between categories 1 and 3, and in particular:</p> <ul style="list-style-type: none"> <li>• Some distress caused to the victim</li> <li>• Some psychological harm caused to the victim</li> <li>• Victim caused to make some changes to lifestyle to avoid contact</li> </ul>
<p><b>Category 3</b></p> <ul style="list-style-type: none"> <li>• Limited distress or harm caused to the victim</li> </ul>

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles guideline***

**STEP TWO**  
**Starting point and category range**

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

**Maximum 6 months' custody (basic offence)**

Harm	Culpability		
	A	B	C
<b>Category 1</b>	<p><b>Starting point</b> 12 weeks' custody</p> <p><b>Category range</b> High level community order-26 weeks' custody</p>	<p><b>Starting point</b> High level community order</p> <p><b>Category range</b> Medium level community order-16 weeks' custody</p>	<p><b>Starting point</b> Medium level community order</p> <p><b>Category range</b> Low level community order-12 weeks' custody</p>
<b>Category 2</b>	<p><b>Starting point</b> High level community order</p> <p><b>Category range</b> Medium level community order-16 weeks' custody</p>	<p><b>Starting point</b> Medium level community order</p> <p><b>Category range</b> Low level community order-12 weeks' custody</p>	<p><b>Starting point</b> Low level Community order</p> <p><b>Category range</b> Band B fine - Medium level community order</p>
<b>Category 3</b>	<p><b>Starting point</b> Medium level community order</p> <p><b>Category range</b> Low level community order-12 weeks' custody</p>	<p><b>Starting point</b> Low level community order</p> <p><b>Category range</b> Band B fine- Medium level community order</p>	<p><b>Starting point</b> Band B fine</p> <p><b>Category range</b> Discharge - Low level community order</p>

The court should then consider any adjustment for any aggravating or mitigating factors. Below is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender.

Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

**Factors increasing seriousness**

**Statutory aggravating factors:**

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that

- has elapsed since the conviction
- Offence committed whilst on bail

**Other aggravating factors:**

- Using a position of trust to facilitate the offences
- Victim is particularly vulnerable (not all vulnerabilities are immediately apparent)
- Grossly violent or offensive material sent
- Impact of offence on others, particularly children
- Exploiting contact arrangements with a child to commit an offence
- Offence committed against those working in the public sector or providing a service to the public
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Offences taken into consideration

**Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- Serious medical condition requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability (where not taken into account at step one)
- Sole or primary carer for dependent relatives
- Determination and/or demonstration of steps having been taken to address offending behaviour

**RACIALLY OR RELIGIOUSLY AGGRAVATED  
HARASSMENT/STALKING OFFENCES ONLY**

Having determined the category of the basic offence to identify the sentence of a non-aggravated offence, the court should now consider the level of racial or religious aggravation involved and apply an appropriate uplift to the sentence in accordance with the guidance below. The following is a list of factors which the court should consider to determine the level of aggravation. Where there are characteristics present which fall under different levels of aggravation, the court should balance these to reach a fair assessment of the level of aggravation present in the offence.

**Maximum sentence for the aggravated offence on indictment is 2 years' custody (maximum for the basic offence is 6 months' custody)**

<b>HIGH LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION</b>	<b>SENTENCE UPLIFT</b>
<ul style="list-style-type: none"> <li>▪ Racial or religious aggravation was the predominant motivation for the offence.</li> <li>▪ Offender was a member of, or was associated with, a group promoting hostility based on race or religion (where linked to the commission of the offence).</li> <li>▪ Aggravated nature of the offence caused severe distress to the victim or the victim's family (over and above the distress already considered at step one).</li> <li>▪ Aggravated nature of the offence caused serious fear and distress throughout local community or more widely.</li> </ul>	<p>Increase the length of custodial sentence if already considered for the basic offence <b>or</b> consider a custodial sentence, if not already considered for the basic offence.</p>
<b>MEDIUM LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION</b>	<b>SENTENCE UPLIFT</b>
<ul style="list-style-type: none"> <li>▪ Racial or religious aggravation formed a significant proportion of the offence as a whole.</li> <li>▪ Aggravated nature of the offence caused some distress to the victim or the victim's family (over and above the distress already considered at step one).</li> <li>▪ Aggravated nature of the offence caused some fear and distress throughout local community or more widely.</li> </ul>	<p>Consider a significantly more onerous penalty of the same type <b>or</b> consider a more severe type of sentence than for the basic offence.</p>
<b>LOW LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION</b>	<b>SENTENCE UPLIFT</b>
<ul style="list-style-type: none"> <li>▪ Aggravated element formed a minimal part of the offence as a whole.</li> <li>▪ Aggravated nature of the offence caused minimal or no distress to the victim or the victim's family (over and above the distress already considered at step one).</li> </ul>	<p>Consider a more onerous penalty of the same type identified for the basic offence.</p>

Magistrates may find that, although the appropriate sentence for the basic offence would be within their powers, the appropriate increase for the aggravated offence

would result in a sentence in excess of their powers. If so, they must commit for sentence to the Crown Court.

**The sentencer should state in open court that the offence was aggravated by reason of race or religion, and should also state what the sentence would have been without that element of aggravation.**

### **STEP THREE**

#### **Consider any factors which indicate a reduction, such as assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

### **STEP FOUR**

#### **Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

### **STEP FIVE**

#### **Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

### **STEP SIX**

#### **Compensation and ancillary orders**

In all cases, the court must consider whether to make a compensation order and/or other ancillary orders.

#### ***Compensation order***

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

#### **Other ancillary orders available include:**

#### ***Restraining order***

Where an offender is convicted of any offence, the court may make a restraining order (section 5 of the Protection from Harassment Act 1997).

The order may prohibit the offender from doing anything for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from further conduct which amounts to harassment or will cause a fear of violence

The order may have effect for a specified period or until further order

**STEP SEVEN****Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP EIGHT****Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Blank page



## Annex E

**Harassment (Putting people in fear of violence)**  
**Protection from Harassment Act 1997 (section 4)**

**Stalking (involving fear of violence or serious alarm or distress)**  
**Protection from Harassment Act 1997 (section 4A)**

---

**Triable either way**  
Maximum: 10 years' custody

Offence range: Fine - 8 years' custody

**Racially or religiously aggravated harassment-  
(Putting people in fear of violence)**  
**Crime and Disorder Act 1998 (section 32(1)(b))**

**Racially or religiously aggravated stalking-  
(with fear of violence)**  
**Crime and Disorder Act 1998 (section 32(1)(b))**

---

**Triable either way**  
Maximum: 14 years' custody.

The racially or religiously aggravated offence is a specified offence for the purposes of section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003

Where offence committed in a domestic context, also refer to *the Domestic Abuse: Overarching Principles guideline*

Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles guideline*

## STEP ONE

### Determining the offence category

The court should determine the offence category with reference only to the factors in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of **culpability** is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

#### Culpability demonstrated by one or more of the following:

**A- Very high culpability-** the extreme nature of one or more culpability B factors or the extreme culpability indicated by a combination of culpability B factors may elevate to category A.

#### **B - High culpability:**

- Conduct intended to maximise fear or distress
- High degree of planning and/or sophisticated offence
- Persistent action over **prolonged** ~~sustained~~ period
- 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

#### **C - Medium culpability:**

Cases that fall between categories B and D, and in particular:

- Conduct intended to cause some fear or distress
- Some planning
- Scope and duration of offence that falls between categories B and D

#### **D - Lesser culpability:**

- Offender's responsibility substantially reduced by mental disorder or learning disability
- Conduct unlikely to cause significant fear or distress
- Little or no planning
- Offence was limited in scope and duration

## Harm

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

#### **Category 1**

- Very serious distress caused to the victim
- Significant psychological harm caused to the victim
- Victim caused to make considerable changes to lifestyle to avoid contact

#### **Category 2**

Harm that falls between categories 1 and 3, and in particular:

- Some distress caused to the victim
- Some psychological harm caused to the victim
- Victim caused to make some changes to lifestyle to avoid contact

#### **Category 3**

- Limited distress or harm caused to the victim

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline**

**STEP TWO****Starting point and category range**

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

**Sentencers should consider whether to ask for psychiatric reports in order to assist in the appropriate sentencing (hospital orders, or mental health treatment requirements) of certain offenders to whom this consideration may be relevant.**

**Maximum 10 years' custody (basic offence)**

Harm	Culpability			
	A	B	C	D
<b>Category 1</b>	<b>Starting point</b> 5 years' custody  <b>Category range</b> 3 years 6 months' - 8 years' custody	<b>Starting point</b> 2 years 6 months' custody  <b>Category range</b> 1 - 4 years' custody	<b>Starting point</b> 36 weeks' custody  <b>Category range</b> 12 weeks' – 1 year 6 months' custody	<b>Starting point</b> 12 weeks' custody  <b>Category range</b> High level community order - 36 weeks' custody
<b>Category 2</b>	<b>Starting point</b> 2 years 6 months' custody  <b>Category range</b> 1 - 4 years' custody	<b>Starting point</b> 36 weeks' custody  <b>Category range</b> 12 weeks' - 1 year 6 months' custody	<b>Starting point</b> 12 weeks' custody  <b>Category range</b> High level community order - 36 weeks' custody	<b>Starting point</b> High level community order  <b>Category range</b> Low level Community order - 12 weeks' custody
<b>Category 3</b>	<b>Starting point</b> 36 weeks' custody  <b>Category range</b> 12 weeks' - 1 year 6 months' custody	<b>Starting point</b> 12 weeks' custody  <b>Category range</b> High level community order - 36 weeks' custody	<b>Starting point</b> High level community order  <b>Category range</b> Low level community order - 12 weeks' custody	<b>Starting point</b> Low level community order  <b>Category range</b> Band C fine - High level community order

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline**

The court should then consider any adjustment for any aggravating or mitigating factors. Below is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender.

Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

### **Factors increasing seriousness**

#### **Statutory aggravating factors:**

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail

#### **Other aggravating factors:**

- Using a position of trust to facilitate the offence
- Victim is particularly vulnerable (not all vulnerabilities are immediately apparent)
- Grossly violent or offensive material sent
- Impact of offence on others, particularly children
- Exploiting contact arrangements with a child to commit the offence
- Offence committed against those working in the public sector or providing a service to the public
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Offences taken into consideration

### **Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- Serious medical condition requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability (where not taken into account at step one)
- Sole or primary carer for dependent relatives
- Determination and/or demonstration of steps having been taken to address offending behaviour

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline**

<b>RACIALLY OR RELIGIOUSLY AGGRAVATED HARASSMENT/STALKING OFFENCES ONLY</b>
---

Having determined the category of the basic offence to identify the sentence of a non-aggravated offence, the court should now consider the level of racial or religious aggravation involved and apply an appropriate uplift to the sentence in accordance with the guidance below. The following is a list of factors which the court should consider to determine the level of aggravation. Where there are characteristics present which fall under different levels of aggravation, the court should balance these to reach a fair assessment of the level of aggravation present in the offence.

**Maximum sentence for the aggravated offence on indictment is 14 years' custody (maximum for the basic offence is 10 years' custody)**

<b>HIGH LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION</b>	<b>SENTENCE UPLIFT</b>
<ul style="list-style-type: none"> <li>▪ Racial or religious aggravation was the predominant motivation for the offence.</li> <li>▪ Offender was a member of, or was associated with, a group promoting hostility based on race or religion (where linked to the commission of the offence)</li> <li>▪ Aggravated nature of the offence caused severe distress to the victim or the victim's family (over and above the distress already considered at step one).</li> <li>▪ Aggravated nature of the offence caused serious fear and distress throughout local community or more widely.</li> </ul>	<p>Increase the length of custodial sentence if already considered for the basic offence <b>or</b> consider a custodial sentence, if not already considered for the basic offence.</p>
<b>MEDIUM LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION</b>	<b>SENTENCE UPLIFT</b>
<ul style="list-style-type: none"> <li>▪ Racial or religious aggravation formed a significant proportion of the offence as a whole.</li> <li>▪ Aggravated nature of the offence caused some distress to the victim or the victim's family (over and above the distress already considered at step one).</li> <li>▪ Aggravated nature of the offence caused some fear and distress throughout local community or more widely.</li> </ul>	<p>Consider a significantly more onerous penalty of the same type <b>or</b> consider a more severe type of sentence than for the basic offence.</p>
<b>LOW LEVEL OF RACIAL OR RELIGIOUS</b>	<b>SENTENCE UPLIFT</b>

<p><b>Where offence committed in a domestic context, also refer to the <i>Domestic Abuse: Overarching Principles</i> guideline</b></p>
--

<b>AGGRAVATION</b>	
<ul style="list-style-type: none"> <li>▪ Aggravated element formed a minimal part of the offence as a whole.</li> <li>▪ Aggravated nature of the offence caused minimal or no distress to the victim or the victim's family (over and above the distress already considered at step one).</li> </ul>	Consider a more onerous penalty of the same type identified for the basic offence.

Magistrates may find that, although the appropriate sentence for the basic offence would be within their powers, the appropriate increase for the aggravated offence would result in a sentence in excess of their powers. If so, they must commit for sentence to the Crown Court.

**The sentencer should state in open court that the offence was aggravated by reason of race or religion, and should also state what the sentence would have been without that element of aggravation.**

**STEP THREE**  
**Consider any factors which indicate a reduction, such as assistance to the prosecution**  
 The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR**  
**Reduction for guilty pleas**  
 The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

**STEP FIVE**  
**Dangerousness**  
 The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose an extended sentence (section 226A).

**STEP SIX**  
**Totality principle**  
 If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

**STEP SEVEN**

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline**

**Compensation and ancillary orders**

In all cases, the court must consider whether to make a compensation order and/or other ancillary orders.

**Compensation order**

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

**Other ancillary orders available include:****Restraining order**

Where an offender is convicted of any offence, the court may make a restraining order (section 5 of the Protection from Harassment Act 1997).

The order may prohibit the offender from doing anything for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from further conduct which amounts to harassment or will cause a fear of violence

The order may have effect for a specified period or until further order

**STEP EIGHT****Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP NINE****Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline

Blank page

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline**



## Annex F

### **Harassment (without violence)** – Protection from Harassment Act 1997, s 2,

#### **Elements of the offence:**

Course of conduct (conduct on at least two occasions in relation to that person)

- that amounts to harassment (includes alarming or causing distress) of another and
- offender knows or ought to know that it amounts to harassment of another.

#### **OR**

Course of conduct (conduct on at least one occasion in relation to each of those persons)

- which involves harassment (includes alarming or causing distress) of 2 or more persons and
- offender knows or ought to know that it involves harassment of those persons and
- by which he intends to persuade any person (whether or not one of those mentioned above)
- not to do something that he is entitled or required to do or
- to do something that he is not under any obligation to do.

Offender ought to know if a reasonable person in possession of the same information would think it amounted to or involved harassment of the other.

### **Harassment (putting people in fear of violence)** – Protection from Harassment Act 1997, s 4

#### **Elements of the offence:**

Course of conduct

- that causes another to fear on at least 2 occasions that violence will be used against him and
- offender knows or ought to know that it will cause the other to fear violence on each of those occasions.

Offender ought to know if a reasonable person in possession of the same information would think it would cause fear.

### **Stalking (harassment which involves a course of conduct that amounts to stalking)** – Protection from Harassment Act 1997 s2A

#### **Elements of the offence:**

Course of conduct (conduct on at least two occasions in relation to that person)

- that amounts to harassment (includes alarming or causing distress) of another and
- offender knows or ought to know that it amounts to harassment of another and
- the course of conduct amounts to stalking

The following are examples of acts or omissions that are associated with stalking:

- following a person
- contacting, or attempting to contact, a person by any means
- publishing any statement or other material -  
(i) relating or purporting to relate to a person, or

- (ii) purporting to originate from a person,
- monitoring the use by a person of the internet, email or any other form of electronic communication
- loitering in any place (whether public or private)
- interfering with any property in the possession of a person
- watching or spying on a person.

**Stalking (involving fear of violence or serious alarm or distress)** –Protection from Harassment Act 1997, s 4A

**Elements of the offence:**

Course of conduct

- that amounts to stalking and
- causes another to fear on at least 2 occasions that violence will be used against him **OR**
- causes another to serious alarm or distress which has a substantial adverse effect on usual day-to-day activities
- offender knows or ought to know that it will cause the other to fear violence on each of those occasions or cause serious alarm or distress.

Offender ought to know if a reasonable person in possession of the same information would think it would cause fear or cause serious alarm or distress.

The following are examples of acts or omissions that are associated with stalking:

- following a person
- contacting, or attempting to contact, a person by any means
- publishing any statement or other material -
  - (i) relating or purporting to relate to a person, or
  - (ii) purporting to originate from a person,
- monitoring the use by a person of the internet, email or any other form of electronic communication
- loitering in any place (whether public or private)
- interfering with any property in the possession of a person
- watching or spying on a person.

**Threats to Kill** –Offences Against the Person 1861 s16

**Elements of the offence:**

Making a threat to another, intending that that other would fear it would be carried out, to kill that other or a third person.

**Disclosing private images** - Criminal Justice and Courts Act 2015, s33

**Elements of the offence:**

Disclosing a private sexual photograph or film to a third person or persons without the consent of the person who appears in the photograph or film with the intention of causing that person distress.

**Domestic Abuse** – Controlling or coercive behaviour in an intimate or family relationship – Serious Crime Act 2015, s 76,

**Elements of the offence:**

Repeatedly or continuously engaging in behaviour towards a 'personally connected' person that is controlling or coercive and has a serious effect on that person and offender knows or ought to know that the behaviour will have a serious effect.

'Personally connected' means

- in an intimate personal relationship with or
- living with and members of the same family or
- living with and have previously have been in an intimate personal relationship.

Behaviour has a 'serious effect' if

- it causes victim fear, on at least two occasions, that violence will be used against victim or
- (b) it causes victim serious alarm or distress which has a substantial adverse effect on victim's usual day-to-day activities.

Offender ought to know if a reasonable person in possession of the same information would know.

Blank page

Table 1: Number of adult offenders sentenced for specified intimidatory offences, 2006-2016<sup>1</sup>

Offence	Court type	Number of adult offenders sentenced										
		2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Harassment (putting people in fear of violence), Protection from Harassment Act 1997, S4	MC	385	333	353	387	411	341	278	322	384	413	365
	CC	348	375	365	304	300	364	239	279	368	393	308
	<b>Total</b>	<b>733</b>	<b>708</b>	<b>718</b>	<b>691</b>	<b>711</b>	<b>705</b>	<b>517</b>	<b>601</b>	<b>752</b>	<b>806</b>	<b>673</b>
Racially or religiously aggravated harassment (putting people in fear of violence), Crime and Disorder Act 1998, S32	MC	12	12	4	9	13	29	19	15	24	26	27
	CC	33	24	29	28	25	17	11	14	10	8	14
	<b>Total</b>	<b>45</b>	<b>36</b>	<b>33</b>	<b>37</b>	<b>38</b>	<b>46</b>	<b>30</b>	<b>29</b>	<b>34</b>	<b>34</b>	<b>41</b>
Harassment (without violence), Protection from Harassment Act 1997, S2	MC	3,241	3,239	3,382	3,821	4,228	3,939	3,893	4,250	4,853	5,218	5,072
	CC	179	169	212	236	258	187	119	137	196	210	177
	<b>Total</b>	<b>3,420</b>	<b>3,408</b>	<b>3,594</b>	<b>4,057</b>	<b>4,486</b>	<b>4,126</b>	<b>4,012</b>	<b>4,387</b>	<b>5,049</b>	<b>5,428</b>	<b>5,249</b>
Racially or religiously aggravated harassment (non violent), Crime and Disorder Act 1998, S32	MC	46	41	52	38	76	61	80	81	107	130	93
	CC	40	35	35	38	39	31	22	15	19	13	5
	<b>Total</b>	<b>86</b>	<b>76</b>	<b>87</b>	<b>76</b>	<b>115</b>	<b>92</b>	<b>102</b>	<b>96</b>	<b>126</b>	<b>143</b>	<b>98</b>
Threats to kill, Offences Against the Person Act 1861, S16	MC	148	138	121	122	138	109	103	112	144	170	159
	CC	301	250	254	230	283	306	298	294	344	339	319
	<b>Total</b>	<b>449</b>	<b>388</b>	<b>375</b>	<b>352</b>	<b>421</b>	<b>415</b>	<b>401</b>	<b>406</b>	<b>488</b>	<b>509</b>	<b>478</b>
Stalking (harassment which involves a course of conduct that amounts to stalking), Protection from Harassment Act 1997, S2A	MC							2	191	336	316	223
	CC								1	13	19	18
	<b>Total</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>2</b>	<b>192</b>	<b>349</b>	<b>241</b>
Stalking (involving fear of violence or serious alarm or distress), Protection from Harassment Act 1997, S4A	MC								27	70	86	76
	CC								14	69	105	97
	<b>Total</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>41</b>	<b>139</b>	<b>173</b>
Disclosing private sexual photographs and films with intent to cause distress, Criminal Justice and Courts Act 2015, S33	MC										57	190
	CC										5	36
	<b>Total</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>62</b>	<b>226</b>
Controlling or Coercive Behaviour in an Intimate or Family Relationship, Serious Crime Act 2015, S76	MC											25
	CC											33
	<b>Total</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>58</b>

Source: Court Proceedings Database, Ministry of Justice

## Note

1) Excludes data for Cardiff magistrates' court for April, July and August 2008

Table 2: Sentence outcomes for adult offenders sentenced for specified intimidatory offences, 2016

Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with <sup>1</sup>	Total
Harassment (putting people in fear of violence), Protection from Harassment Act 1997, S4	0	16	5	129	228	276	19	673
Racially or religiously aggravated harassment (putting people in fear of violence), Crime and Disorder Act 1998, S32	0	2	3	6	16	14	0	41
Harassment (without violence), Protection from Harassment Act 1997, S2	7	613	935	2,143	857	556	138	5,249
Racially or religiously aggravated harassment (non violent), Crime and Disorder Act 1998, S32	1	7	9	37	26	15	3	98
Threats to kill, Offences Against the Person Act 1861, S16		5	4	53	135	255	26	478
Stalking (harassment which involves a course of conduct that amounts to stalking), Protection from Harassment Act 1997, S2A	0	11	22	88	79	39	2	241
Stalking (involving fear of violence or serious alarm or distress), Protection from Harassment Act 1997, S4A	0	1	2	30	64	71	5	173
Disclosing private sexual photographs and films with intent to cause distress, Criminal Justice and Courts Act 2015, S33	0	10	16	59	85	52	4	226
Controlling or Coercive Behaviour in an Intimate or Family Relationship, Serious Crime Act 2015, S76	0	2	0	9	19	28	0	58

Source: Court Proceedings Database, Ministry of Justice

Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with <sup>1</sup>	Total
Harassment (putting people in fear of violence), Protection from Harassment Act 1997, S4	0%	2%	1%	19%	34%	41%	3%	100%
Racially or religiously aggravated harassment (putting people in fear of violence), Crime and Disorder Act 1998, S32 <sup>2</sup>	0%	5%	7%	15%	39%	34%	0%	100%
Harassment (without violence), Protection from Harassment Act 1997, S2	<0.5%	12%	18%	41%	16%	11%	3%	100%
Racially or religiously aggravated harassment (non violent), Crime and Disorder Act 1998, S32	1%	7%	9%	38%	27%	15%	3%	100%
Threats to kill, Offences Against the Person Act 1861, S16	0%	1%	1%	11%	28%	53%	5%	100%
Stalking (harassment which involves a course of conduct that amounts to stalking), Protection from Harassment Act 1997, S2A	0%	5%	9%	37%	33%	16%	1%	100%
Stalking (involving fear of violence or serious alarm or distress), Protection from Harassment Act 1997, S4A	0%	1%	1%	17%	37%	41%	3%	100%
Disclosing private sexual photographs and films with intent to cause distress, Criminal Justice and Courts Act 2015, S33	0%	4%	7%	26%	38%	23%	2%	100%
Controlling or Coercive Behaviour in an Intimate or Family Relationship, Serious Crime Act 2015, S76	0%	3%	0%	16%	33%	48%	0%	100%

Source: Court Proceedings Database, Ministry of Justice

## Note

1) Includes a number of orders, for example hospital orders, confiscation orders and compensation orders

Table 3: Average and maximum custodial sentence lengths for adult offenders sentenced to immediate custody for specified intimidatory offences, 2016 <sup>1</sup>

Offence	Post guilty plea			Pre guilty plea (estimated)		
	Mean sentence length (in months) <sup>2,4</sup>	Median sentence length (in months) <sup>3,4</sup>	Maximum sentence length (in months)	Mean sentence length (in months) <sup>2,4</sup>	Median sentence length (in months) <sup>3,5</sup>	Maximum sentence length (in months)
Harassment (putting people in fear of violence), Protection from Harassment Act 1997, S4	10 months	6 months	5 years	1 year 2 months	9 months	5 years
Racially or religiously aggravated harassment (putting people in fear of violence), Crime and Disorder Act 1998, S32 <sup>4</sup>	1 year	8 months	4 years	1 year 5 months	9 months	5 years 4 months
Harassment (without violence), Protection from Harassment Act 1997, S2	3 months	2 months	6 months	3 months	4 months	6 months
Racially or religiously aggravated harassment (non violent), Crime and Disorder Act 1998, S32 <sup>4,5</sup>	5 months	4 months	12 months	6 months	5 months	1 year 4 months
Threats to kill, Offences Against the Person Act 1861, S16	1 year 5 months	1 year 2 months	9 years	1 year 11 months	1 year 6 months	10 years
Stalking (harassment which involves a course of conduct that amounts to stalking), Protection from Harassment Act 1997, S2A	3 months	3 months	6 months	4 months	4 months	6 months
Stalking (involving fear of violence or serious alarm or distress), Protection from Harassment Act 1997, S4A	1 year 1 month	1 year	3 years	1 year 7 months	1 year 4 months	3 years 6 months
Disclosing private sexual photographs and films with intent to cause distress, Criminal Justice and Courts Act 2015, S33 <sup>6</sup>	5 months	4 months	2 years	8 months	6 months	2 years
Controlling or Coercive Behaviour in an Intimate or Family Relationship, Serious Crime Act 2015, S76 <sup>4</sup>	1 year 5 months	1 year 4 months	3 years	1 year 11 months	1 year 8 months	4 years 6 months

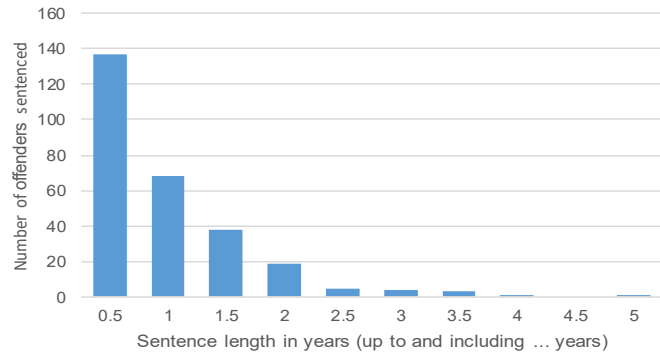
Source: Court Proceedings Database, Ministry of Justice

## Notes

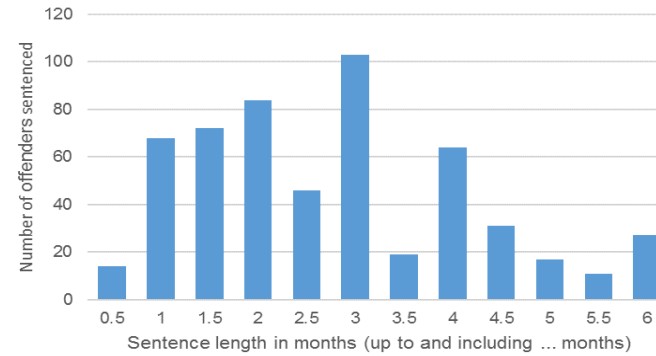
- 1) To estimate the pre guilty plea sentence lengths for most offences in this table, it has been assumed that around 90% of offenders sentenced pleaded guilty, and that those who pleaded guilty received a reduction in line with the reductions observed in the CCSS data (for example, 65% of offenders who pleaded guilty received a 33% reduction, 13% received a 25% reduction etc.). For offenders sentenced to immediate custody in magistrates' courts, the offenders who received an uplift were selected at random. There were two offences where analysis suggested that the proportion of offenders pleading guilty was different to 90%. Where this was the case a footnote has been added to indicate what proportion was used instead.
- 2) The mean is calculated by taking the sum of all values and then dividing by the number of values
- 3) The median is the value which lies in the middle of a set of numbers when those numbers are placed in ascending or descending order
- 4) Mean and median should be treated with caution, due to the low number of offenders sentenced to immediate custody for this offence
- 5) For this offence it was assumed that 80% of offenders sentenced pleaded guilty
- 5) For this offence it was assumed that 100% of offenders sentenced pleaded guilty

**Figure 1: Distribution of custodial sentence lengths for adult offenders sentenced to immediate custody for specified intimidatory offences, after any reduction for guilty plea, 2016**

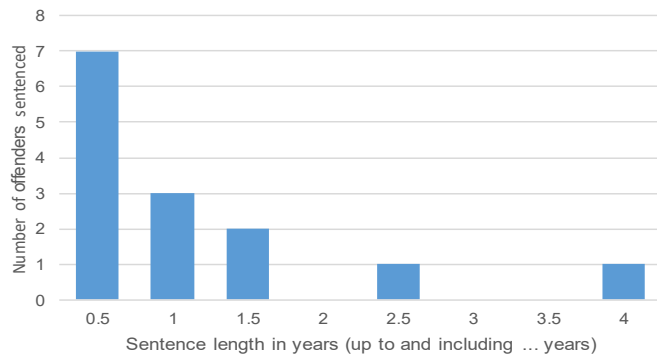
Harassment (putting people in fear of violence), Protection from Harassment Act 1997, S4



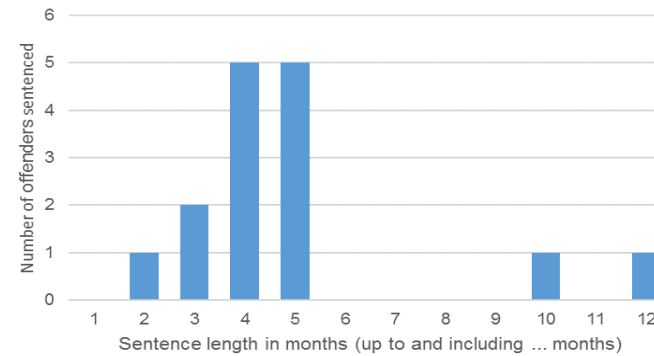
Harassment (without violence), Protection from Harassment Act 1997, S2



Racially or religiously aggravated harassment (putting people in fear of violence), Crime and Disorder Act 1998, S32

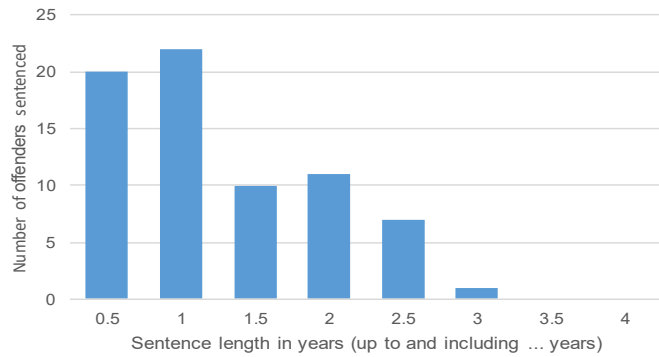


Racially or religiously aggravated harassment (non violent), Crime and Disorder Act 1998, S32

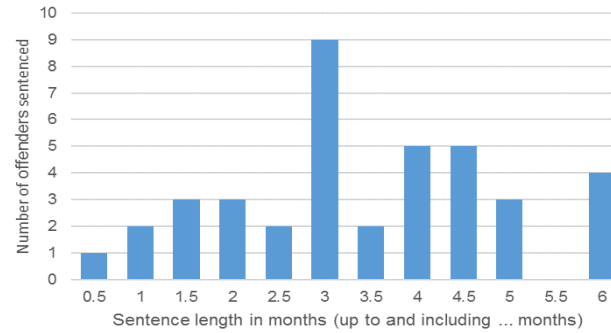




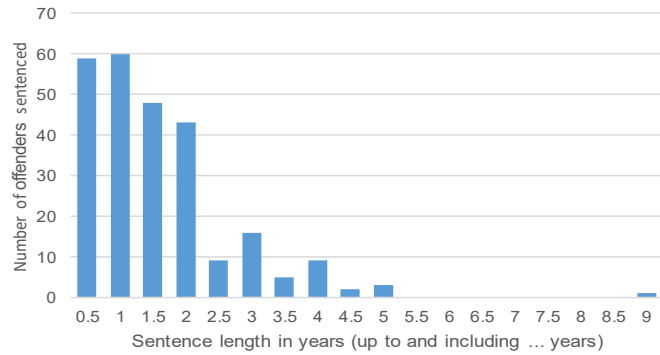
Stalking (involving fear of violence or serious alarm or distress), Protection from Harassment Act 1997, S4A



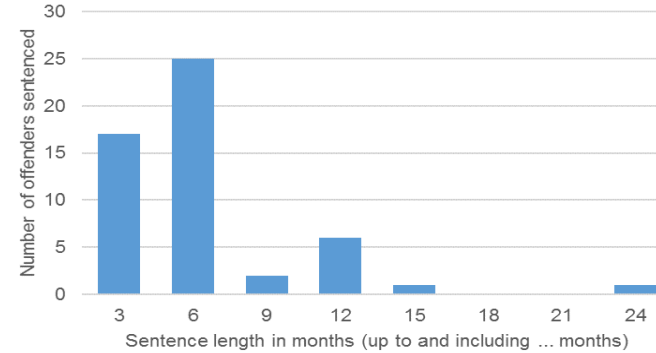
Stalking (harassment which involves a course of conduct that amounts to stalking), Protection from Harassment Act 1997, S2A



Threats to kill, Offences Against the Person Act 1861, S16



Disclosing private sexual photographs and films with intent to cause distress, Criminal Justice and Courts Act 2015, S33



Controlling or Coercive Behaviour in an Intimate or Family Relationship, Serious Crime Act 2015, S76

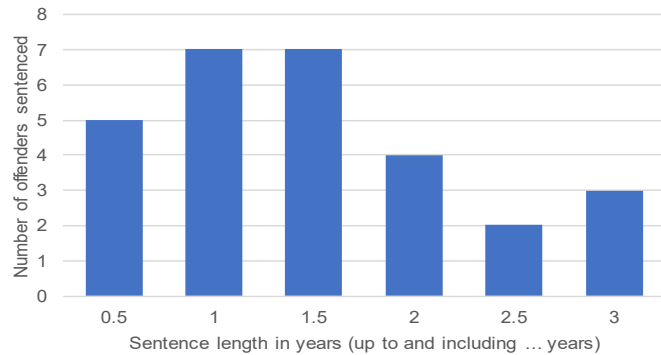
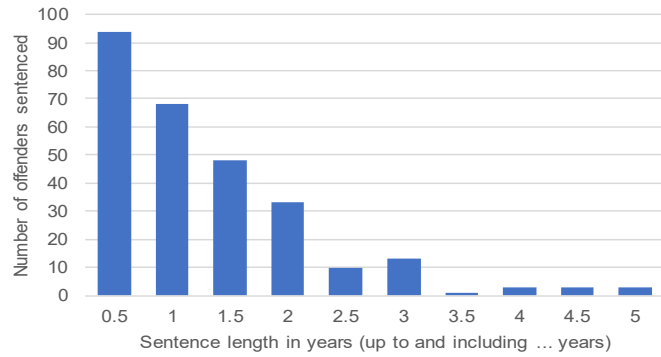
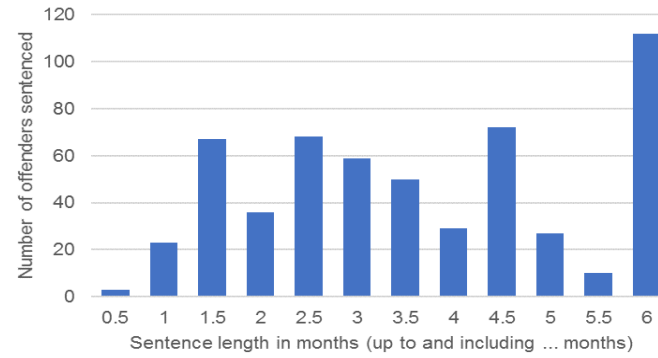


Figure 2: Distribution of estimated custodial sentence lengths for adult offenders sentenced to immediate custody for specified intimidatory offences, before any reduction for guilty plea, 2016

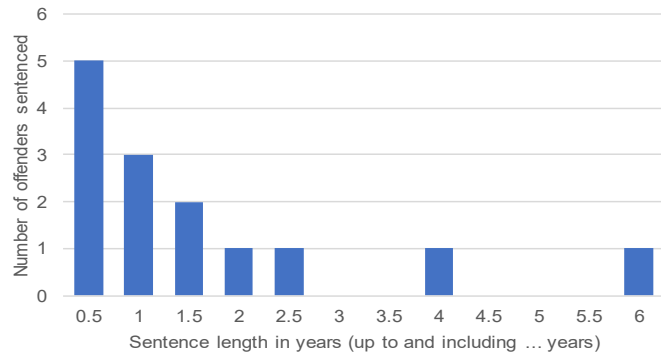
Harassment (putting people in fear of violence), Protection from Harassment Act 1997, S4



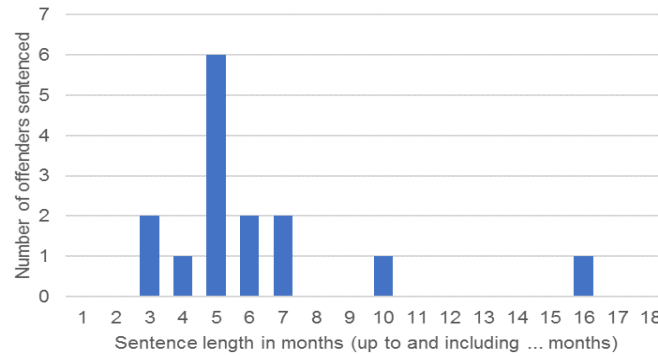
Harassment (without violence), Protection from Harassment Act 1997, S2



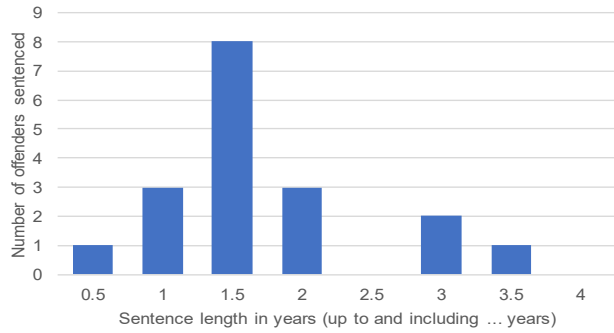
Racially or religiously aggravated harassment (putting people in fear of violence), Crime and Disorder Act 1998, S32



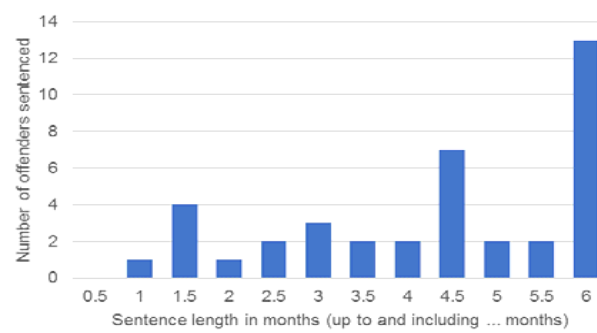
Racially or religiously aggravated harassment (non violent), Crime and Disorder Act 1998, S32



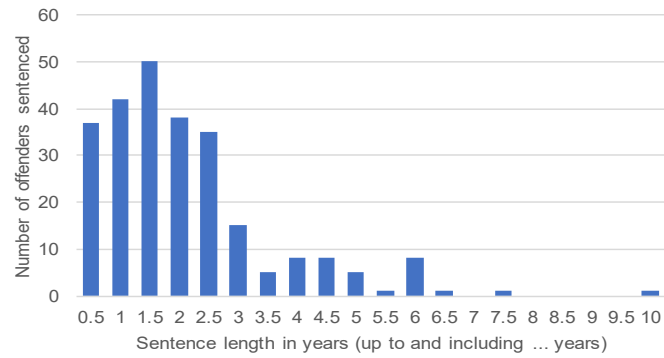
Stalking (involving fear of violence or serious alarm or distress), Protection from Harassment Act 1997, S4A



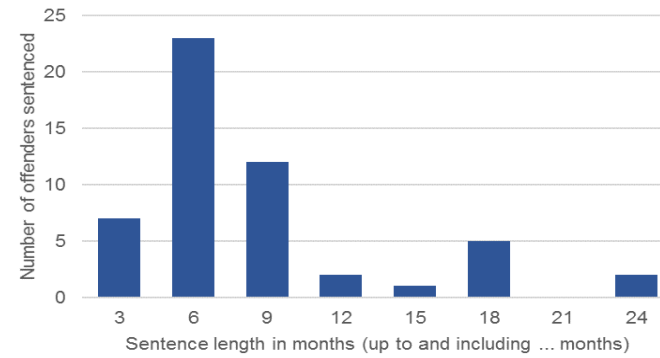
Stalking (harassment which involves a course of conduct that amounts to stalking), Protection from Harassment Act 1997, S2A



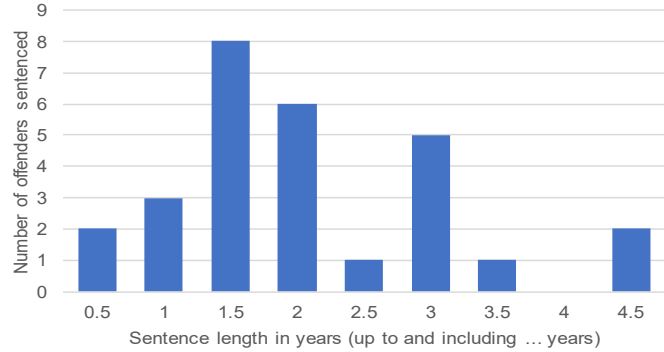
Threats to kill, Offences Against the Person Act 1861, S16



Disclosing private sexual photographs and films with intent to cause distress, Criminal Justice and Courts Act 2015, S33



Controlling or Coercive Behaviour in an Intimate or Family Relationship, Serious Crime Act 2015, S76



Blank page

**Sentencing Council meeting:** 13<sup>th</sup> April 2018  
**Paper number:** SC(18)APR05– Breach  
**Lead Council members:** Jill Gramann & Martin Graham  
**Lead officials:** Lisa Frost  
0207 071 5784

## 1 ISSUE

1.1 At the October 2017 meeting the Council signed off the definitive Breach guideline, subject to consideration of the resource assessment. Work to assess the impact of the guideline has now been conducted and the Council are asked to consider the information presented and to agree a publication and in force date for the definitive guideline.

## 2 RECOMMENDATION

2.1 That the Council;

- Considers the information in relation to the impact of the Breach guideline;
- Agrees a publication and in force date for the definitive guideline for Breach offences.

## 3 CONSIDERATION

3.1 At the October 2017 meeting the Council signed off the definitive Breach guideline. The Council were advised of difficulties in completing a resource assessment for some breaches within the guideline due to the lack of data on current sentencing practice, notably for breaches of Community Orders and Suspended Sentence Orders. The definitive guidelines for Breach of CO's and SSO's are attached at **Annex A** for reference.

3.2 The Council agreed that publication of the guideline should be paused to allow a data collection exercise to be undertaken this Spring, to provide for a more informed resource assessment.

3.3 This delay also provided for more time for work to be undertaken to raise the profile of the Imposition guideline, with the aim of addressing the trend for SSO's to be imposed as a more severe form of CO, to mitigate the risk of a high number of suspended sentence activations upon publication of the breach guideline. This paper provides information on work undertaken in this respect to provide a full picture of the potential impact of the guideline.

#### **Imposition related stakeholder engagement**

3.4 Significant stakeholder engagement has been undertaken in relation to the Imposition guideline since its publication, and has been more intensive over the past few months. Officials explored how the guidelines had been received during various meetings and events, and concluded that more direct and clear communication was necessary to ensure the guideline is being properly applied. Communications at the initial launch of the guideline were careful not to appear critical of prior sentencing behaviour, which in hindsight may have compromised the objective of ensuring the message in Imposition that a suspended sentence is a custodial sentence and not a more severe form of community order. As was discussed at a previous meeting, it is crucial that this is understood and embedded in practice to ensure the Breach guideline does not result in activation of suspended sentences when custody may not have been a fully intended or appropriate sentence.

3.5 A summary of work undertaken and engagement with various agencies and criminal justice partners is outlined below.

#### **Judicial College**

Upon publication of the Imposition guideline officials worked with Judicial College to develop training materials which could be incorporated in training packs for sentencers. However, this was targeted at new magistrates and did not address training of existing sentencers, as we were advised magistrates ongoing training is decided within the geographical areas within which they are based. Progress has been made recently following contact being made with agencies to secure their engagement and assistance with ensuring compliance with Imposition, and Judicial College have confirmed that Imposition related training material will be issued as mandatory training for all sentencers.

### Probation Service

The National Probation Service has been particularly responsive in relation to this issue. Following discussions held with them they have revised guidance for their officers and are instructing them not to recommend SSOs as a stand-alone sentence in PSR's, and align their recommendations with Imposition and refer only to custodial and community sentences with direct reference to the guideline. They are also arranging for the removal of SSOs as a sentence option from the systems used to prepare reports, and will include only custody and community orders. Sarah Munro participated in a video in explaining the reasons for this which will be issued to Probation Officers as part of a training package on 12<sup>th</sup> April. From that date they will be instructed not to recommend an SSO as a standalone sentence.

### Community Rehabilitation Companies

An event will be hosted by officials and Martin Graham on 3<sup>rd</sup> May for Community Rehabilitation Company Chief Executives. As well as discussing the Imposition and Breach guidelines, the changes NPS are making to PSR reports will be explained so that they can ensure alignment of their own operational guidance and information included in Breach referrals.

### Sentencers

Reaching sentencers with a view to disseminating a clear, consistent message proved problematic due to the various strands of the Judiciary and their differing governing bodies. The target audience includes magistrates, legal advisers, District and Circuit Judges, as well as Court of Appeal Judges. We initially contacted various bodies with responsibility for particular groups including the JCS, MA, NBCF, Judicial College and the Legal Trainers Network who largely suggested articles in publications which did not guarantee the reach we required, nor carried the impact of an instruction. For this reason we decided that the best approach would be a direct communication to sentencers from our Chairman. This letter was addressed and issued to Court of Appeal, Presiding and Resident Judges; District Judges and magistrates; and magistrates' court legal advisers. It informed them of the imminent change in Probation recommendations and to clarify the important reasons the guideline must be followed. The letter was approved by the SPJ and President of the Queens Bench Division, and was issued on 3<sup>rd</sup> April 2018. It is

attached at **Annex B**. Alongside this, articles will be published in various sentencer communications over the coming months to reiterate these messages.

### Court of Appeal

Following the assistance of Heather Hallett in her capacity as Vice President of the Court of Appeal (Criminal Division), Court of Appeal case summaries now include a note directly referencing the Imposition guideline where the original Crown Court sentence imposed is relevant.

3.6 This robust approach to raising awareness and compliance with the Imposition guideline is more likely to achieve the objective intended by publishing the guideline. It is also thought that once the Breach guideline is published and sentencers see the options which will be available to them on sentencing, this will reinforce the message that suspended sentences are custodial sentences.

### **Current evidence of impact of Imposition guideline**

3.7 The Imposition guideline came into force on 1 February 2017, and data are now available covering the period up to the end of September 2017. The published figures are very high level and are only available showing whole years, from the beginning of each October to the end of the following September. Therefore, the only analysis that can be conducted at this point is a comparison of figures for the year ending September 2017 with similar figures for previous years.

3.8 The number of offenders sentenced to a SSO increased almost year-on-year for at least the past ten years, and by the year ending September 2016, made up 4.6% of offenders sentenced. For the year ending September 2017, this decreased to 4.2%, the lowest proportion since the year ending September 2013 when SSOs made up 3.9% of offenders sentenced.

3.9 However, from the year ending September 2016 to the year ending September 2017, the proportions of offenders sentenced to immediate custody and COs also decreased, while the proportion receiving fines increased. This is likely to be because of a change in the offence mix, with a higher proportion of lower-level offences coming before the courts in the last year. Overall, this makes it difficult to assess whether the Imposition guideline has had the intended effect. The number of offenders sentenced to a SSO is at its lowest level for several years, but this may just reflect a change in the nature of the offences sentenced.



3.10 A richer dataset for the whole of 2017 will be available at the end of May, and then it will be possible to conduct more detailed analysis of the possible impact of the Imposition guideline on sentencing practice.

### **Data Collection/Resource Assessment**

3.11 The draft resource assessment for breach of a SSO and breach of a CO stated that:

- It is difficult to establish current sentencing practice, as there is no reliable data available on the total number of breaches or the sentencing outcomes of breaches sentenced at court;
- There is some evidence that some SSOs are being imposed as a more severe form of CO, so when a breach occurs, the custodial sentence may not be activated as it was not intended that custody actually be served for the original offence;
- The Imposition guideline was intended to address this issue, with the expectation being that the number of SSOs imposed would decrease (which in turn should cause a subsequent decrease in the number of breaches of SSOs);
- The Breach guideline, if implemented as intended, would be expected to cause an increase in the proportion of those SSOs which are imposed that are activated; and,
- Due to the lack of data and the unknown impact of the Imposition guideline, it was not possible to provide a precise estimate of the potential impact of the CO and SSO guidelines on prison, probation and youth justice resources.

3.12 The Breach guideline has the potential to affect the penalties imposed for a large number of offenders, and so any impact that the guideline may have could be substantial. There was therefore a need to collect new data to be able to provide a clearer estimate of the possible impact of the guideline on sentencing practice.

### Data collection at magistrates' courts

3.13 From November 2017 to the end of March 2018, a data collection exercise was conducted in a sample<sup>1</sup> of magistrates' courts across England and Wales. As part of this exercise, sentencers were asked to give details about how they dealt with breaches of COs and SSOs (plus four other offences). The topics covered in the data collection for breaches of COs and SSOs included:

- Details of the original order imposed, including the length and any requirements;
- Details of factors relating to the offender's compliance with the order:
  - the attitude or engagement of the offender with the order;
  - the proportion of requirements completed;
  - the proximity of the breach to the imposition of the order;
  - circumstances or offender characteristics that impeded the offender's compliance;
  - the number of previous breaches of the order; and,
  - any other factors taken into account in relation to compliance.
- Details of the relative seriousness of the new offence for which the offender was convicted (for breach of a SSO by conviction of a further offence); and,
- The penalty imposed for the breach, including, for breach of a SSO, the reasons for not activating or for reducing the custodial sentence (if applicable).

3.14 An early extract of the data was taken<sup>2</sup> to inform the Council's resource assessment of the Breach guideline. The analysis is presented below.

3.15 When considering the figures presented, it is important to bear in mind that the data represent a very small proportion of all breaches, and so may not be representative of all sentencing practice. If the figures are biased then any estimate of the impact will be incorrect. There is no straightforward way of checking how representative the data are, because there is no reliable alternative source to compare with.

---

<sup>1</sup> In total, 80 magistrates' courts were selected to take part in the exercise.

<sup>2</sup> The early extract of the data included all electronic forms submitted by the end of 9 March 2018.

3.16 It should be noted that, while the data collection covered magistrates' courts only, a separate piece of work was conducted to analyse a sample of transcripts of judges' sentencing remarks for breaches of SSOs and COs sentenced at the Crown Court. This work covered only a very small sample of sentences, but found that the main points and themes were broadly similar to those presented below in the magistrates' courts data analysis.

#### Evidence from the data collection regarding the use of the Imposition guideline

3.17 The data collection did not directly capture any information regarding the use or understanding of the Imposition guideline, but several observations have been made that provide insight into potential issues:

- For the data collection form for breaches of COs by failing to comply with requirements, one of the questions asked sentencers if there was anything else they would like to tell us about how they sentenced the offence. On 15 (out of 762) forms, sentencers stated that they 'activated the order' or gave reasons why they did not 'activate the order'. This implies that they were actually dealing with a breach of a SSO, and had completed the wrong form, suggesting that some sentencers are still perceiving SSOs as community sentences. It is only because of this small number of sentencers spontaneously mentioning activation that we are aware of this. It is therefore possible that more sentencers also completed the incorrect form, but in a way that is not identifiable from the data.
- When dealing with breaches of COs, on four of the forms, sentencers indicated that they revoked the CO and imposed a new CO, but then stated that they suspended the sentence. In these cases, it seems that they actually had imposed a SSO and had completed the form incorrectly. If they had selected 'custody' then they would have been presented with the option to declare whether the sentence was suspended. One sentencer stated that "This form cannot accept all the things that need to be ticked". Again, this suggests that some sentencers consider SSOs to be community sentences.

#### Evidence from the data collection regarding breaches

3.18 For the data analysis presented below, records were excluded if the incorrect form was completed, but all other records were retained.

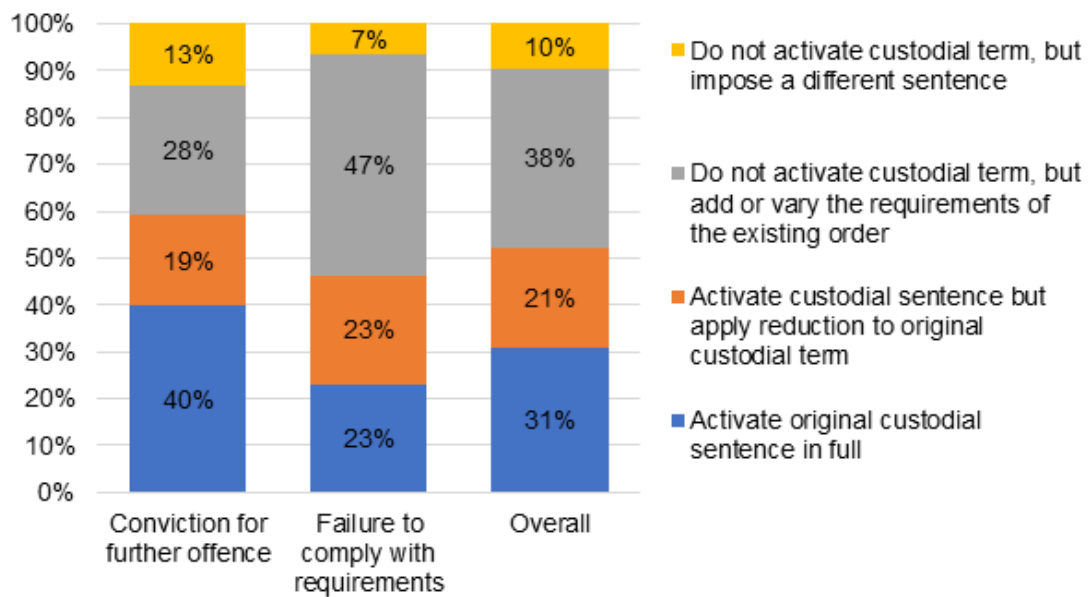
### Breach of a suspended sentence order – current sentencing practice

3.19 For this assessment, 174 completed data collection forms were analysed, including 83 forms for conviction for a further offence during the operational period of the order, and 91 for failure to comply with the community requirements of the order.

3.20 Overall, 52% of offenders had their sentences activated following the breach (31% in full, and 21% with a reduction to the sentence length). The rest either had their existing order modified (38%) or had a different sentence<sup>3</sup> imposed (10%).

3.21 The breakdown of these figures differed depending on whether the breach was for a further offence or for failure to comply with requirements, with custodial sentences more likely to be activated if the offender was being sentenced for a further offence during the operational period of the order, as the chart below shows.

#### **Sentencing outcomes for breach of a SSO, from an early extract of data from the magistrates' court data collection**



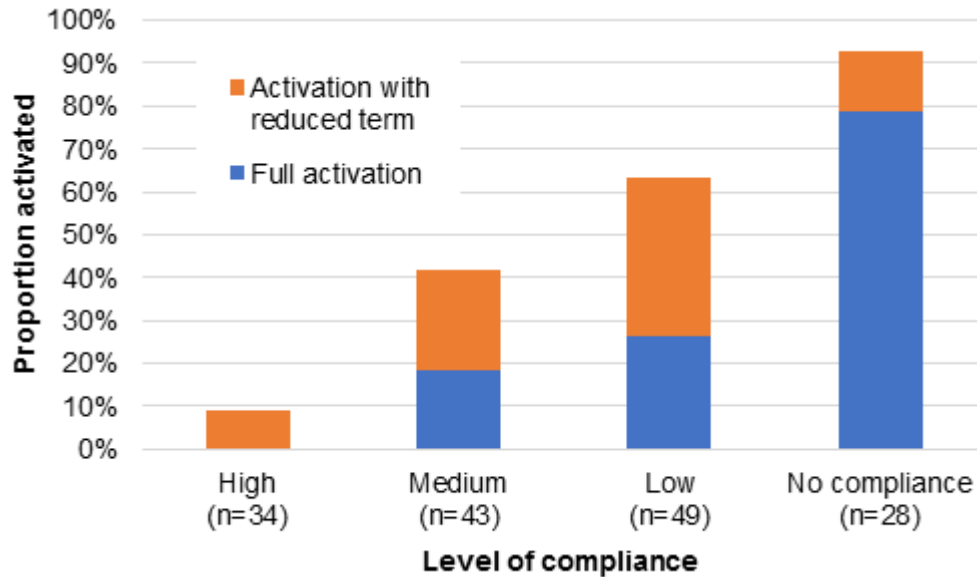
3.22 When looking at the activation rate<sup>4</sup> by the level of compliance (for conviction for a further offence and failure to comply with requirements, combined), the data shows that the lower the level of compliance with the order, the more likely the sentencers were to activate the order, as would be expected. The vast majority (93%) of offenders who were deemed not to have complied with the order at all had their sentences activated, while only 9% of offenders with a high level of compliance

<sup>3</sup> Most of the different sentences imposed were fines, although one offender was given a conditional discharge and for one it was not clear what sentence was imposed.

<sup>4</sup> The activation rate is defined here as the proportion of forms that included activation out of all forms analysed.

went on to have their sentence activated. This is thought to be broadly in line with sentences following the Breach guideline.

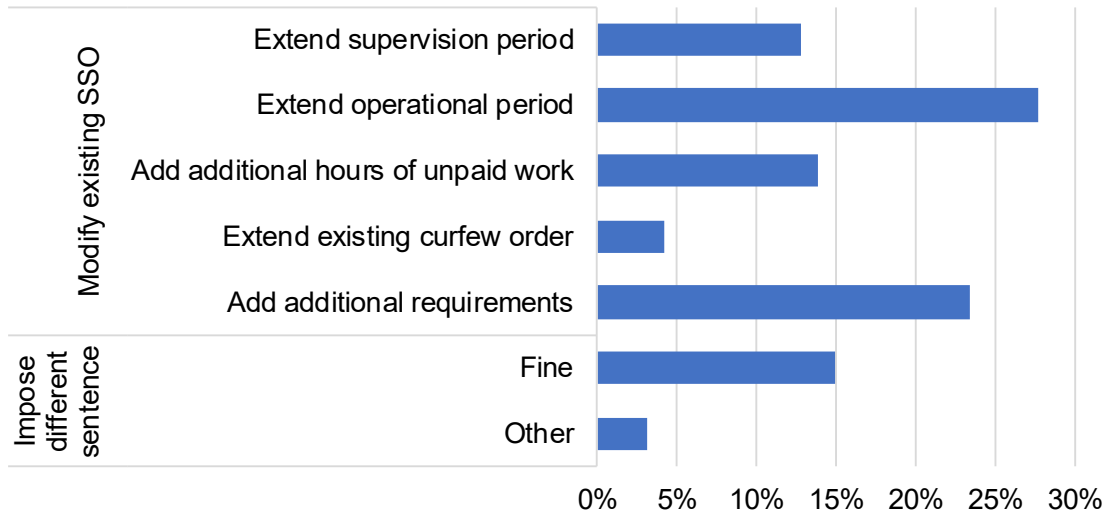
**Proportion of offenders who had their sentence activated, split by level of compliance, from an early extract of data from the magistrates' court data collection**



3.23 Where a sentencer indicated that they did not activate the custodial sentence at all, and instead either modified the existing order or imposed a different sentence, the most common choice was to extend the operational period of the existing order (representing around 28% of offenders for whom the custodial sentence wasn't activated).<sup>5</sup>

<sup>5</sup> Note that the majority of sentencers only chose one of the five options listed, but 14% chose two or three of the options (for example, by extending the supervision period *and* adding additional requirements).

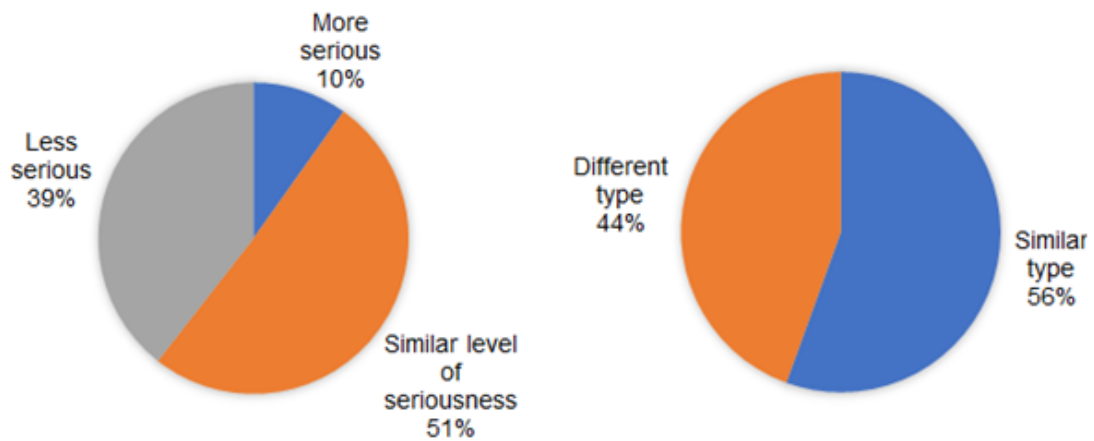
**Penalties imposed for breach of a SSO, for offenders whose custodial sentence was not activated, from an early extract of data from the magistrates' court data collection**



3.24 The second most common was adding additional requirements (23%). Of the additional requirements imposed, the most commonly chosen was a Rehabilitation Activity Requirement (RAR).

3.25 The guideline for sentencing offenders convicted for a further offence during the operational period of the order says that “The facts/nature of the new offence is the primary consideration in assessing the action to be taken on the breach.” Where the new offence is more serious or where there are multiple new offences, the guideline tells sentencers that they should be activating the custodial sentence in full. Around 14% of offenders were being dealt with for multiple new offences. The relative seriousness and type of new offence is shown below.

**The relative seriousness and type of the new offence compared to the original offence for which the order was imposed, from an early extract of data from the magistrates' court data collection**



3.26 Overall, around 20% (17 offenders) had been convicted either for multiple new offences, or for a new offence that was more serious than the original offence. The majority of these had their custodial sentence activated, either in full (71%, 12 offenders) or with a reduction (18%, 3 offenders). The remaining 2 offenders had their existing orders modified. Under the new guideline, all of these offenders would have their sentence activated in full.

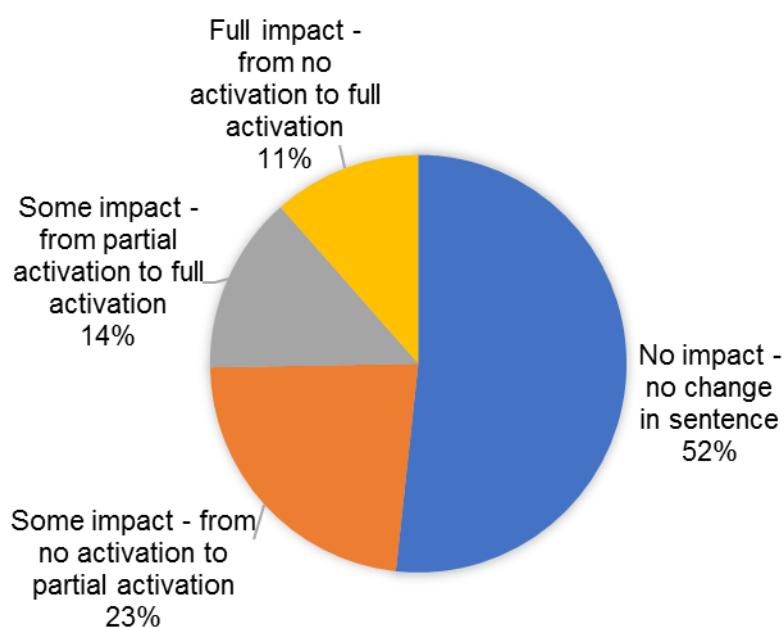
3.27 For most of the rest of this guideline, the sentencer is told to weigh up the seriousness and type of the new offence against the overall level of compliance of the offender with the order, in order to decide the appropriate sentence. For breach of a SSO by failing to comply with requirements, the compliance is the only factor to be considered by the sentencer in the new guideline.

Breach of a suspended sentence order - estimated changes to sentencing practice

3.28 Analysis was conducted to compare the sentence given within the magistrates' court data collection with the sentence the offender would be expected to receive under the new guideline, if sentencers use the sentencing tables only, without considering the provision for when it would be 'unjust in all of the circumstances' to activate. For example, if an offender was convicted for a further offence that was more serious than the original offence for which the order was imposed, then, under the new guideline, they would have their sentence activated in full. If the data collection indicated that an offender of this type was currently not having their sentence activated, and instead had their SSO modified in some way, then this would be recorded as "Full impact", because it is anticipated under this scenario that the offender would go from no activation to full activation and so the new guideline would have the fullest impact on this offender.

3.29 So if we assume that sentencers only consider the sentencing tables in the guideline, and do not apply the provisions for when activating the sentence would be 'unjust in all of the circumstances' then this would be expected to lead to the following changes in sentence as a result of the guideline.

**Expected changes to sentence outcomes for breach of a SSO, if the sentencing tables are applied strictly, with no exceptions**



3.30 Just over half (52%) of sentences would be expected to stay the same under the new guideline in this scenario, while the rest (48%) would be expected to change, either by activating in full under the new guideline where previously the sentence was not activated or partially activated (activated with a reduction in the custodial term), or by partially activating now where previously the sentence was not activated at all.

3.31 However, there are several key reasons why it is expected that the actual proportion of offenders who will receive different sentences under the new guideline will be lower than the 48% mentioned above:

- As explained, the 48% does not take into account the guideline's provision for when activation would be 'unjust in all of the circumstances'. As part of the data collection, when sentencers indicated that they did not activate the custodial sentence, they were asked to provide a reason. The words 'unjust' or 'not in the interests of justice' were spontaneously mentioned on numerous forms where the custodial sentence was not activated. If these types of cases continue to be assessed in this way under the new guideline, then these



offenders will continue not to have their sentences activated, and the impact will be lower.

- In the data collection, many offenders had a characteristic or circumstance taken into account, where the sentencer indicated that it had impeded the offender's compliance with the order.<sup>6</sup> There were also specific reasons given for why the sentencer chose not to activate. These included mental health issues, disabilities, learning difficulties, drug and alcohol dependency, family problems including childcare responsibilities and illnesses, housing issues including homelessness, a change in circumstance of the offender, the sentencer wanting to give the offender the opportunity to complete a programme, and the sentencer stating that a programme seemed to be working. For many of the forms, multiple reasons were given for not activating; for example, one sentencer stated: "Dissimilar offence, less serious offence, compliance with probation, proximity to end of SSO, imminent arrival of first child". If these were sufficient reasons not to activate, and for these cases it is considered 'unjust' to activate under the new guideline, then sentencers will continue not to activate and the impact of the guideline will be lower.
- When sentencers indicated that they activated the custodial sentence but applied a reduction to the length, almost all sentencers stated that this was because of the offender's compliance in some way; either that the offender had completed some of the requirements and/ or because the offender had complied for the majority of the length of the order. If sentencers continue to consider compliance as a reason for it to be 'unjust in all of the circumstances' to activate in full, then they will continue to apply reductions as they are currently, as the guideline specifically provides for this in relation to any completed unpaid work or curfew in the penalty levels in appropriate cases.
- For breaches where the offender has committed a further offence during the operational period of the order, it is possible that some sentencers will state that the custodial sentence should be served concurrently with a custodial sentence imposed for the new offence. This would mean that if offenders were given different sentences under the new guideline, the impact would be

---

<sup>6</sup> Note that some of these cases are the same as those mentioned in the previous point.

lower than if the sentences were to be served consecutively. We have no data however on how many such sentences are served concurrently.

3.32 The analysis suggests that current sentencing practice is not too different to the penalties recommended in the guideline, as the guideline allows for reductions to sentence lengths when there has been some compliance with the order, and for sentencers to use the 'unjust' provision if there are appropriate circumstances not to activate the order. Therefore, the impact may be lower than was previously anticipated (at the point of guideline development and consultation).

3.33 Together, these reasons demonstrate that the guideline is likely to change the penalties imposed for a lower proportion of cases than the 48% mentioned above. However, even if these assumptions are correct, there is likely to be an increase in the proportion of sentences activated as a result of the guideline, and this may have a large cumulative impact on the prisons, with many more offenders being sent to custody than at present.

3.34 However, there is evidence to suggest that the sentences served by these offenders may be low. As part of the data collection, information on the custodial sentence lengths of the original orders and the lengths of reductions given (when applicable) was collected. If offenders only serve around half of their sentence in custody (and are released from prison at the half-way point), then the data suggests that offenders with full activation of their sentence would serve an average of 8 weeks in custody, offenders with full activation but who would previously have had a reduction in their sentence would serve an average of 3 additional weeks, and offenders with partial activation would serve an average of 5 weeks. It should be noted that this represents magistrates' court sentences only. Around 60% of offenders sentenced to SSOs in 2016 were sentenced at magistrates' courts (although it should be noted that sentences served by offenders sentenced at the Crown Court are likely to be considerably higher).

3.35 In addition, if the work to embed the use of the Imposition guideline has the intended effect, and the number of SSOs imposed decreases, then the guideline will apply to fewer offenders and so any impact will be smaller than it would be under current sentencing practice.

### Breach of a suspended sentence order - estimating the cost of any impact

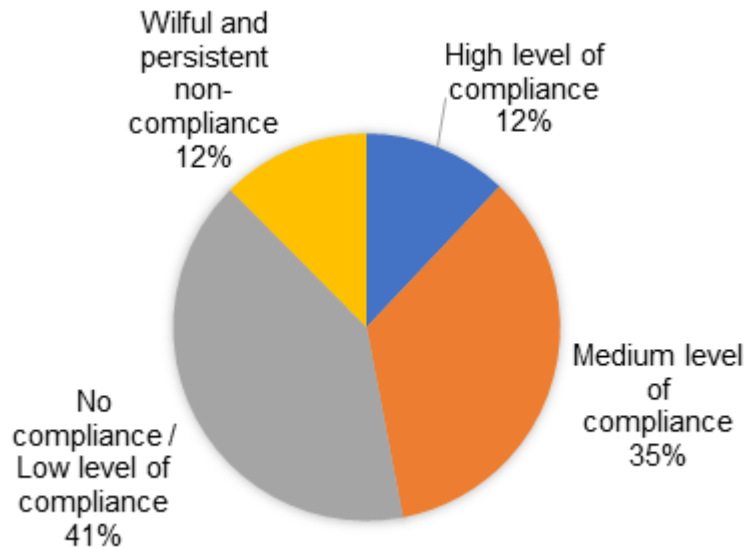
3.36 There are no reliable data sources available to report the number of offenders sentenced each year for breaches of SSOs. Several data sources have some data on breaches, but these either capture something not directly related to what is needed (such as probation data on terminations of orders) or are not considered to be reliable enough to trust and have therefore never been published (such as the MoJ CPD data on breaches). This means that no one source, or combination of sources, is able to fully provide the data needed. While it is possible to try to estimate the number based on these sources, depending on the set of assumptions used and the method for counting breaches, any estimate of the impact of the guideline would vary widely and result in a number that is potentially both meaningless and very likely misleading. It is therefore not possible, or advisable, to calculate any informative or realistic estimate of the guideline on sentencing practice, or the subsequent impact on prison and probation services.

### Breach of a community order

3.37 In total, 747 completed forms were analysed to assess current sentencing practice for breaches of COs, and to estimate the impact of the guideline.

3.38 The new guideline for breach of a CO (by failing to comply with requirements) states that where the non-compliance is wilful and persistent, the sentencer should revoke the order and impose a custodial sentence. Analysis of the data collected from magistrates' courts shows that around 12% of breaches of COs were considered to be 'wilful and persistent non-compliance'.

**Levels of compliance with COs, from an early extract of data from the magistrates' court data collection**



3.39 For all other types, the sentencer is told either to revoke the order and re-sentence the original offence, add curfew requirements, add additional hours of unpaid work, extend the length of the order, add additional requirements or impose a fine. These options are too varied for it to be feasible to estimate the impact of the guideline for high, medium, low or no compliance, because it would not be possible to determine with any certainty how the penalty may be different under the new guideline.

3.40 Of those offenders whose non-compliance was deemed to be 'wilful and persistent', 59% already received a custodial sentence. The other 41%, who are not currently receiving a custodial sentence, would receive a custodial sentence under the new guideline.

3.41 Out of those offenders already receiving a custodial sentence, 53% were sentenced to immediate custody and the remaining 47% had their sentence suspended.

3.42 If we assume these proportions from the data collection apply to all offenders sentenced for breach of a CO, then overall, just under 3% of offenders will be sentenced to immediate custody when they wouldn't have been under current sentencing practice (i.e. were deemed to be wilfully and persistently non-compliant, and will receive an immediate custodial sentence under the new guideline where they had previously received a non-custodial sentence).

3.43 In a similar way as for breaches of SSOs, the number of offenders dealt with for breach of a CO at court per year was not known, so it has not been possible to estimate the likely impact of the guideline.

#### Summary of impact

3.44 Overall, there is a huge amount of uncertainty regarding the impact of the new guideline on sentencing for breaches of SSOs and COs. With no reliable information about volumes, no up-to-date information on the impact of the Imposition guideline, very little idea of sentencing practice at the Crown Court and only limited information on sentencing at the magistrates' courts, it has not been possible to quantify the impact of the guideline on the prison or probation services.

3.45 Any changes in sentencing practice could have a large cumulative impact on the prisons, with many more offenders being sent to custody than at present. However, the work currently being undertaken to embed the use of the Imposition guideline in court should help to reduce any possible impact, and if SSOs are only imposed as intended, then the impact of the guideline may not be substantial. An option to further mitigate the risk of an increased level of activations could be to publish the guideline as planned at the end of May, but to have a greater length of time than usual for it to come into force, with October proposed as a suitable time by a number of stakeholders we have engaged with to provide for training and events focused on providing information on the guideline.

3.46 Resource assessments covering all breaches included in the guideline will be cascaded to Council in due course, following the decisions made at this meeting.

**Question 1: Does the Council agree to go ahead with publishing the definitive Breach Offences guideline in May?**

**Question 2: Does the Council agree that the guideline should have a longer than usual lead time before coming into force, and become effective from October?**

**Question 3: Is the Council content with the interpretation of the latest data on breach, as detailed above, and for this to form the basis of the resource assessments on breach of a SSO and CO?**

## **4 RISKS**

4.1 As explained throughout, there is a risk that the guideline could have an impact on average sentencing practice, particularly if the guideline leads sentencers to more frequently activate the custodial sentences of SSOs when breached. This could have a potentially large cumulative impact on the prisons, with many more offenders being sent to custody than at present. However, the work to embed the use of the Imposition guideline should help to counteract this by ensuring that SSOs are only imposed when it is intended that the offender would serve a custodial sentence if they breached their order. Additionally, there is no evidence to suggest that sentencers do not currently have good reasons not to activate, and they may continue to consider it to be 'unjust in all of the circumstances' to activate under the new guideline.

# **Breach of a Community Order**

## **Criminal Justice Act 2003 (Schedule 8)**

## Breach of Community Order by Failing to Comply with Requirements

The court must take into account the extent to which the offender has complied with the requirements of the community order when imposing a sentence.

In assessing the level of compliance with the order the court should consider:

- i) the overall attitude and engagement with the order as well as the proportion of elements completed;
- ii) the impact of any completed or partially completed requirements on the offender's behaviour;
- iii) the proximity of breach to imposition of order; and
- iv) evidence of circumstances or offender characteristics, such as disability, mental health issues or learning difficulties which have impeded offender's compliance with the order.

Overall compliance with order	Penalty
Wilful and persistent non-compliance	Revoke the order and re-sentence imposing custodial sentence (even where the offence seriousness did not originally merit custody)
Low level of compliance	Revoke the order and re-sentence original offence <b>OR</b> Add curfew requirement 20 - 30 days* <b>OR</b> 30 - 50 hours additional unpaid work/extend length of order/add additional requirements <b>OR</b> Band C fine
Medium level of compliance	Revoke the order and resentence original offence <b>OR</b> Add curfew requirement 10 - 20 days* <b>OR</b> 20 - 30 hours additional unpaid work/extend length of order/add additional requirements <b>OR</b> Band B fine
High level of compliance	Add curfew requirement 6 - 10 days* <b>OR</b> 10 - 20 hours additional unpaid work/extend length of order/add additional requirements <b>OR</b> Band A fine

\* curfew days do not have to be consecutive and may be distributed over particular periods, for example at weekends, as the court deems appropriate. The period of the curfew should not exceed the duration of the community order and cannot be for longer than 12 months.



## Technical guidance

- a) If imposing more onerous requirements the length of the order may be extended up to 3 years or six months longer than the previous length, whichever is longer (but only once).
- b) If imposing unpaid work as a more onerous requirement and an unpaid work requirement was not previously included, the minimum number of hours that can be imposed is 20.
- c) The maximum fine that can be imposed is £2,500.
- d) If re-sentencing, a suspended sentence **MUST NOT** be imposed as a more severe alternative to a community order. A suspended sentence may only be imposed if it is fully intended that the offender serve a custodial sentence in accordance with the *Imposition of Community and Custodial* sentences guideline.
- e) Where the order was imposed by Crown Court, magistrates should consider their sentencing powers in dealing with a breach. Where the judge imposing the order reserved any breach proceedings commit the breach for sentence.

### Powers of the court following a subsequent conviction

A conviction for a further offence does not constitute a breach of a community order. However, in such a situation, the court should consider the following guidance from the *Offences Taken into Consideration and Totality* guideline:<sup>1</sup>

#### **Offender convicted of an offence while serving a community order**

*The power to deal with the offender depends on his being convicted whilst the order is still in force; it does not arise where the order has expired, even if the additional offence was committed whilst it was still current.*

*If an offender, in respect of whom a community order made by a magistrates' court is in force, is convicted by a magistrates' court of an additional offence, the magistrates' court should ordinarily revoke the previous community order and sentence afresh for both the original and the additional offence.*

*Where an offender, in respect of whom a community order made by a Crown Court is in force, is convicted by a magistrates' court, the magistrates' court may, and ordinarily should, commit the offender to the Crown Court, in order to allow the Crown Court to re-sentence for the original offence and the additional offence.*

*The sentencing court should consider the overall seriousness of the offending behaviour taking into account the additional offence and the original offence. The court should consider whether the combination of associated offences is sufficiently serious to justify a custodial sentence.*

*If the court does not consider that custody is necessary, it should impose a single community order that reflects the overall totality of criminality. The court must take into account the extent to which the offender complied with the requirements of the previous order.*

<sup>1</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive\\_guideline\\_TICs\\_\\_totality\\_Final\\_web.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive_guideline_TICs__totality_Final_web.pdf) p.14

**Blank page**

# **Breach of a Suspended Sentence Order**

**Criminal Justice Act 2003 (Schedule 12)**

## Breach of a Suspended Sentence Order

### 1) Conviction for further offence committed during operational period of order

The court **must activate the custodial sentence** unless it would be unjust in all the circumstances to do so. The predominant factor in determining whether activation is unjust relates to the level of compliance with the suspended sentence order and the facts/nature of any new offence. **These factors are already provided for in the penalties.**

The facts/nature of the new offence is the primary consideration in assessing the action to be taken on the breach.

Where the breach is in the second or third category below, the prior level of compliance is also relevant. In assessing the level of compliance with the order the court should consider:

- i) the overall attitude and engagement with the order as well as the proportion of elements completed;
- ii) the impact of any completed requirements on the offender's behaviour;
- iii) the proximity of breach to imposition of order; and
- iv) evidence of circumstances or offender characteristics, such as disability, mental health issues or learning difficulties which have impeded offender's compliance with the order.

Breach involves	Penalty
Multiple and/or more serious new offences committed	Full activation of original custodial term
New offence similar in type and gravity to offence for which Suspended Sentence Order imposed and:  a) No/Low level of compliance with Suspended Sentence Order <b>OR</b> b) Medium or High level of compliance with Suspended Sentence Order	Full activation of original custodial term  Activate sentence but apply appropriate reduction* to original custodial term taking into consideration any unpaid work or curfew requirements completed
New offence less serious than original offence but requires a custodial sentence and:  a) No/Low level of compliance with Suspended Sentence Order <b>OR</b> b) Medium or High level of compliance with Suspended Sentence Order	Full activation of original custodial term  Activate sentence but apply appropriate reduction* to original custodial term taking into consideration any unpaid work or curfew requirements completed
New offence does not require custodial sentence	Activate sentence but apply reduction* to original custodial term taking into consideration any unpaid work or curfew requirements completed <b>OR</b> Impose more onerous requirements and/or extend supervision period and/or extend operational period and/or impose fine

\* It is for the court dealing with the breach to identify the appropriate proportionate reduction depending on the length and duration of any compliance with the requirements specified

## Unjust in all the circumstances

**The court dealing with the breach should remember that the court imposing the original sentence determined that a custodial sentence was appropriate in the original case.**

In determining if there are other factors which would cause activation to be unjust, the court may consider all factors including:

- any strong personal mitigation;
- whether there is a realistic prospect of rehabilitation;
- whether immediate custody will result in significant impact on others.

**Only new and exceptional factors/circumstances not present at the time the sentence was imposed should be taken into account.**

In cases where the court considers that it would be unjust to order the custodial sentence to take effect, it must state its reasons and it **must** deal with the offender in one of the following ways:

- (a) impose a fine not exceeding £2,500; **OR**
- (b) extend the operational period (to a maximum of two years from date of original sentence); **OR**
- (c) if the SSO imposes community requirements, do one or more of:
  - (i) impose more onerous community requirements;
  - (ii) extend the supervision period (to a maximum of two years from date of original sentence);
  - (iii) extend the operational period (to a maximum of two years from date of original sentence).

See page **xx**.

## 2) Failure to comply with a community requirement during the supervision period of the order

The court **must activate the custodial sentence** unless it would be unjust in all the circumstances to do so. The predominant factor in determining whether activation is unjust relates to the level of compliance with the suspended sentence order. **This factor is already provided for in the penalties.**

The court must take into account the extent to which the offender has complied with the suspended sentence order when imposing a sentence.

In assessing the level of compliance with the order the court should consider:

- i) the overall attitude and engagement with the order as well as the proportion of elements completed;
- ii) the impact of any completed or partially completed requirements on the offender's behaviour; and
- iii) the proximity of breach to imposition of order; and
- iv) evidence of circumstances or offender characteristics, such as disability, mental health issues or learning difficulties which have impeded offender's compliance with the order.

Breach involves	Penalty
No/Low level of compliance	Full activation of original custodial term
Medium level of compliance	Activate sentence but apply reduction* to original custodial term taking into consideration any unpaid work or curfew requirements completed
High level of compliance	Activate sentence but apply reduction* to original custodial term taking into consideration any unpaid work or curfew requirements completed <b>OR</b> Impose more onerous requirements and/or extend supervision period and/or extend operational period and/or impose fine

\*It is for the court dealing with the breach to identify the appropriate proportionate reduction depending on the length and duration of any compliance with the requirements specified

See page **xx**.

## Unjust in all the circumstances

**The court dealing with the breach should remember that the court imposing the original sentence determined that a custodial sentence was appropriate in the original case.**

In determining if there are other factors which would cause activation to be unjust, the court may consider all factors including:

- any strong personal mitigation;
- whether there is a realistic prospect of rehabilitation;
- whether immediate custody will result in significant impact on others.

**Only new and exceptional factors/circumstances not present at the time the sentence was imposed should be taken into account.**

In cases where the court considers that it would be unjust to order the custodial sentence to take effect, it must state its reasons and it **must** deal with the offender in one of the following ways:

- (a) impose a fine not exceeding £2,500; **OR**
- (b) extend the operational period (to a maximum of two years from date of original sentence); **OR**
- (c) if the SSO imposes community requirements, do one or more of:
  - (i) impose more onerous community requirements;
  - (ii) extend the supervision period (to a maximum of two years from date of original sentence);
  - (iii) extend the operational period (to a maximum of two years from date of original sentence).

See page **xx**.

Blank page



Dear Judge

I am writing to all sentencers and magistrates' legal advisers regarding the definitive guideline on the Imposition of Community and Custodial Sentences came into force in February 2017. This guideline was issued in anticipation of a guideline for Breach offences which will be issued shortly. When we began work on the breach guideline, our research identified a trend. Over a ten year period between 2005-2015, we observed a substantial decline in the number of community orders imposed (from almost 203,000 in 2005 to 188,000 in 2010 to less than 108,000 in 2015) whilst the number of suspended sentence orders (SSOs) increased substantially (from less than 4,000 in 2005, to 46,000 in 2010 to over 52,000 in 2015).

Evidence suggested that part of the reason for this could be the development of a culture to impose suspended sentences as a more severe form of community order in cases where the custody threshold may not have been crossed. In such cases, if the suspended sentence order is then breached, there are two possible outcomes - neither of which is satisfactory. Either the courts must activate the custodial sentence and the offender then serve time in custody even when it may never have been intended that they do so for the original offence. Or the court could choose not to enforce the suspended sentence, thereby diminishing the deterrent power of such orders.

Before introducing the breach guideline, we decided that in the interests of effective and fair sentencing, this issue needed to be addressed. This is why the Council developed the Imposition guideline, which makes it clear that a suspended sentence is a custodial sentence and not a more severe form of community order. They can only be imposed where the court has determined first that the custody threshold has been crossed and second that custody is unavoidable. Only once these two decisions have been made following the structured exercise set out in the Imposition

guideline, can custody be imposed. At that point the court may then undertake a weighted assessment of the various factors which may lead the court to consider that it is possible to suspend the sentence.

Although the Imposition guideline has been in effect since 1st February 2017, the Council has some concerns that behaviour in respect of imposing these sentences has not changed. For the guideline to be effective, and to mitigate the risk of a high volume of activated suspended sentences upon the publication of the Breach guideline shortly, it is important that all members of the Judiciary and magistrates' courts' Legal Advisers are aware of it and ensure it is properly applied when sentencing appropriate cases.

To support effective application of the Imposition guideline, I have agreed with the Director of the National Probation Service that Probation Officers will refrain from recommending SSOs in pre sentence reports. This is because SSOs are not a standalone sentence; they are a custodial sentence and the court should only impose them having followed the structured sentencing exercise in the Imposition guideline. This does not mean the court should never suspend a custodial sentence, but this can only ever occur where the Court genuinely deems that a custodial sentence is entirely necessary and then conducts the weighted assessment as to whether suspension is possible. This in no way impacts upon judicial discretion to suspend custodial sentences: it merely seeks to reinforce good sentencing practice.

You will therefore notice that PSR reports will change in respect of the recommendations made by Probation staff and will refer only to custodial sentences or community orders, which are the only sentences available to the court. Guidance will be issued to Probation staff shortly, and will ensure sentencers are furnished with all relevant information to enable the appropriate sentence to be passed.

I would be grateful if you could share this letter with all circuit judges and recorders who sit at the Crown Court centres for which you act as Resident Judge and ensure full compliance with the Imposition guideline.

Yours faithfully,

A handwritten signature in black ink that reads "Colman Treacy". The signature is written in a cursive style and is positioned above a horizontal line that extends to the right.

**LORD JUSTICE TREACY**  
**CHAIRMAN OF THE SENTENCING COUNCIL**

**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**13 April 2018**  
**SC(18)APR06 – Child Cruelty**  
**Maura McGowan**  
**Eleanor Nicholls**  
**020 7071 5799**

## **1 ISSUE**

1.1 This is the third consideration of the child cruelty guidelines following consultation. Revised versions of the guidelines for the Cruelty to a Child and Causing or Allowing offences, incorporating changes made to culpability and harm, and aggravating and mitigating factors, at your meetings in January and March, are attached at Annexes A and B.

1.2 This paper considers sentence levels for these two offences, and some aspects of the Failure to Protect from the Risk of FGM guideline (attached at Annex C). In addition, on 27 March we received the Justice Select Committee's response to the consultation (Annex D), which raises questions about our approach to culpability. Their concerns are summarised below, along with questions asking whether Council wishes to reconsider decisions made in January and March in light of the JSC's consultation response.

## **2 RECOMMENDATION**

2.1 That the Council considers and agrees the amendments proposed to sentence levels set out at **Annex A** (Cruelty to a Child) and **Annex B** (Causing or Allowing), and some elements of the FGM offence guideline (Annex C), and that the Council considers the JSC's response to consultation and whether it wishes to change its approach to assessing culpability.

## **3 CONSIDERATION**

### *Sentence Levels: Causing or Allowing*

3.1 Further consideration of transcripts, including recently received 2016 case transcripts, suggests that the proposed starting points for B2 cases are too high. Often, these are cases where there is a balance between A and C, such as where there is failure to protect from acts involving several culpability A factors, often including prolonged or multiple incidents involving significant force, or using a weapon, but the offender is a victim of domestic abuse. Transcript analysis shows that such cases receive substantially lower sentences than the current sentence levels allow. This is a particular problem because there may be no additional mitigation other than the circumstances covered by Culpability C, so no way of reducing the sentence from the Starting Point (other than for a guilty plea). Transcripts show that in such circumstances, sentences are often suspended, so we need to allow judges to go down to two

years. I would therefore suggest reducing the starting point from four years to three, and giving a range of 18 months to five years, rather than the current two years to six years.

***Question One: Does the Council agree to these changes to Category B2?***

3.2 The starting point for A3 offences also appears to be somewhat too high. There is a wide gap between the starting points for A3 and B3. There may be little difference in culpability between a “low” category A, particularly a failure to protect case, and a high category B case. I therefore propose reducing the starting point for A3 to three years, and reducing the lower end of the range to 18 months, keeping the upper end at six years to reflect the higher culpability here than in the B2 offences.

***Question Two: Does the Council agree to these changes to sentence levels for Category A3?***

*Causing or Allowing: culpability factors*

3.3 Further consideration of sentence levels and new transcripts has shown that the Category A factor “significant force” may be used too often, since the force needed to cause the level of harm necessary for the offence is likely to be very high. The word “significant” may be more appropriate for instances where there is more than a minimal level, but not the most extreme, for that offence. I therefore propose amending the culpability factors so that Category A contains the factor, “Use of very significant force”, Category B contains, “Use of considerable force” and Category C retains the current wording, “Minimal force”.

***Question Three: Does the Council agree to amending the wording of culpability factors relating to levels of force?***

*Causing or Allowing: harm factors*

3.4 A related problem was discussed at the Council meeting in March: how to ensure that only the more serious cases of harm were included in Category 2. At your previous meeting you agreed that including “Serious physical” harm was otiose, analysis of additional 2016 transcripts for this offence suggests it may be necessary to reconsider. Only after reading through many transcripts could I develop a picture of the wide range of harm caused by this offending, in order that I could place any case on the scale of harm. The range of harm is quite broad, from cases where there were one or two broken limbs, to cases of severe brain damage alongside multiple rib and limb fractures. There are only around 30 offenders sentenced for this offence each year, so it is unlikely that a judge will have seen many of them. Whilst the descriptions in category 2 make a clear distinction between long and short-term harm, further information would assist judges who do not see this offence very often. It would also help reassure members of the public that the “other harm” is still considered to be serious.

3.5 I therefore suggest two options for describing the differing levels of harm:

- a) We include the word "Serious physical harm that does not fall into category 2 above";  
or
- b) This problem is similar to the problem with categorising "highly dangerous weapon" in the guideline on bladed articles and offensive weapons, and could be tackled in a similar way, with additional wording such as:

The harm caused/allowed is defined in legislation as "harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861". The harm required for Category 2 harm must therefore be harm substantially above and beyond the minimum required for grievous bodily harm.

**Question Four: Does Council wish to adopt either of the above suggested changes to wording of harm categories for this offence?**

*Sentence levels: Cruelty to a Child*

3.6 Further analysis of sentencing data and transcripts suggests that the sentence levels for some of the less serious categories here may be too high. One quarter of those sentenced in 2016 received a community sentence (after guilty plea). However, only one of the categories, C3, has a starting point of a community order. Even accounting for guilty pleas, this suggests that the levels should be revised to include community orders as the starting point for other categories, perhaps C2 and B3, with corresponding ranges as follows:

	<b>C2</b>	<b>B3</b>	<b>C3</b>
<b>Starting point</b>	High level community order	High level community order	Medium level community order
<b>Category Range</b>	Medium level community order – one year's custody	Medium level community order – one year's custody	Low level community order – six months' custody

3.7 Another reason for including more community orders is to prompt consideration of community sentences rather than SSOs; transcripts suggest that this is an offence where sentencers are particularly prone to using SSOs in order to send a message to the offender that their behaviour is serious, and then suspending the sentence to allow the offender to continue contact with their child. Giving starting points of community order may help to remind sentencers that they should be considering these, rather than SSOs. Despite the changes to

the starting points and ranges, I also propose retaining custody in the range for C3, to give sentencers the option in the most serious cases.

***Question Five: Does Council wish to make these changes to include more community orders as starting points?***

3.8 Changes may also be needed at the upper end of sentence levels for this offence. Data and transcript analysis suggest that on several cases with category 1A facts, the sentence passed was considerably lower than the current proposed range. Only an estimated 2% of all sentences (prior to any guilty plea reduction) were within the range currently proposed for 1A (5 to 9 years' custody) which suggests that this starting point and range are too high. There is also a considerable gap between the starting point of 1A and those for 2A and 1B. As the maximum penalty for this offence is 10 years, and one person did receive a 9 year sentence, we may not wish to move too much lower, however, current sentencing practice suggests that very few cases are so serious as to be sentenced at this level; it may be that the more serious offences against children are charged as assault offences rather than under this offence.

3.9 As cases that would fall into category 1A are rare, this suggests that the sentence levels for 1A should be changed and that we need to ensure cases are not wrongly categorised as 1A, leading to higher sentences. I therefore propose to reduce the starting point of 1A from six years to five, and the range from four to eight years' custody. In addition, I propose making the same changes to the culpability factors relating to levels of force, as for the Causing or Allowing offence (see 3.3 above), to help reduce the number of cases being categorised as 1A. The full sentence levels table is at Annex A.

***Question Six: Does Council agree to changes to sentence levels for category 1A?***

***Question Seven: Does Council wish to amend the culpability factors relating to levels of force?***

*Cases on the borderline between categories*

3.10 In both the Causing or Allowing and the Child Cruelty offences, as discussed at several points in previous meetings and above, the factors for culpability and harm may push too many cases into the highest category and lead to increases in sentences. Although this has been addressed by changes agreed at previous meetings, and I hope by those proposed above, I am still concerned that there is insufficient scope for sentencers to distinguish between cases where, say, there are several Category A factors present, and those where there is only one such factor. Further changes could be made to the wording of Category B Culpability (both offences) and Category 2 harm (Cruelty to a Child) to assist sentencers with weighing the

different factors in these cases. If the Council wishes to make changes I will consider wording for discussion at the next meeting.

**Question Eight: Does the Council consider that further wording on this is necessary?**

*FGM offence: culpability*

3.11 We received only 34 responses to the consultation relating to FGM (compared with 42 overall) and some of these were partial responses; some respondents said that they were not qualified to give an opinion on the subject. Views in the responses differed considerably, from those who felt that the harm and culpability were almost always at the highest level, to those who felt that offenders were often likely to be victims themselves of coercion and intimidation, and therefore their culpability was limited. As there have been no prosecutions for the offence to date, so no data from cases, I am proposing limited changes to the version of the guideline which you agreed for consultation.

3.12 On culpability, there was general agreement about the factors, though some respondents wanted more detail and also recognised that there may be overlap between higher and lower culpability factors (for example, an offender's failure to respond to warnings may be as a result of coercion and intimidation). The CPS initially suggested that the high culpability factors "significant planning" and "involving others" may not be appropriate for a "failure to protect" offence like this. However, I have discussed this with them further and they agreed that, whilst they will not be relevant in many cases, they should be kept in, and confirmed that this offence could also be charged in a case where it was clear that the offender had played an active role in planning and arranging the FGM, but it had not been possible to charge an ancillary offence to a section 1 offence (the offence of actually carrying out the FGM procedure).

3.13 The National Crime Agency suggested adding the high culpability factor "Played a leading role in the commission of the FGM offence", similar to the "Leading role in a group or gang" factor for assault. This may help in cases such as those above, where there was active involvement and not merely failure to protect.

3.14 The risk with including these factors is that the offender may, in effect, be sentenced for a more serious offence of which they have not been convicted, though these factors are still arguably within the scope of the offence. Given the uncertainty around how these FGM offences will be charged and the lack of information about types of offending and circumstances of the offenders that would come before the court, the Council may wish to consider whether we have sufficient evidence on which to base a definitive guideline. If this guideline is not published alongside the other two Child Cruelty offences, it could still be considered at a later date, possibly with other FGM and/or related offences.

**Question Nine: Does the Council wish to delay publication of the definitive guideline for the s3A offence?**

**Question Ten: If not, does the Council wish to include “Leading role in the commission of the FGM offence” as a high culpability factor?**

3.15 In light of changes made to the other Child Cruelty guidelines to ensure that appropriate cases are considered in culpability category B, I propose making the same change to the FGM offence guideline so that the Culpability B wording will now read:

Other cases falling between A and C because:

- Factors in both high and lesser categories are present which balance each other out and/or
- The offender’s culpability falls between the factors as described in high and lesser culpability

**Question Eleven: Is the Council content to amend the wording for Category B culpability to ensure consistency with the other Child Cruelty offences?**

3.16 Some respondents suggested additional high culpability factors relating to “other harmful practices” such as forced marriage or “previous family members being subject to FGM”. I do not propose including any of these, as they are beyond the scope of the offence being sentenced.

3.17 The campaigning organisation FORWARD (the key third sector organisation working in this area) made several comments relating to warnings, interventions and FGM Protection Orders. They felt that the child’s being subject to an FGMPO was not really relevant and did not “make the offence worse”. What mattered was the warnings or interventions, and whether the offender knew that what he/she was doing was wrong. They also felt that the guideline should give more detail or examples of the types of warnings/interventions covered.

3.18 I do not propose making changes to these factors; whilst the child’s being subject of a FGMPO may not increase the harm felt by the victim, it does increase the culpability of the offender, separate from any other warnings/interventions received. In terms of other warnings and interventions we would want to include all types, whoever gave them. Giving examples would risk narrowing the scope, so I do not propose to expand this factor.

**Question Twelve: Is the Council content not to make these changes proposed by FORWARD?**



3.19 Respondents supported the inclusion of the lower culpability factor “Subjected to coercion, intimidation or exploitation”. The Prison Reform Trust felt that this wording was too strong, as it might not catch cases where there was perhaps little overt coercion, but a cultural/family background which put pressure on the offender. They wanted the guideline to pay more attention to the “relevant cultural context”. I am not proposing to change the factor to include this, however; to do so would be too broad (it would arguably apply in all cases) and the factor as it currently stands enables sentencers to consider the levels of coercion/intimidation/exploitation and decide that the offender is less culpable where appropriate.

***Question Thirteen: Is the Council content not to make changes along these lines as proposed by the Prison Reform Trust?***

3.20 The harm factors, sentence levels and aggravating/mitigating factors for this offence will be covered at the May meeting, when these guidelines on Child Cruelty offences are due to be signed off.

*Justice Select Committee response to consultation*

3.21 The committee’s response covers many areas already discussed post-consultation, and is in general supportive of the approach we have taken to these guidelines. As well as some minor proposals for changes to wording, there are two particular concerns which it is worth mentioning, and where decisions may need to be revisited.

3.22 The first and most significant concern relates to assessment of culpability for the Child Cruelty and Causing or Allowing offences. The committee does not agree that failure to protect should be considered of equal culpability with inflicting harm upon the victim. They feel that the two cannot be morally equal, and that the guidelines should be clear that failure to protect is less culpable. They argue this particularly in relation to the Causing or Allowing offence, and “allowing” cases. Their comments are based on the guidelines as consulted on. Following consultation you have agreed several changes to culpability factors so that, whilst in principle a failure to protect offence could be as culpable as an offence where the offender inflicted the harm, it is likely that the failure to protect offences would be considered as of lower culpability. In considering culpability for the “Causing or Allowing” offence, you also considered the changes need to make the guideline apply fairly both to cases where it was clear which offender had caused and which had allowed, and to those cases where it was not clear. I believe that this goes far enough to address the committee’s concerns, whilst maintaining your view failure to protect and inflicting harm could be equally culpable in some cases.

***Question Fourteen: Does the Council agree to retain culpability factors as revised post-consultation, allowing for failure to protect being of equal culpability with inflicting harm in some cases, or do you wish to reconsider this approach?***

3.23 The committee also suggested changes to mitigating factors. The most significant change was to the “Good character” factor, which they believe should be qualified in these offences, as good character may either be irrelevant to this particular offence, or may actually facilitate the commission of the offence. Similar concerns were raised in relation to domestic abuse and sexual offences. The committee proposed using the wording from the sexual offences guideline:

Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed, and such conduct may constitute an aggravating factor.

***Question Fifteen: Does the Council wish to retain the current wording for good character or to use the wording taken from the sexual offences guideline? Should such a change apply to all three offences within this group of Child Cruelty guidelines?***

#### **4. Risks and Impact**

4.1 We have now received and analysed most of the 2016 case transcripts for the causing or allowing offences, and also looked back at the 2014 transcripts used to develop the guideline. This analysis has fed into proposals on sentence levels above. Once the sentence levels are agreed at this meeting, we will carry out further impact assessment in preparation for sign off of these guidelines in May.

**Child Cruelty – Assault and ill treatment, abandonment, neglect and failure to protect.**

**Cruelty to a child**

Children and Young Persons Act 1933 (S1(1))

Triable either way

Maximum: 10 years' custody

Offence range: Low level community order – 9 years' custody

This guideline applies only to offenders aged 18 and older

**STEP ONE**  
**Determining the offence category**

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

**Culpability demonstrated by one or more of the following:**

**A - High culpability:**

- Prolonged and/or multiple incidents of serious cruelty, including serious neglect
- Gratuitous degradation of victim and/or sadistic behaviour
- Use of very significant force
- Use of a weapon
- Blatant and deliberate disregard to the welfare of the victim
- Failure to take any steps to protect the victim from offences in which the above factors are present
- Offender with professional responsibility for the victim (where linked to the commission of the offence)

**B - Medium culpability:**

- Use of considerable force
- Limited steps taken to protect victim in cases with Category A factors present
- Other cases falling between A and C because:
  - Factors in both high and lesser categories are present which balance each other out and/or
  - The offender's culpability falls between the factors as described in high and lesser culpability

**C - Lesser culpability:**

- Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- Victim of domestic abuse, including coercion and/or intimidation (when linked to the commission of the offence)
- Steps taken to protect victim but fell just short of what could reasonably be expected
- Momentary or brief lapse in judgement, including in cases of neglect
- Minimal force or failure to protect the victim from an incident involving minimal force
- Low level of neglect

**Harm**

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

**Psychological, developmental or emotional harm**

A finding that the psychological, developmental or emotional harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does **not** imply that the psychological/developmental harm suffered by the victim is minor or trivial.

<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Serious psychological, developmental, and/or emotional harm</li> <li>• Serious physical harm (including illnesses contracted due to neglect)</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Cases falling between category 1 and 3</li> <li>• A high likelihood of category 1 harm being caused</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• Little or no psychological, developmental, and/or emotional harm</li> <li>• Little or no physical harm</li> </ul>

**STEP TWO****Starting point and category range**

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

<b>Harm</b>	<b>Culpability</b>		
	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<p><b>Starting point</b> 5-6 years' custody</p> <p><b>Category range</b> 4-5 — 8-9 years' custody</p>	<p><b>Starting point</b> 3 years' custody</p> <p><b>Category range</b> 2 – 6 years' custody</p>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> High level community order – 2 years 6 months' custody</p>
<b>Category 2</b>	<p><b>Starting point</b> 3 years' custody</p> <p><b>Category range</b> 2 – 6 years' custody</p>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> High level community order – 2 years 6 months' custody</p>	<p><b>Starting point</b> <del>6 months' custody</del> High level community order</p> <p><b>Category range</b> Medium level community order – 1</p>

			year's <del>6 months'</del> custody
<b>Category 3</b>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> High level community order – 2 years 6 months' custody</p>	<p><b>Starting point</b> <del>6 months' custody</del> High level community order</p> <p><b>Category range</b> Medium level community order – 1 year's <del>6 months'</del> custody</p>	<p><b>Starting point</b> <u>Medium</u> High-level community order</p> <p><b>Category range</b> Low level community order – 6 months' custody</p>

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

### Factors increasing seriousness

#### **Statutory aggravating factors:**

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail

#### **Other aggravating factors:**

- Failure to seek medical help (where not taken into account at step one)
- Commission of offence whilst under the influence of alcohol or drugs
- Deliberate concealment and/or covering up of the offence
- Blame wrongly placed on others
- Failure to respond to interventions or warnings about behaviour
- Threats to prevent reporting of the offence
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Offences taken into consideration
- Offence committed in the presence of another child

### Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Determination and demonstration of steps having been taken to address addiction or offending behaviour, including co-operation with agencies working for the welfare of the victim
- Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
- Good character and/or exemplary conduct (the more serious the offence, the less weight should normally be attributed to this factor)
- Serious medical condition requiring urgent, intensive or long-term treatment
- Mental disorder or learning disability (where not taken into account at step one)
- Co-operation with the investigation

### **STEP THREE**

#### **Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

### **STEP FOUR**

#### **Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

### **STEP FIVE**

#### **Parental responsibilities for sole or primary carers**

In the majority of cruelty to a child cases the offender will have parental responsibility for the victim. When the case is on the cusp of custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children the offender may care for). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lesser culpability/harm cases involving a momentary lapse in judgement where the offender has otherwise been a loving and capable parent/carer.

### **STEP SIX**

#### **Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Offences Taken into Consideration and Totality guideline.

### **STEP SEVEN**

**Ancillary orders**

In all cases the court should consider whether to make ancillary orders.

**STEP EIGHT****Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP NINE****Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.



## **Causing or allowing a child to suffer serious physical harm**

### **Domestic Violence, Crime and Victims Act 2004 (section 5)**

Indictable only

Maximum: 10 years' custody

Offence range: High level community order – 9 years' custody

## **Causing or allowing a child to die**

### **Domestic Violence, Crime and Victims Act 2004 (section 5)**

Indictable only

Maximum: 14 years' custody

Offence range: 1 year's custody – 14 years' custody

This guideline applies only to offenders aged 18 and older and when the victim of the offence is aged 17 or under.

**STEP ONE**  
**Determining the offence category**

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

**Culpability** demonstrated by one or more of the following:

**A - High culpability:**

- Prolonged and/or multiple incidents of serious cruelty, including serious neglect
- Gratuitous degradation of victim and/or sadistic behaviour
- Use of very significant force
- Use of a weapon
- Deliberate disregard for the welfare of the victim
- Failure to take any steps to protect the victim from offences in which the above factors are present
- Offender with professional responsibility for the victim (where linked to the commission of the offence)

**B - Medium culpability:**

- Use of considerable force
- Limited steps taken to protect victim in cases with Category A factors present
- Other cases falling between A and C because:
  - Factors in both high and lesser categories are present which balance each other out and/or
  - The offender's culpability falls between the factors as described in high and lesser culpability

**C - Lesser culpability:**

- Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- Victim of domestic abuse, including coercion and/or intimidation (when linked to the commission of the offence)
- Steps taken to protect victim but fell just short of what could reasonably be expected
- Momentary or brief lapse in judgement
- Minimal force or failure to protect the victim from an incident involving minimal force
- Low level of neglect

**Harm**

The court should consider the factors set out below to determine the level of harm that has been caused to the victim.

**Psychological, developmental or emotional harm**

A finding that the psychological, developmental or emotional harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does **not** imply that the psychological/developmental harm suffered by the victim is minor or trivial.

<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Death</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Physical harm which has a substantial and/or long term effect</li> <li>• Serious psychological, developmental or emotional harm</li> <li>• Significantly reduced life expectancy</li> <li>• A progressive, permanent or irreversible condition</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• <u>[Option A] Serious physical Harm</u> that does not fall into Category 2</li> </ul>

[Option B] The harm caused/allowed is defined in legislation as "harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861". The harm required for Category 2 harm must therefore be harm substantially above and beyond the minimum required for grievous bodily harm.

**STEP TWO****Starting point and category range**

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

<b>Harm</b>	<b>Culpability</b>		
	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<b>Starting point</b> 9 years' custody  <b>Category range</b> 7 – 14 years' custody	<b>Starting point</b> 5 years' custody  <b>Category range</b> 3 – 8 years' custody	<b>Starting point</b> 2 years' custody  <b>Category range</b> 1 year– 4 years' custody

<b>Category 2</b>	<b>Starting point</b> 7 years' custody  <b>Category range</b> 5 – 9 years' custody	<b>Starting point</b> <u>3</u> 4 years' custody  <b>Category range</b> <u>18 months</u> <u>2</u> – <u>5</u> 6 years' custody	<b>Starting point</b> 1 year 6 months' custody  <b>Category range</b> 6 months – 3 years' custody
<b>Category 3</b>	<b>Starting point</b> <u>3</u> 4 years' custody  <b>Category range</b> <u>18 months</u> <u>2</u> – 6 years' custody	<b>Starting point</b> 1 year 6 months' custody  <b>Category range</b> 6 months – 3 years' custody	<b>Starting point</b> 9 months' custody  <b>Category range</b> High level community order – 2 years' custody

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

### Factors increasing seriousness

#### **Statutory aggravating factors:**

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail

#### **Other aggravating factors:**

- Failure to seek medical help (where not taken into account at step one)
- Prolonged suffering prior to death
- Commission of offence whilst under the influence of alcohol or drugs
- Deliberate concealment and/or covering up of the offence
- Blame wrongly placed on others
- Failure to respond to interventions or warnings about behaviour
- Threats to prevent reporting of the offence
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Offences taken into consideration
- Offence committed in the presence of another child

## Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Determination and demonstration of steps having been taken to address addiction or offending behaviour, including co-operation with agencies working for the welfare of the victim
- Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
- Good character and/or exemplary conduct (the more serious the offence, the less weight should normally be attributed to this factor).
- Serious medical condition requiring urgent, intensive or long-term treatment
- Mental disorder or learning disability (where not taken into account at step one)
- Co-operation with the investigation

### STEP THREE

#### Consider any factors which indicate a reduction for assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

### STEP FOUR

#### Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

### STEP FIVE

#### Parental responsibilities for sole or primary carers

In the majority of cases the offender will have parental responsibility for the victim. When the case is on the cusp of custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children the offender may care for). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lesser culpability/harm cases, particularly “failure to protect” offences, where the offender has otherwise been a loving and capable parent/carer.

### STEP SIX

#### Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall

offending behaviour in accordance with the Offences Taken into Consideration and Totality guideline.

#### **STEP SEVEN**

##### **Ancillary orders**

In all cases the court should consider whether to make ancillary orders.

#### **STEP EIGHT**

##### **Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

#### **STEP NINE**

##### **Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

# **Child Cruelty – Failing to protect a girl from female genital mutilation**

## **Failure to protect a girl from risk of genital mutilation** Female Genital Mutilation Act 2003 (S3A)

Indictable only

Maximum: 7 years' custody

Offence range: Low level community order – 6 years' custody

This guideline applies only to offenders aged 18 and older

**STEP ONE**  
**Determining the offence category**

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

**Culpability** demonstrated by one or more of the following:

**A - High culpability:**

- Significant planning (where not charged as a separate offence)
- Leading role in the commission of the FGM offence (where not charged as a (separate offence)
- Child was subject to an FGM Protection Order
- Failure to respond to interventions or warnings e.g. from medical professionals/social services etc
- Involving others through coercion, intimidation or exploitation

**B - Medium culpability:**

- ~~Cases falling between A and C~~
- Other cases falling between A and C because:
  - Factors in both high and lesser categories are present which balance each other out and/or
  - The offender's culpability falls between the factors as described in high and lesser culpability

**C - Lesser culpability:**

- Steps taken to protect child but fell just short of what could reasonably be expected
- Offender victim of domestic abuse (where linked to commission of the offence)
- Subjected to coercion, intimidation or exploitation
- Offender's responsibility substantially reduced by mental disorder or learning disability

**Harm**

The court should consider the factors set out below to determine the level of harm that has been caused to the victim.

**For all cases of failing to protect a girl from female genital mutilation there will be serious physical and psychological harm (likely both immediately and long-term) but there are factors that may increase it further.**



<b>Category 1</b>	<ul style="list-style-type: none"> <li>Cases where the physical and/or psychological harm is particularly severe</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>All other cases</li> </ul>

## STEP TWO

### Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Harm	Culpability		
	A	B	C
<b>Category 1</b>	<p><b>Starting point</b> 5 years' custody</p> <p><b>Category range</b> 3 – 6 years' custody</p>	<p><b>Starting point</b> 3 years' custody</p> <p><b>Category range</b> 2 – 5 years' custody</p>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> High level community order – 3 years' custody</p>
<b>Category 2</b>	<p><b>Starting point</b> 3 years' custody</p> <p><b>Category range</b> 2 – 5 years' custody</p>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> High level community order – 3 years' custody</p>	<p><b>Starting point</b> Medium level community order</p> <p><b>Category range</b> Low level community order – 1 year's custody</p>

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

### Factors increasing seriousness

#### **Statutory aggravating factors:**

- Previous convictions, having regard to a) the **nature** of the offence to which the

conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

- Offence committed whilst on bail

***Other aggravating factors:***

- Failure to seek medical help when necessary
- Deliberate concealment and/or covering up of the offence
- Blamed others for the offence
- Victim particularly vulnerable
- Threats to prevent reporting of the offence
- Failure to comply with current court orders (where not taken into account at step one)
- Offence committed on licence or post sentence supervision
- Offences taken into consideration

**Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Offender particularly isolated with limited access to support
- Appropriate medical care sought for victim
- Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
- Good character and/or exemplary conduct
- Serious medical condition requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability (where not taken into account at step one)
- Co-operation with the investigation

**STEP THREE**

**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR**

**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

#### **STEP FIVE**

##### **Parental responsibilities**

In the majority of failing to protect a child from female genital mutilation cases the offender will have parental responsibility for the victim. When the case is on the cusp of custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children the offender may care for). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lower culpability cases or where the offender has otherwise been a loving and capable parent/carer.

#### **STEP SIX**

##### **Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Offences Taken into Consideration and Totality guideline.

#### **STEP SEVEN**

##### **Ancillary orders**

In all cases the court should consider whether to make ancillary orders.

#### **STEP EIGHT**

##### **Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

#### **STEP NINE**

##### **Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Blank page



# Justice Committee

House of Commons London SW1A 0AA  
Tel 020 7219 8196/8198 Email [justicecom@parliament.uk](mailto:justicecom@parliament.uk)  
Website [www.parliament.uk/justicecttee](http://www.parliament.uk/justicecttee)

The Right Hon Lord Justice Treacy  
Chairman  
Sentencing Council  
Royal Courts of Justice  
The Strand  
London WC2A 2LL

27 March 2018

## **Draft Sentencing Council Guideline on Child Cruelty**

The Justice Committee thanks the Sentencing Council for giving it the opportunity of responding to the draft guideline on child cruelty, and in particular for permitting this response to be made after the thirteen-week consultation period has ended. Once again, we are grateful to the Council for agreeing to share with us the responses that it received to its consultation on this guideline, and for providing a helpful summary of its proposals and analysis of the consultation responses.

In the light of the resources available to us and the Council's own timetable for finalising the guidelines, our letter does not aim to provide a comprehensive response to each of the consultation questions. We have instead focused on particular themes where we felt that our observations could contribute most usefully to the discussion.

### **Failure to protect (Q1)**

In its consultation document, the Council questioned whether, as in the current definitive guideline, a "failure to protect" a child (absent other factors) should carry the same level of culpability as actually inflicting cruelty. We note that respondents' views were divided. While some agreed that culpability should be the same, others argued that there was a moral distinction between inflicting cruelty and a failure to protect; or at least that active encouragement should be distinguished from a failure to act.

It was argued by some that a vulnerable person who fails to protect the victim might be less culpable; the draft guideline for these offences already lists vulnerability factors that indicate lesser culpability: mental disorder, learning disability, lack of maturity, or being a victim of domestic abuse. Respondents also emphasised the potential complexity of family dynamics and possible overlap between mental illness,

domestic abuse and substance abuse.

We believe that a change is needed in this area of the guideline. We acknowledge that the guideline already contains a number of mitigating factors which might be thought sufficiently to account for the lower culpability in the case of a person who fails to protect a child from cruelty, rather than inflicting it. However, we believe that in cases where these apply, they do not fully capture the extent of the moral distinction between inflicting cruelty and allowing it to occur. Further, in cases where none of these mitigating factors apply, we consider that there is still an important moral difference between inflicting cruelty on a child and failing to prevent it taking place, even where that is for no other reason than indifference.

For these reasons, we consider that the definitive guideline ought to set a lower starting point for offenders who have failed to protect a child from cruelty, as opposed to inflicting it.

### **Definition of serious harm (Q3)**

The consultation proposes an approach to the assessment of harm in which Category 1 (the most severe) includes "Serious psychological and/or developmental harm." We note that several respondents to the Council's consultation thought this level needed further explanation or guidance; and/or considered that emphasis should be placed on the need for expert evidence, particularly on psychological harm/developmental harm. We felt this assessment should be left to sentencers, as it depends so closely on the facts of the case. However, we agree with those respondents who argued that sentencers should be asked to consider obtaining expert evidence on the psychological/ developmental harm inflicted on a child. This is an area in which expert advice may be essential.

### **Aggravating factors (Q6)**

The consultation proposes a range of aggravating factors. We agree with those respondents who felt that where an offender is a person in authority, for example a teacher or priest, this should be an aggravating factor.

### **Mitigating factors (Q7)**

The consultation proposes a number of mitigating factors, including remorse and good character. We agree with those who argued that if remorse is taken into consideration as a mitigating factor, it is essential that it must be genuine. We note that good character is a mitigating factor, and that the consultation proposed that "the more serious the offence, the less weight which should normally be attributed to this factor". We do not believe good character is always relevant in such cases, because a person of apparent good character can make use of it to inflict harm without being detected. We made a similar point in our response to your earlier

consultation on the guideline on domestic abuse, where we made reference to the definitive guideline on Sexual Offences. This states, "Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed and such conduct may constitute an aggravating factor". We think the same, or a similar qualification should be made in this guideline.

### **Causing or allowing a child to die or suffer serious physical harm (Q12)**

As with the cruelty to a child guideline, the consultation explains that "a person failing to protect a child from certain actions is treated at the same level of culpability as the person who actually commits the action". The document goes on to explain that this lack of distinction is "particularly important for this guideline" because a primary purpose of the legislation was "to close the loophole created if there is not enough evidence to determine who, when more than one person is present in the household, caused the harm or death". Prosecutors do not have to show which of the people present caused the harm and which allowed it, and both are sentenced at the same level. The consultation says that in cases where the court does not know which of the people involved caused the harm, the result of a distinction between the sentences given for causing harm and for allowing it would be that both offenders "would have to be sentenced on the basis of allowing harm, rather than causing it". We acknowledge the importance of avoiding this difficulty in cases where it is not known to the court who has caused the harm.

However, the consultation document then acknowledges that "there will be some cases where the court is aware which offender caused the harm, and which one allowed it". It suggests that in such cases there will often be circumstances which prevented the person who only allowed the harm from being able to intervene, which "may on balance reduce their culpability or mitigate the seriousness" of the offence. Absent such circumstances, though, the offender who allowed the harm will be treated as having the same culpability as their co-defendant who caused the harm. We do not agree with this approach. As noted above in our response to Q1, we consider that there is an important moral distinction between causing and allowing harm which is not sufficiently captured by the possible presence of other circumstances.

In some jurisdictions, a "Good Samaritan" law applies, but this is not a feature of English law. We recognise that a person who is a member of a victim's household has a close connection to the victim and a greater responsibility to protect them from harm. However, we do not feel this responsibility is enough to erase the distinction between causing and allowing harm.

We are of the opinion that this distinction should be reflected in a lower starting point in sentencing for offenders who have allowed harm. This will of course only be

relevant in cases where it is known to the court which offender caused the harm.

### **Sentence ranges and starting points for the offence of failing to protect a girl from the risk of FGM (Q23)**

This guideline related to Section 3A of the FGM Act 2003. The guidelines note that there have been no convictions for any of the offences under the Act. We note that some respondents to the consultation, including the National Crime Agency and the NSPCC, thought that sentencing for this offence should take into account the complex cultural and social context which leads parents to mistakenly believe that FGM is in a girl's best interests; they argue that, rather than lengthy sentences, it would be better to challenge communities' attitudes and beliefs through education. This would be broadly consistent with the approach advocated by the World Health Organisation (WHO). In contrast, other respondents felt that sentencing ranges for this offence should be as high as for other child cruelty offences, if not higher, and that proposed mitigating factors were too lenient. The Council is proposing a custodial starting point for all but the least serious cases.

We note that a Home Affairs Committee report on this topic, published in 2016, referred to FGM as a "national scandal" and lamented the lack of prosecutions for the "failure to protect" offence. The Committee called for an increase in the number of prosecutions, in line with other countries in Europe.

We support the Sentencing Council's approach. We believe that a custodial starting point is appropriate for sentencing for all but the least serious cases. Challenging communities' attitudes and beliefs, while welcome, should in our view go alongside offering support to people in affected communities who are trying to combat the practice of FGM; both are, of course, outside the scope of the consultation. We believe that it is appropriate to confirm our opposition to this practice as a society by taking a firm line on sentencing, and would hope to see progress in prosecuting cases under this Act.

### **Inconsistency between sentencing decisions**

As part of the consultation process, respondents were asked to use the draft guideline to consider three case scenarios, one for each of the offences, and to indicate their final sentences – detailing the culpability, harm, aggravating and mitigating factors. We note that the respondents' assessments vary widely. Although many respondents would not in practice be involved in sentencing, this divergence of views might be thought to suggest that the guideline gives too much scope for discretion, potentially undermining consistency in sentencing; on the other hand,



discretion may be considered desirable.

We were doubtful of the value of this exercise. The cases described, and the sentencing decisions they give rise to, are by their nature very fact sensitive. It is therefore hard in an exercise like this to capture the subtleties of case scenarios in a meaningful way, without giving rise to red herrings. This means the varied responses will do little to help assess the clarity and consistency of the guideline. The Council should in its final definitive guideline acknowledge the broad range of circumstances that may arise in offences of these kinds. But we are unconvinced that the Council should continue to produce scenarios of this type for future consultations.

### **Equality impact**

The consultation paper contains a brief paragraph acknowledging that more women than men are sentenced for these offences, but concludes that no equality impacts are anticipated (because the guidelines should promote consistency in sentencing); however, the Council 'would welcome views or any evidence on this issue'.

A minority of respondents considered that the Council should conduct a more detailed assessment of equality impact in relation to gender. It was also suggested that the race equality impact of sentencing for FGM offences should be better understood. We consider that, in relation to all guidelines, the Commission should keep equality issues under review, especially around race in relation to FGM offences.

We hope you will be able to take our observations into account in preparing your definitive guideline, and look forward to your reply.

**Bob Neill MP**  
Chairman  
Justice Committee

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a smaller 'N' and a horizontal line underneath.

Blank page

**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council members:**  
**Lead official:**

**13 April 2018**  
**SC(18)APR07 - Seriousness**  
**Maura McGowan, Julian Roberts**  
**Ruth Pope**  
**0207 071 5781**

## **1 ISSUE**

1.1 At the November 2017 meeting the Council considered and agreed a guideline with expanded explanations for factors for use where there is no offence-specific guideline. At the January 2018 meeting the Council considered expanded explanations for some offence specific guidelines.

1.2 The plan had been to consider expanded explanations for the remaining offence-specific guidelines at this meeting and to sign off the whole project for consultation.

1.3 On reflection this appears to be over ambitious and is likely to place too great a burden on the Council, its officials and consultees. The Council is therefore asked to consider splitting the project into two distinct phases and signing off just the first phase for consultation at this meeting.

1.4 Both phases of the project are dependent on being able to present the guidelines in a digital form, and the Council will be able to see a demonstration of the digital guideline at this meeting.

## **2 RECOMMENDATION**

2.1 That the Council agrees to separate the 'seriousness' project into two phases

- a guideline for where there is no offence specific guideline (the generic guideline) and
- expanded explanations for factors in offence-specific guidelines.

2.2 That the Council agrees to bring both phases into force at the same time.

2.3 That the Council considers the draft generic guideline at Annex A and agrees:

- to consult on this guideline from June – September 2018
- the approach taken in the consultation document at Annex C

2.4 The Council is also asked to agree what the status of the SGC Seriousness guideline will be once the generic guideline is definitive.

### 3 CONSIDERATION

#### *Offences for which there are no offence-specific guidelines*

3.1 For reference, the offences for which there is currently no offence-specific guideline include:

Firearms offences	Wildlife offences
Immigration offences	Planning offences
Modern slavery	Landlord, HMO offences
Cybercrime - hacking	Data protection offences
Kidnap and false imprisonment	Fire regulation offences
FGM	Offences against vulnerable adults
Child abduction	Perverting the course of justice / perjury
Blackmail	Forgery / counterfeiting

#### *Splitting the project into two phases*

3.2 The draft generic guideline at Annex A consists of 24 pages of detailed information on which the Council will be asking consultees to comment. While not all elements of the guideline will be of relevance to all consultees, the majority of them will need to consider the guideline in its entirety to establish which elements are relevant. It is submitted that asking consultees to consider the material in relation to offence-specific guidelines as well would be unduly burdensome, potentially confusing and could affect the quality of the responses.

3.3 Members will recall from the January meeting that the way factors are worded and used across offence specific guidelines varies considerably and that consequently the consideration of expanded explanations was somewhat complex. At the January meeting the Council considered expanded explanations for factors in the assault, burglary, sex, robbery, drugs, fraud, environmental offences, possession of offensive weapon/ bladed article and theft guidelines. At the time it was proposed to cover health and safety, dangerous dogs, intimidatory offences, arson and criminal damage and child cruelty at the March meeting. In fact there was not time on the March agenda and the matter was put back to the April meeting. On reflection it is felt that officials will be better able to present the Council with well-researched and thought through proposals given more time and that the Council will have more time to devote to this when the agendas are lighter in the early summer.

3.4 It is therefore proposed to consult on the generic guideline over the summer and to continue to develop the offence-specific material and consult on that in the autumn.

**Question 1: Does the Council agree to split the project to replace the SGC seriousness guideline into two phases?**

### *Options for completing the 'seriousness project'*

3.5 Subject to decisions made at this meeting, the generic guideline will update all of the relevant guidance in the SGC Seriousness guideline. It could therefore be argued that when the generic guideline is definitive, it would supersede the SGC guideline which would be withdrawn. However, in the context of digital guidelines, this would leave the issue of whether the generic explanations of factors should be provided for offence-specific guidelines, pending the finalisation of the offence-specific explanations. In many cases the generic and offence specific explanations will be identical (for example the text on previous convictions) but there will inevitably be differences because of variations in the way in which factors are expressed and used across offence-specific guidelines.

3.6 This could lead to a confusing situation for users of the guidelines, where explanations would be available for some but not all factors, or for some but not all guidelines. There is also a question of whether it would be legitimate to provide the generic information in the context of offence specific guidelines unless the Council had specifically consulted on that basis – which would expand the scope of the first phase of the project.

3.7 If the SGC Seriousness guideline were to remain in force, this too would be confusing and/or unhelpful to guideline users. The proposal is therefore, for the two phases of the project to replace the Seriousness guideline to come into force at the same time. A provisional timetable is suggested below:

June – September 2018	Consult on generic guideline
May – October 2018	Council meetings to develop offence specific information
December 2018 – February 2019	Consult on offence-specific guidance
May 2019	Sign off definitive version of both phases
July 2019	Publish definitive guidelines for both phases
October 2019	Both in force (SGC guideline withdrawn)

### **Question 2: Does the Council agree with the provisional timetable for both phases of the project?**

#### *Consideration of the generic guideline*

3.8 The bulk of the content at **Annex A** has already been seen and agreed by the Council. Proposed additions to previously agreed factors/explanations are underlined and are discussed below. (A version of the guideline without the additional explanations is provided at **Annex D** to simulate how it will look as a digital guideline.)

3.9 A minor addition is suggested at step one to remind courts not to refer to draft guidelines.

**Question 3: Does the Council wish to add a reference to draft guidelines?**

3.10 Representations have been received from magistrates in North East Wales requesting a guideline for the offence of littering (contrary to section 87 of the Environmental Protection Act 1990). They are dealing with a large number of such offences using the single justice procedure arising from fixed penalty notices that are issued by the local authority but not paid. They have been told that the Council has no immediate plans to develop a guideline specifically for this offence, but that there will be a consultation on a guideline for sentencing offences for which there is no offence-specific guideline which may assist them.

3.11 There was not anything in the generic guideline that addressed sentencing offences for which a fixed penalty notice had been issued and so a short reference has been added at step one with further information taken from the MCSG explanatory material. Assuming the Council is happy with this inclusion, it remains to be seen whether the magistrates concerned would consider that the guideline gives sufficiently precise guidance to assist.

**Question 4: Does the Council wish to add information on fixed penalty notices at step one?**

3.12 Following discussions at the January Council meeting, Jill Gramann provided suggestions for improving the explanation for the mental health and learning disability mitigating factor. The suggested amended wording following those suggestions is:

Short description:

Mental disorder or learning disability

More information:

Mental disorders and learning disabilities are different things, although an individual may suffer from both. A **learning disability** is a permanent condition developing in childhood, whereas **mental illness** (or a mental health problem) can develop at any time, and is not necessarily permanent; people can get better and resolve mental health problems with help and treatment.

In the context of sentencing a broad interpretation of the terms 'mental disorder' and learning disabilities' should be adopted to include:

- Offenders with an intellectual impairment (low IQ);
- Offenders with a cognitive impairment such as (but not limited to) dyslexia, attention deficit hyperactivity disorder (ADHD);
- Offenders with an autistic spectrum disorder (ASD) including Asperger's syndrome;
- Offenders with a personality disorder;
- Offenders with a mental illness.

Offenders may have a combination of the above conditions.

Sentencers should be alert to the fact that not all mental disorders or learning disabilities are visible or obvious.

A mental disorder or learning disability can affect both:

1. the offender's responsibility for the offence and
2. the impact of the sentence on the offender.

The court will be assisted by a PSR and, where appropriate, medical reports in assessing:

1. the degree to which a mental disorder or learning disability has reduced the offender's responsibility for the offence. This may be because the condition had an impact on the offender's ability to understand the consequences of their actions, to limit impulsivity and/or to exercise self-control.
  - a relevant factor will be the degree to which a mental disorder or learning disability has been exacerbated by the actions of the offender (for example by the **voluntary** abuse of drugs or alcohol or by **voluntarily** failing to follow medical advice);
  - in considering the extent to which the offender's actions were voluntary, the extent to which a mental disorder or learning disability has an impact on the offender's ability to exercise self-control or to engage with medical services will be a relevant consideration.
2. any effect of the mental disorder or learning disability on the impact of the sentence on the offender; a mental disorder or learning disability may make it more difficult for the offender to cope with custody or to comply with a community order.

3.13 The Council will shortly be commencing work on an overarching guideline on mental health and when that is published as a definitive guideline (the plan is to publish in December 2019), this factor will be amended to direct users to that guideline. In the interim the above wording will remind sentencers to consider mental health issues and provide them with some assistance as to the relevance of mental health to sentencing.

**Question 5: Does the Council agree with the proposed 'Mental health or learning disability' factor?**

*Comparing the proposed guideline with the SGC Seriousness guideline*

3.14 Currently the SGC Seriousness guideline is still in force, despite the fact that parts of it have been superseded by the Imposition guideline. If the proposed generic guideline is to replace the SGC guideline it will need to cover all of the useful content albeit that the factors in both guidelines are non-exhaustive.

3.15 The table at **Annex B** lists all the factors in the draft guideline and the equivalent factor in the SGC guideline. The numbering in the table is for ease of identifying the factors.

3.16 The factor at row 4 of the table, 'failure to respond to previous sentences', is covered by the expanded guidance on previous convictions in the draft guideline and it is not proposed to add it as a standalone factor. The factor at row 9 of the table, 'an intention to commit more serious harm than resulted from the offence' is addressed by the guidance on harm:

Where harm was intended but no harm or a lower level of harm resulted – the sentence will normally be assessed with reference to the level of harm intended.

3.17 Views are sought as to whether the factor at row 10, 'deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence' should be added as a specific factor to the generic guideline. At annex A this wording has been added to the expanded information on culpability at step one.

3.18 The factor (at row 14) 'professional offending' has not been included in the current draft of the guideline. It was included in a draft considered by the Council at the October 2017 meeting but there was some difficulty in establishing what it meant. The interpretation in the draft guideline was offending in a commercial context, but Council members thought that 'professional' implied organised or career criminals. The 'commercial' offending aspect is covered by the factors at rows 12 and 13 of the table. Views are sought as to whether there are aspects of 'professional' offending that are not captured by these factors and those relating to planning and role (in culpability).

3.19 The factor at row 18 relating to hostility to a minority group is not included as it is largely covered by the statutory aggravating factor at row 3 and is not a factor that is used in any other Sentencing Council guidelines.

3.20 The factor at row 20 relating to multiple victims has not been included. It is proposed to add the word 'collective' to the second bullet point of the explanation under harm so that it reads:

- An assessment of harm should generally reflect the collective impact of the offence upon the victim(s) and may include direct harm (including physical injury, psychological injury and financial loss) and consequential harm.

3.21 Where there are multiple victims giving rise to multiple offences then the Totality guideline (at step 6) sets out the approach to be taken.

3.22 An additional point has been added to the explanation under harm to cover the SGC factor at row 21:

- Where the harm caused is greater than that intended - the sentence will normally be assessed with reference to the level of harm suffered by the victim.

3.23 The factor at row 22 has not been added as a specific factor; it is covered by the general consideration of harm and, in part, by the explanation under vulnerable victim

- Culpability is increased if an offender persisted in the offending once it was obvious that the victim was vulnerable (for example continuing to attack an injured victim)

3.24 The factor at row 23 has been adapted and added to the harm explanation:



- When considering the value of property lost or damaged the court should also take account of any sentimental value to the victim(s); and any consequential loss caused by disruption to a victim's life or business

3.25 The mitigating factor at row 52 has not been added. It is unlikely to be relevant to any of the offences that the generic guideline is designed to cover and could be seen to represent 'victim blaming'.

**Question 6: Does the Council agree to the amendments proposed above?**

**Question 7: Is the Council content that the generic guideline covers all of the relevant factors in the SGC guideline?**

*Other factors*

3.26 The Council previously suggested that reference should be made to the Terrorism guideline for those offences with a terrorist element. The following factor and explanation have been added:

Short description:

Offence committed in a terrorist context

More information:

Where there is a terrorist element to the offence, refer also to the *Terrorism Offences* definitive guideline [link]

**Question 8: Does the Council agree to include the reference to the Terrorism guideline?**

*Consultation outline*

3.27 The consultation on the generic guideline will be published on the Council's website only. The consultation will be publicised widely, as there are a large number of stakeholders to whom it will be relevant. Consultees will be directed to the online consultation and to a digital version of the draft guideline on a dummy website. A text version of the consultation document and the guideline will be available for download for those users (such as those who send in collective responses) who find this to be more convenient.

3.28 An early and incomplete draft of the consultation document is provided at **Annex C**. The approach taken is to treat the additional information in the generic guideline as largely self-explanatory; otherwise the consultation document would be attempting to explain the explanations. The final draft will be circulated to Council members for comment before publication.

**Question 9: Is the Council content with the approach taken in the draft consultation document?**

#### **4 IMPACT AND RISKS**

4.1 This guideline is wide in scope and so has the potential for a significant impact, but as the guideline mainly seeks to encourage what is already best practice, any impact on sentence levels and thereby correctional resources is likely to be minor. The resource assessment for the draft guideline will be framed in general terms as it is impossible to quantify the impact with any accuracy. The Council has already indicated that it considers that the guideline is unlikely to have an overall inflationary effect on sentencing.

4.2 The timetable for this guideline is based on the assumption that guidelines will be accessed digitally in the Crown Court as well as in magistrates' courts. If there is any delay in the provision of digital guidelines in the Crown Court, this may have an adverse effect on the delivery of the replacement for the *Seriousness* guideline.

# **Sentencing offences for which there is no offence-specific sentencing guideline**

# Applicability of guideline

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this draft guideline. Following consultation, when a definitive guideline is produced it will apply to all offenders aged 18 and older, and to organisations who are sentenced on or after [date to be confirmed], regardless of the date of the offence.

Section 125(1) Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

“Every court -

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so.”

When issued as a definitive guideline this guideline will apply only to offenders aged 18 and older. General principles to be considered in the sentencing of youths are in the Sentencing Council’s definitive guideline, *Overarching Principles – Sentencing Children and Young People*.<sup>1</sup>

---

<sup>1</sup> [Add link](#)

### STEP ONE – reaching a provisional sentence

Where there is no definitive sentencing guideline for the offence, to arrive at a provisional sentence the court should take account of all of the following (if they apply):

- the statutory maximum sentence (and if appropriate minimum sentence) for the offence;
- sentencing judgments of the Court of Appeal (Criminal Division) for the offence; and
- definitive sentencing guidelines for analogous offences

for the avoidance of doubt the court should **not** take account of any draft sentencing guidelines or definitive guidelines that are not yet in force.

When considering definitive guidelines for analogous offences the court must make adjustments for any differences in the statutory maximum sentence and in the elements of the offence.

- Where possible the court should follow the stepped approach of sentencing guidelines to arrive at the sentence.
- The seriousness of the offence is assessed by considering the **culpability** of the offender and the **harm** caused by the offending.
- The initial assessment of harm and culpability should take no account of plea or previous convictions.

When sentencing an offence for which a **fixed penalty notice** was available the reason why the offender did not take advantage of the fixed penalty will be a relevant consideration.

The court should consider which of the five purposes of sentencing,

- the punishment of offenders,
- the reduction of crime (including its reduction by deterrence),
- the reform and rehabilitation of offenders,
- the protection of the public, and
- the making of reparation by offenders to persons affected by their offences


it is seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence.

More information:


**Culpability** is assessed with reference to the offender's role, level of intention and/or premeditation and the extent and sophistication of planning.

- The court should balance these characteristics to reach a fair assessment of the offender's overall culpability in the context of the circumstances of the offence.

- The relevance of factors will vary depending on the type of offending. Where a characteristic is inherent in the offence, the mere presence of that characteristic will not be determinative of the level of culpability.
- Deliberate or gratuitous violence or damage to property, over and above what is needed to carry out the offence will normally indicate a higher level of culpability
- For offences where there is no requirement for the offender to have any level of intention, recklessness, negligence, dishonesty, knowledge, understanding or foresight for the offence to be made out, the range of culpability **may** be inferred from the circumstances of the offence as follows:

Highest level  Lowest level	Deliberate - intentional act or omission
	Reckless - acted or failed to act regardless of the foreseeable risk
	Negligent - failed to take steps to guard against the act or omission
	Low/no culpability - act or omission with none of the above features

- For offences that require some level of culpability (eg intention, recklessness or knowledge) to be made out, the range of culpability will be narrower. Relevant factors **may** typically include but are not limited to:

Highest level  Lowest level	High level of planning/ sophistication/ leading role
	Some planning/ significant role
	Little or no planning/ minor role

- These models of assessing culpability will not be applicable to all offences

**Harm – *caused, risked and/or intended***

- There may be primary and secondary victims of an offence and, depending on the offence, victims may include one or more individuals, a community, the general public, the state, the environment and/or animal(s). In some cases there may not be an identifiable victim.
- An assessment of harm should generally reflect the collective impact of the offence upon the victim(s) and may include direct harm (including physical injury, psychological harm and financial loss) and consequential harm.
- When considering the value of property lost or damaged the court should also take account of any sentimental value to the victim(s); and any consequential loss caused by disruption to a victim’s life or business.
- Where harm was intended but no harm or a lower level of harm resulted – the sentence will normally be assessed with reference to the level of harm intended.
- Where the harm caused is greater than that intended - the sentence will normally be assessed with reference to the level of harm suffered by the victim.
- Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.
- Risk of harm is less serious than the same actual harm. Where the offence has caused risk of harm but no (or less) actual harm the normal approach is to move down to the next category of harm. This may not be appropriate if either the likelihood or extent of potential harm is particularly high.
- A victim personal statement (VPS) may assist the court in assessing harm, but the absence of a VPS should not be taken to indicate the absence of harm.

Penalty notices may be issued as an alternative to prosecution in respect of a range of offences. An admission of guilt is not a prerequisite to issuing a penalty notice.

- An offender who is issued with a penalty notice may nevertheless be prosecuted for the offence if he or she:
- asks to be tried for the offence; or
- fails to pay the penalty within the period stipulated in the notice and the prosecutor decides to proceed with charges.
- In some cases of non-payment, the penalty is automatically registered and enforceable as a fine without need for recourse to the courts. This procedure applies to penalty notices for disorder and fixed penalty notices issued in respect of certain road traffic offences but not to fixed penalty notices issued for most other criminal offences

When sentencing in cases in which a penalty notice was available:

- the fact that the offender did not take advantage of the penalty (whether that was by requesting a hearing or failing to pay within the specified timeframe) does not increase the seriousness of the offence and must not be regarded as an aggravating factor. The appropriate sentence must be determined in accordance with the sentencing principles set out in this guideline (including the amount of any fine, which must take an offender's financial circumstances into account), disregarding the availability of the penalty;
- where a penalty notice could not be offered or taken up for reasons unconnected with the offence itself, such as administrative difficulties outside the control of the offender, the starting point should be a fine equivalent to the amount of the penalty and no order of costs should be imposed. The offender should not be disadvantaged by the unavailability of the penalty notice in these circumstances.

Where an offender has had previous penalty notice(s), the fact that an offender has previously been issued with a penalty notice does not increase the seriousness of the current offence and must not be regarded as an aggravating factor. It may, however, properly influence the court's assessment of the offender's suitability for a particular sentence, so long as it remains within the limits established by the seriousness of the current offence.

## **STEP TWO**

Once a provisional sentence is arrived at the court should take into account factors that may make the offence more serious and factors which may reduce seriousness or reflect personal mitigation.

- Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.
- It is for the sentencing court to determine how much weight should be assigned to the aggravating and mitigating factors taking into account all of the circumstances of the offence and the offender. Not all factors that apply will necessarily influence the sentence.

- The presence of an aggravating factor that is an integral part of the offence being sentenced cannot be used as justification for increasing the sentence further.
- **If considering a community or custodial sentence refer also to the *Imposition of community and custodial sentences* definitive guideline. [link/ or drop down]**
- **If considering a fine – see information on fine bands [drop down on fine bands]**

**Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence**

### ***Statutory aggravating factors***

#### Short description:

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

#### More information:

### **Guidance on the Use of Previous Convictions**

The following guidance should be considered when seeking to determine the degree to which previous convictions should aggravate sentence:

Section 143 of the Criminal Justice Act states that:

*In considering the seriousness of an offence (“the current offence”) committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to—*

*(a) the nature of the offence to which the conviction relates and its relevance to the current offence, and*

*(b) the time that has elapsed since the conviction.*

1. Previous convictions are considered at step two in the Council's offence-specific guidelines.
2. The primary significance of previous convictions is the extent to which they indicate trends in offending behaviour and possibly the offender's response to earlier sentences;
3. Previous convictions are normally **relevant** to the current offence when they are of a similar type;
4. Previous convictions of a type different from the current offence **may** be relevant where they are an indication of persistent offending or escalation and/or a failure to comply with previous court orders;
5. Numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary;
6. If the offender received a non-custodial disposal for the previous offence, a court should not necessarily move to a custodial sentence for the fresh offence;
7. In cases involving significant persistent offending, the community and custody thresholds may be crossed even though the current offence normally warrants a lesser sentence.



Any custodial sentence imposed to reflect persistent offending rather than the current offence should be kept to the necessary minimum.

8. The aggravating effect of relevant previous convictions reduces with the passage of time; **older convictions are less relevant** to the offender's culpability for the current offence and less likely to be predictive of future offending.
9. Where the previous offence is particularly old it will normally have little relevance for the current sentencing exercise;
10. The court should consider the time gap since the previous conviction and the reason for it. Where there has been a significant gap between previous and current convictions or a reduction in the frequency of offending this may indicate that the offender has made attempts to desist from offending in which case the aggravating effect of the previous offending will diminish.
11. Where the current offence is significantly less serious than the previous conviction (suggesting a decline in the gravity of offending), the previous conviction may carry less weight.
12. When considering the totality of previous offending a court should take a rounded view of the previous crimes and not simply aggregate the individual offences.
13. Where information is available on the context of previous offending this may assist the court in assessing the relevance of that prior offending to the current offence.

Short description:

Offence committed whilst on bail

More information:

S143 (3) Criminal Justice Act 2003 states:

In considering the seriousness of any offence committed while the offender was on bail, the court must treat the fact that it was committed in those circumstances as an aggravating factor.

Short description:

Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity.

More information:

See below for the statutory provisions.

- **Note the requirement for the court to state that the offence has been aggravated by the relevant hostility.**
- **Where the element of hostility is core to the offending, the aggravation will be higher than where it plays a lesser role.**

**Increase in sentences for racial or religious aggravation**

s145(2) of the Criminal Justice Act 2003 states:

*If the offence was racially or religiously aggravated, the court—*

- (a) *must treat that fact as an aggravating factor, and*
- (b) *must state in open court that the offence was so aggravated.*

An offence is racially or religiously aggravated for these purposes if—

at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence, hostility based on the victim's membership (or presumed membership) of a racial or religious group; **or**

the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

*“membership”*, in relation to a racial or religious group, includes association with members of that group;

*“presumed”* means presumed by the offender.

It is immaterial whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned above.

*“racial group”* means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

*“religious group”* means a group of persons defined by reference to religious belief or lack of religious belief.

### **Increase in sentences for aggravation related to disability, sexual orientation or transgender identity**

s146 of the Criminal Justice Act 2003 states:

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are—

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—

- (i) the sexual orientation (or presumed sexual orientation) of the victim,
- (ii) a disability (or presumed disability) of the victim, or
- (iii) the victim being (or being presumed to be) transgender, or

(b) that the offence is motivated (wholly or partly)—

- (i) by hostility towards persons who are of a particular sexual orientation,
- (ii) by hostility towards persons who have a disability or a particular disability or
- (iii) by hostility towards persons who are transgender.

(3) The court—

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and

(b) must state in open court that the offence was committed in such circumstances.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(5) In this section “disability” means any physical or mental impairment.

(6) In this section references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.

---

***Other aggravating factors: (factors are not listed in any particular order and are not exhaustive)***

**Care should be taken to avoid double counting factors already taken into account in assessing culpability or harm or those inherent in the offence**

Short description:

Commission of offence whilst under the influence of alcohol or drugs

More information:

- The fact that an offender is **voluntarily** intoxicated at the time of the offence will tend to increase the seriousness of the offence provided that the intoxication has **contributed to the offending**.
- In the case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary, but the court should have regard to the extent to which the offender has engaged with any assistance in dealing with the addiction in making that assessment.
- An offender who has voluntarily consumed drugs and/or alcohol must accept the consequences of the behaviour that results, even if it is out of character.

---

Short description:

Offence was committed as part of a group or gang

More information:

The mere membership of a group (two or more persons) or gang should not be used to increase the sentence, but where the **offence was committed as part** of a group or gang this will normally make it more serious because:

- the **harm** caused (both physical or psychological) or the potential for harm may be greater and/or
- the **culpability** of the offender may be higher (the role of the offender within the group will be a relevant consideration).

When sentencing young adult offenders, consideration should also be given to the guidance on the mitigating factor relating to age and immaturity when considering the significance of group offending.

Short description:

Offence involved use or threat of use of a weapon

More information:

- A ‘weapon’ can take many forms and may include a shod foot
- The use or production of a weapon has relevance
  - to the **culpability** of the offender where it indicates planning or intention to cause harm; and
  - to the **harm** caused (both physical or psychological) or the potential for harm.
- Relevant considerations will include:
  - the dangerousness of the weapon;
  - whether the offender brought the weapon to the scene, or just used what was available on impulse;
  - the context in which the weapon was threatened, used or produced.

Short description:

Planning of an offence

More information:

- Evidence of planning normally indicates a higher level of intention and pre-meditation which increases the level of culpability.
- The greater the degree of planning the greater the culpability

Short description:

Commission of the offence for financial gain

More information:

- Where an offence (which is not one which by its nature is an acquisitive offence) has been committed wholly or in part for financial gain or the avoidance of cost, this will increase the seriousness.
- Where the offending is committed in a commercial context for financial gain or the avoidance of costs, this will normally indicate a higher level of culpability.
  - examples would include, but are not limited to, dealing in unlawful goods, failing to comply with a regulation or failing to obtain the necessary licence or permission in order to avoid costs.
  - offending of this type can undermine legitimate businesses.
- Where possible, if a financial penalty is imposed, it should remove any economic benefit the offender has derived through the commission of the offence including:
  - avoided costs;
  - operating savings;
  - any gain made as a direct result of the offence.
- Where the offender is fined, the amount of economic benefit derived from the offence should normally be added to the fine. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to comply with the law.
- Where it is not possible to calculate or estimate the economic benefit, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.

- When sentencing **organisations** the fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law.**

Short description:

High level of profit from the offence

More information:

- A high level of profit is likely to indicate:
  - high culpability in terms of planning and
  - a high level of harm in terms of loss caused to victims or the undermining of legitimate businesses
- In most situations a high level of gain will be a factor taken in to account at step one – care should be taken to avoid double counting.
- Where possible if a financial penalty is imposed it should remove any economic benefit the offender has derived through the commission of the offence including:
  - avoided costs;
  - operating savings;
  - any gain made as a direct result of the offence.
- Where the offender is fined, the amount of economic benefit derived from the offence should normally be added to the fine. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to comply with the law.
- Where it is not possible to calculate or estimate the economic benefit, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.
- When sentencing **organisations** the fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law.**

Short description:

Abuse of trust or dominant position

More information:

- In order for an abuse of trust to make an offence more serious the relationship between the offender and victim(s) must be one that would give rise to the offender having a significant level of responsibility towards the victim(s) on which the victim(s) would be entitled to rely.
- Abuse of trust may occur in many factual situations. Examples may include relationships such as teacher and pupil, parent and child, professional adviser and client, or carer (whether paid or unpaid) and dependant. It may also include ad hoc situations such as a late-night taxi driver and a lone passenger. It would **not** generally include a familial relationship without a significant level of responsibility.
- Where an offender has been given an inappropriate level of responsibility, abuse of trust is unlikely to apply.
- A close examination of the facts is necessary and a clear justification should be given if abuse of trust is to be found.

Short description:

Gratuitous degradation of victim / maximising distress to victim

More information:

Where an offender deliberately causes **additional** harm to a victim over and above that which is an essential element of the offence - this will increase seriousness. Examples may include, but are not limited to, posts of images on social media designed to cause additional distress to the victim (where not separately charged).

---

Short description:

Vulnerable victim

More information:

- An offence is more serious if the victim is vulnerable because of personal circumstances such as (but not limited to) age, illness or disability (unless the vulnerability of the victim is an element of the offence).
  - Other factors such as the victim being isolated, incapacitated through drink or being in an unfamiliar situation **may** lead to a court considering that the offence is more serious.
  - The extent to which any vulnerability may impact on the sentence is a matter for the court to weigh up in each case.
  - Culpability will be increased if the offender targeted a victim because of an actual or perceived vulnerability.
  - Culpability will be increased if the victim is made vulnerable by the actions of the offender (such as a victim who has been intimidated or isolated by the offender).
  - Culpability is increased if an offender persisted in the offending once it was obvious that the victim was vulnerable (for example continuing to attack an injured victim).
  - The level of harm (physical, psychological or financial) is likely to be increased if the victim is vulnerable.
- 

Short description:

Victim was providing a public service or performing a public duty at the time of the offence

More information:

This reflects:

- the fact that people in public facing roles are more exposed to the possibility of harm and consequently more vulnerable and/or
  - the fact that someone is working for the public good merits the additional protection of the courts.
- 

Short description:

Other(s) put at risk of harm by the offending

More information:

- Where there is risk of harm to other(s) not taken in account at step one and not subject to a separate charge, this makes the offence more serious.

- Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.
- 

Short description:

Offence committed in the presence of other(s) (especially children)

More information:

- This reflects the psychological harm that may be caused to those who witnessed the offence.
  - The presence of one or more children may in some situations make the primary victim more vulnerable – for example an adult may be less able to resist the offender if concerned about the safety or welfare of children present.
- 

Short description:

Actions after the event including but not limited to attempts to cover up/ conceal evidence

More information:

Unless this conduct is the subject of separate charges, it should be taken into account to make the offence more serious.

---

Short description:

Blame wrongly placed on other(s)

More information:

- Where the investigation has been hindered and/or other(s) have suffered as a result of being wrongly blamed by the offender, this will make the offence more serious.
  - This factor will **not** be engaged where an offender has simply exercised his or her right not to assist the investigation or accept responsibility for the offending.
- 

Short description:

Failure to respond to warnings or concerns expressed by others about the offender's behaviour

More information:

Where an offender has had the benefit of warnings or advice about their conduct but has failed to heed it, this would make the offender more blameworthy.

This may particularly be the case when:

- such warning(s) or advice were of an official nature or from a professional source and/or
  - the warning(s) were made at the time of or shortly before the commission of the offence.
- 

Short description:

Offence committed on licence or post sentence supervision or while subject to court order(s)

More information:

- An offender who is subject to licence or post sentence supervision is under a particular obligation to desist from further offending.
  - Commission of an offence while subject to a **relevant** court order makes the offence more serious (where not dealt with separately as a breach of that order).
  - Care should be taken to avoid double counting matters taken into account when considering previous convictions.
- 

Short description:

Offence committed in custody

More information:

- Offences committed in custody are more serious because they undermine the fundamental need for control and order which is necessary for the running of prisons and maintaining safety.
  - Generally the sentence for the new offence will be consecutive to the sentence being served as it will have arisen out of an unrelated incident. The court must have regard to the totality of the offender's criminality when passing the second sentence, to ensure that the total sentence to be served is just and proportionate. Refer to the Totality guideline [\[link\]](#) for detailed guidance.
  - Care should be taken to avoid double counting matters taken into account when considering previous convictions.
- 

Short description:

Offence committed in a domestic context

More information:

Refer to the *Domestic abuse* guideline [\[Link\]](#)

---

Short description:

Offence committed in a terrorist context

More information:

Where there is a terrorist element to the offence, refer also to the *Terrorism Offences* definitive guideline [\[link\]](#)

---

Short description:

Location and/or timing of offence

More information:

- In general, an offence is not made more serious by the location and/or timing of the offence except in ways taken into account by other factors in this guideline (such as planning, vulnerable victim, offence committed in a domestic setting, maximising distress to victim, others put at risk of harm by the offending, offence committed in the presence of others). Care should be taken to avoid double counting.



- Courts should be cautious about aggravating an offence by reason of it being committed for example at night, or in broad daylight, in a crowded place or in an isolated place unless it also indicates increased harm or culpability not already accounted for.
- An offence may be more serious when it is committed in places in which there is a particular need for discipline or safety such as prisons, courts, schools or hospitals.

Short description:

Established evidence of community/ wider impact

More information:

- This factor should increase the sentence only where there is clear evidence of wider harm not already taken into account elsewhere. A community impact statement will assist the court in assessing the level of impact.
- For issues of prevalence see the separate guidance.

Short description:

Prevalence

More information:

- Sentencing levels in offence specific guidelines take account of collective social harm. Accordingly offenders should normally be sentenced by straightforward application of the guidelines without aggravation for the fact that their activity contributed to a harmful social effect upon a neighbourhood or community.
- It is not open to a sentencer to increase sentence for prevalence in ordinary circumstances or in response to a personal view that there is 'too much of this sort of thing going on in this area'.
- First, there must be evidence provided to the court by a responsible body or by a senior police officer.
- Secondly, that evidence must be before the court in the specific case being considered with the relevant statements or reports having been made available to the Crown and defence in good time so that meaningful representations about that material can be made.
- Even if such material is provided, a sentencer will only be entitled to treat prevalence as an aggravating factor if satisfied
  - that the level of harm caused in a particular locality is significantly higher than that caused elsewhere (and thus already inherent in the guideline levels);
  - that the circumstances can properly be described as exceptional; **and**
  - that it is just and proportionate to increase sentence for such a factor in the particular case being sentenced.

Short description:

Offences taken into consideration

More information:

*Taken from the Offences taken into consideration definitive guideline:*

## General principles

When sentencing an offender who requests offences to be taken into consideration (TICs), courts should pass a total sentence which reflects all the offending behaviour. The sentence must be just and proportionate and must not exceed the statutory maximum for the conviction offence.

## Offences to be Taken into Consideration

The court has discretion as to whether or not to take TICs into account. In exercising its discretion the court should take into account that TICs are capable of reflecting the offender's overall criminality. The court is likely to consider that the fact that the offender has assisted the police (particularly if the offences would not otherwise have been detected) and avoided the need for further proceedings demonstrates a genuine determination by the offender to 'wipe the slate clean'.

It is generally **undesirable** for TICs to be accepted in the following circumstances:

- where the TIC is likely to attract a greater sentence than the conviction offence;
- where it is in the public interest that the TIC should be the subject of a separate charge;
- where the offender would avoid a prohibition, ancillary order or similar consequence which it would have been desirable to impose on conviction. For example:
  - where the TIC attracts mandatory disqualification or endorsement and the offence(s) for which the defendant is to be sentenced do not;
- where the TIC constitutes a breach of an earlier sentence;
- where the TIC is a specified offence for the purposes of section 224 of the Criminal Justice Act 2003, but the conviction offence is non-specified; or
- where the TIC is not founded on the same facts or evidence or part of a series of offences of the same or similar character (unless the court is satisfied that it is in the interests of justice to do so).

## Jurisdiction

The magistrates' court cannot take into consideration an indictable only offence. The Crown Court can take into account summary only offences provided the TICs are founded on the same facts or evidence as the indictable charge, or are part of a series of offences of the same or similar character as the indictable conviction offence

## Procedural safeguards

A court should generally only take offences into consideration if the following procedural provisions have been satisfied:

- the police or prosecuting authorities have prepared a schedule of offences (TIC schedule) that they consider suitable to be taken into consideration. The TIC schedule should set out the nature of each offence, the date of the offence(s), relevant detail about the offence(s) (including, for example, monetary values of items) and any other brief details that the court should be aware of;
- a copy of the TIC schedule must be provided to the defendant and his representative (if he has one) before the sentence hearing. The defendant should sign the TIC schedule to provisionally admit the offences;
- at the sentence hearing, the court should ask the defendant in open court whether he admits each of the offences on the TIC schedule and whether he wishes to have them taken into consideration;

- if there is any doubt about the admission of a particular offence, it should not be accepted as a TIC. Special care should be taken with vulnerable and/or unrepresented defendants;
- if the defendant is committed to the Crown Court for sentence, this procedure must take place again at the Crown Court even if the defendant has agreed to the schedule in the magistrates' court.

## Application

The sentence imposed on an offender should, in most circumstances, be increased to reflect the fact that other offences have been taken into consideration. The court should:

1. Determine the sentencing starting point for the conviction offence, referring to the relevant definitive sentencing guidelines. No regard should be had to the presence of TICS at this stage.
2. Consider whether there are any aggravating or mitigating factors that justify an upward or downward adjustment from the starting point.

The presence of TICs should generally be treated as an aggravating feature that justifies an adjustment from the starting point. Where there is a large number of TICS, it may be appropriate to move outside the category range, although this must be considered in the context of the case and subject to the principle of totality. The court is limited to the statutory maximum for the conviction offence.

3. Continue through the sentencing process including:
  - consider whether the frank admission of a number of offences is an indication of a defendant's remorse or determination and/ or demonstration of steps taken to address addiction or offending behaviour;
  - any reduction for a guilty plea should be applied to the overall sentence;
  - the principle of totality;
  - when considering ancillary orders these can be considered in relation to any or all of the TICS, specifically:
    - compensation orders;
    - restitution orders

---

**Factors reducing seriousness or reflecting personal mitigation** (factors are not listed in any particular order and are not exhaustive)

Short description:

No previous convictions or no relevant/recent convictions

More information:

- First time offenders generally represent a lower risk of re-offending. Re-offending rates for first offenders are significantly lower than rates for repeat offenders. In addition, first offenders are normally regarded as less blameworthy than offenders who have committed the same crime several times already. For these reasons first offenders attract a mitigated sentence (unless the crime is particularly serious).

- Where there are previous offences but these are old and /or are for offending of a different nature, the sentence will normally be reduced to reflect that the new offence is not part of a pattern of offending and there is therefore a lower likelihood of reoffending.
- When assessing whether a previous conviction is 'recent' the court should consider the time gap since the previous conviction and the reason for it.
- Previous convictions are likely to be 'relevant' when they share characteristics with the current offence (examples of such characteristics include – but are not limited to – dishonesty, violence, abuse of position or trust, use or possession of weapons, disobedience of court orders). In general the more serious the previous offending the longer it will retain relevance.

---

Short description:

Good character and/or exemplary conduct

More information:

This factor may apply whether or not the offender has previous convictions. Evidence that an offender has demonstrated positive good character through, for example, charitable works may reduce the sentence.

**However**, this factor is less likely to be relevant where the offending is very serious. Where an offender has used their good character or status to facilitate or conceal the offending it could be treated as an aggravating factor.

---

Short description:

Remorse

More information:

The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence.

---

Short description:

Self-reporting

More information:

Where an offender has self-reported to the authorities, particularly in circumstances where the offence may otherwise have gone undetected, this should reduce the sentence (separate from any guilty plea reduction at step four).

---

Short description:

Cooperation with the investigation/ early admissions

More information:

Assisting or cooperating with the investigation and /or making pre-court admissions may ease the effect on victims and witnesses and save valuable police time justifying a reduction in sentence (separate from any guilty plea reduction at step four).

---

Short description:

Little or no planning

More information:

Where an offender has committed the offence with little or no prior thought, this is likely to indicate a lower level of culpability and therefore justify a reduction in sentence.

**However**, impulsive acts of unprovoked violence or other types of offending may indicate a propensity to behave in a manner that would not normally justify a reduction in sentence.

---

Short description:

The offender was in a lesser or subordinate role if acting with others / performed limited role under direction

More information:

Whereas acting as part of a group or gang may make an offence more serious, if the offender's role was minor this may indicate lower culpability and justify a reduction in sentence.

---

Short description:

Little or no financial gain

More information:

Where an offence (which is not one which by its nature is an acquisitive offence) is committed in a context where financial gain could arise, the culpability of the offender may be reduced where it can be shown that the offender did not seek to gain financially from the conduct and did not in fact do so.

---

Short description:

Involved through coercion, intimidation or exploitation

More information:

- Where this applies it will reduce the culpability of the offender.
- This factor may be of particular relevance where the offender has been the victim of domestic abuse, trafficking or modern slavery, but may also apply in other contexts.
- Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation which the offender may find difficult to articulate, and where appropriate ask for this to be addressed in a PSR.

- This factor **may** indicate that the offender is vulnerable and would find it more difficult to cope with custody or to complete a community order.

---

Short description:

Limited awareness or understanding of the offence

More information:

The factor may apply to reduce the culpability of an offender

- acting alone who has not appreciated the significance of the offence **or**
- where an offender is acting with others and does not appreciate the extent of the overall offending.

In such cases the sentence may be reduced from that which would have applied if the offender had understood the full extent of the offence and the likely harm that would be caused.

---

Short description:

Delay since apprehension

More information:

Where there has been an **unreasonable** delay in proceedings since apprehension **that is not the fault of the offender**, the court may take this into account by reducing the sentence.

---

Short description:

Activity originally legitimate

More information:

Where the offending arose from an activity which was originally legitimate, but became unlawful (for example because of a change in the offender's circumstances or a change in regulations), this **may** indicate lower culpability and thereby a reduction in sentence.

---

Short description:

Age and/or lack of maturity

More information:

Age and/or lack of maturity can affect:

- the offender's responsibility for the offence and
- the effect of the sentence on the offender.

Either or both of these considerations may justify a reduction in the sentence.

The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).

In particular young adults may still be developing neurologically and consequently be less able to:

- evaluate the consequences of their actions
- limit impulsivity
- limit risk taking

Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.

Environment plays a role in neurological development and factors such as childhood deprivation or abuse will affect development.

An immature offender may find it more difficult to cope with custody or to complete a community order.

There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct.

When considering a custodial or community sentence for a young adult the National Probation Service should address these issues in a PSR.

---

Short description:

Sole or primary carer for dependent relatives

More information:

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing. For more serious offences where a substantial period of custody is appropriate, this factor will carry less weight.

---

Short description:

Physical disability or serious medical conditions requiring urgent, intensive or long-term treatment

More information:

Such conditions as may affect the impact of a sentence on the offender may justify a reduction in sentence.

---

Short description:

Mental disorder or learning disability

More information:

Mental disorders and learning disabilities are different things, although an individual may suffer from both. A **learning disability** is a permanent condition developing in childhood, whereas **mental illness** (or a mental health problem) can develop at any time, and is not necessarily permanent; people can get better and resolve mental health problems with help and treatment.

In the context of sentencing a broad interpretation of the terms ‘mental disorder’ and learning disabilities’ should be adopted to include:

- Offenders with an intellectual impairment (low IQ);
- Offenders with a cognitive impairment such as (but not limited to) dyslexia, attention deficit hyperactivity disorder (ADHD);
- Offenders with an autistic spectrum disorder (ASD) including Asperger’s syndrome;
- Offenders with a personality disorder;
- Offenders with a mental illness.

Offenders may have a combination of the above conditions.

Sentencers should be alert to the fact that not all mental disorders or learning disabilities are visible or obvious.

A mental disorder or learning disability can affect both:

1. the offender’s responsibility for the offence and
2. the impact of the sentence on the offender.

The court will be assisted by a PSR and, where appropriate, medical reports in assessing:

1. the degree to which a mental disorder or learning disability has reduced the offender’s responsibility for the offence. This may be because the condition had an impact on the offender’s ability to understand the consequences of their actions, to limit impulsivity and/or to exercise self-control.
  - a relevant factor will be the degree to which a mental disorder or learning disability has been exacerbated by the actions of the offender (for example by the **voluntary** abuse of drugs or alcohol or by **voluntarily** failing to follow medical advice);
  - in considering the extent to which the offender’s actions were voluntary, the extent to which a mental disorder or learning disability has an impact on the offender’s ability to exercise self-control or to engage with medical services will be a relevant consideration.
2. any effect of the mental disorder or learning disability on the impact of the sentence on the offender; a mental disorder or learning disability may make it more difficult for the offender to cope with custody or comply with a community order.

Short description:

Determination and /or demonstration of steps having been taken to address addiction or offending behaviour

More information:

Where offending is driven by or closely associated with drug or alcohol abuse (for example stealing to feed a habit, or committing acts of disorder or violence whilst drunk) a commitment to address the underlying issue may justify a reduction in sentence. This will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation.



Similarly, a commitment to address other underlying issues that may influence the offender's behaviour may justify the imposition of a sentence that focusses on rehabilitation.

The court will be assisted by a PSR in making this assessment.

### **STEP THREE**

#### **Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

### **STEP FOUR**

#### **Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

### **STEP FIVE**

#### **Dangerousness**

#### **Where the offence is listed in Schedule 15 and/or Schedule 15B of the Criminal Justice Act 2003**

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 224A or section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

### **STEP SIX**

#### **Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality guideline*.

### **STEP SEVEN**

#### **Compensation and ancillary orders**

In all cases the court should consider whether to make compensation and/or other ancillary orders. The Court will be assisted by the parties in identifying relevant ancillary orders.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

### **STEP EIGHT**

#### **Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

### **STEP NINE**

#### **Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Blank page

	<b>Proposed</b>	<b>SGC</b>	
	<b>Aggravating</b>	<b>Factors indicating higher culpability</b>	<b>Factors indicating a more than usually serious degree of harm</b>
	<i>Statutory aggravating</i>		
1.	Previous convictions, having regard to a) the <b>nature</b> of the offence to which the conviction relates and its <b>relevance</b> to the current offence; and b) the <b>time</b> that has elapsed since the conviction	Previous conviction(s), particularly where a pattern of repeat offending is disclosed	
2.	Offence committed whilst on bail	Offence committed whilst on bail for other offences	
3.	Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity.	Offence was racially or religiously aggravated Offence motivated by or demonstrating hostility to the victim based on his or her sexual orientation (or presumed sexual orientation) Offence motivated by or demonstrating hostility to the victim based on his or her disability (or presumed disability)	
	<i>Other aggravating</i>		
4.		Failure to respond to previous sentences	
5.	Commission of offence whilst under the influence of alcohol or drugs	Commission of an offence whilst under the influence of alcohol or drugs	

	<b>Proposed</b>	<b>SGC</b>	
	<b>Aggravating</b>	<b>Factors indicating higher culpability</b>	<b>Factors indicating a more than usually serious degree of harm</b>
6.	Offence was committed as part of a group or gang	Offenders operating in groups or gangs	
7.	Offence involved use or threat of use of a weapon	Use of a weapon to frighten or injure victim	
8.	Gratuitous degradation of victim / maximising distress to victim		Additional degradation of the victim (e.g. taking photographs of victim as part of a sexual offence)
9.		An intention to commit more serious harm than resulted from the offence	
10.		Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence	
11.	Planning of an offence	Planning of an offence	
12.	Commission of the offence for financial gain	Commission of the offence for financial gain (where this is not inherent in the offence itself)	
13.	High level of profit from the offence	High level of profit from the offence	
14.		'Professional' offending	

	<b>Proposed</b>	<b>SGC</b>	
	<b>Aggravating</b>	<b>Factors indicating higher culpability</b>	<b>Factors indicating a more than usually serious degree of harm</b>
15.	Failure to respond to warnings or concerns expressed by others about the offender's behaviour	Failure to respond to warnings or concerns expressed by others about the offender's behaviour	
16.	Vulnerable victim	Deliberate targeting of vulnerable victim(s)	Victim is particularly vulnerable
17.	Victim was providing a public service or performing a public duty at the time of the offence		Offence is committed against those working in the public sector or providing a service to the public
18.		Offence motivated by hostility towards a minority group, or a member or members of it	
19.	Other(s) put at risk of harm by the offending		
20.			Multiple victims
21.			An especially serious physical or psychological effect on the victim, even if unintended
22.			A sustained assault or repeated assaults on the same victim

	<b>Proposed</b>	<b>SGC</b>	
	<b>Aggravating</b>	<b>Factors indicating higher culpability</b>	<b>Factors indicating a more than usually serious degree of harm</b>
23.			In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)
24.	Offence committed in the presence of others (especially children)		Presence of others e.g. relatives, especially children or partner of the victim
25.	Actions after the event (including but not limited to attempts to cover up/ conceal evidence)	An attempt to conceal or dispose of evidence	
26.	Blame wrongly placed on other(s)		
27.	Offence committed on licence or post sentence supervision or while subject to court order(s)	Offence committed whilst on licence	
28.	Offence committed in custody		
29.	Offence committed in a domestic context		
30.	Abuse of trust or dominant position	Abuse of power Abuse of a position of trust	

	<b>Proposed</b>	<b>SGC</b>	
	<b>Aggravating</b>	<b>Factors indicating higher culpability</b>	<b>Factors indicating a more than usually serious degree of harm</b>
31.	Location and/or timing of offence		Location of the offence (for example, in an isolated place)
32.	Established evidence of community/ wider impact		
33.	Prevalence		Prevalence
34.	Offences taken into consideration		

	<b>Proposed</b>	<b>SGC</b>	
	<b>Mitigating</b>	<b>Factors indicating significantly lower culpability</b>	<b>Personal mitigation</b>
35.	No previous convictions or no relevant/recent convictions		
36.	Good character and/or exemplary conduct		
37.	Remorse		Remorse
38.	Self-reporting		
39.	Cooperation with the investigation/ early admissions		Admissions to police in interview Ready co-operation with the authorities

	<b>Proposed</b>	<b>SGC</b>	
	<b>Mitigating</b>	<b>Factors indicating significantly lower culpability</b>	<b>Personal mitigation</b>
40.	Little or no planning		
41.	The offender was in a lesser or subordinate role if acting with others / performed limited role under direction		The fact that the offender played only a minor role in the offence
42.	Little or no financial gain		
43.	Involved through coercion, intimidation or exploitation		
44.	Limited awareness or understanding of the offence		
45.	Delay since apprehension		
46.	Activity originally legitimate		
47.	Age and/or lack of maturity		Youth or age where it affects the responsibility of the individual defendant
48.	Sole or primary carer for dependent relatives		
49.	Physical disability or serious medical conditions requiring urgent, intensive or long-term treatment		



	<b>Proposed</b>	<b>SGC</b>	
	<b>Mitigating</b>	<b>Factors indicating significantly lower culpability</b>	<b>Personal mitigation</b>
50.	Mental disorder or learning disability		Mental illness or disability
51.	Determination and /or demonstration of steps having been taken to address addiction or offending behaviour		
52.		A greater degree of provocation than normally expected	

Blank page

# **Generic sentencing guideline for use where there is no offence-specific guideline**

**Consultation**

June 2018

leave blank, back of cover

**Generic Sentencing  
Guideline for use where  
there is no offence-specific  
guideline**  
**Consultation**

Published on XX June 2018

The consultation will end on XX September 2018

# About this consultation

- To:** This consultation is open to everyone including members of the judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice.
- Duration:** From XX June 2018 to
- Enquiries (including requests for the paper in an alternative format) to:** Office of the Sentencing Council  
Royal Courts of Justice  
(full address as below)  
Tel: 020 7071 5793  
Email: [info@sentencingcouncil.gov.uk](mailto:info@sentencingcouncil.gov.uk)
- How to respond:** Please send your response by [date] to:  
Ruth Pope  
Office of the Sentencing Council  
Room EB20  
Royal Courts of Justice  
Strand  
London WC2A 2LL  
DX: 44450 RCJ/Strand  
Email: [consultation@sentencingcouncil.gov.uk](mailto:consultation@sentencingcouncil.gov.uk)
- Additional ways to feed in your views:** This consultation exercise is accompanied by a resource assessment, and an online questionnaire which can be found at:  
[www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)  
A series of consultation meetings is also taking place. For more information, please use the “Enquiries” contact details above.
- Response paper:** Following the conclusion of this consultation exercise, a response will be published at:  
[www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)
- Freedom of information:** We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents’ names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.  
In addition, responses may be shared with the Justice Committee of the House of Commons.

# Contents

<b>Introduction</b>	<b>3</b>
What is the Sentencing Council?	3
Background	3
Why is the Council producing a generic guideline?	3
Guidance for factors in offence-specific guidelines	4
What is the Council consulting about?	4
<b>Developing the guideline</b>	<b>6</b>
General considerations	6
Digital guidelines	6
<b>The proposals in detail</b>	<b>7</b>
Applicability of guideline	7
Step one	7
Step two	8

**2** [Title, Subtitle]

leave blank, back of contents table



# Introduction

## What is the Sentencing Council?

The Sentencing Council is the independent body responsible for developing sentencing guidelines for the courts to use when passing a sentence. The Council's remit extends to allow consultation on the sentencing of offenders following conviction.

## Background

The Sentencing Council's predecessor body, the Sentencing Guidelines Council, published its Overarching Principles: Seriousness guideline in 2004.<sup>1</sup> It remains in force although parts of it have been superseded.

The SGC Seriousness guideline sets out the statutory provisions governing the five purposes of sentencing and the assessment of culpability and harm as set out in the Criminal Justice Act 2003. The SGC guideline then goes on to give guidance on the assessment of harm and culpability and to list factors that indicate an increase or decrease the harm or culpability.

It then gives guidance on reductions for a guilty plea (which has been superseded by the *Reduction in Sentence for a Guilty Plea* definitive guideline), the custody and community sentence thresholds (superseded by the *Imposition of Community and Custodial Sentences* definitive guideline) and prevalence (which is still current).

## Why is the Council producing a generic guideline?

The Council aims to replace all SGC guidelines by 2020, so that all guidelines are in the Sentencing Council format and are up-to-date. In 2018 the Council will be moving to digital guidelines for use in the Crown Court (magistrates' courts already use digital guidelines) and this presents an opportunity to embed additional information into guidelines.

The Council has produced offence-specific guidelines for most of the high volume criminal offences sentenced by the courts in England and Wales and is currently developing guidelines for the remaining high volume offences. There remain, however, many offences which are not yet covered by definitive or draft offence-specific guidelines. These include but are not limited to:

Blackmail	Kidnap and false imprisonment
Child abduction	Landlord, HMO offences
Cybercrime - hacking	Modern slavery
Data protection offences	Offences against vulnerable adults
Female genital mutilation	Offences committed in custody
Fire regulation offences	Perverting the course of justice / perjury
Forgery / counterfeiting	Planning offences
Immigration offences	Wildlife offences

---

<sup>1</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/web\\_seriousness\\_guideline.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/web_seriousness_guideline.pdf)

In addition the Council has produced overarching guidance on many of the key issues of sentencing (including totality, sentencing children and young people, domestic abuse, reductions in sentence of a guilty plea and imposition of custodial and community sentences) and the Council has commenced work on developing overarching guidance on mental health and learning disabilities in sentencing. There are other overarching issues about which the Council has been asked to provide guidance, such as youth and immaturity and the significance of previous convictions.

The Council has therefore taken this opportunity to:

1. replace the SGC Seriousness guideline;
2. provide a guideline for the sentencing of offences not covered by an offence specific guideline;
3. embed in that guideline, overarching guidance on sentencing issues.

## **Guidance for factors in offence-specific guidelines**

The introduction of digital guidelines will also allow the Council to provide additional guidance on the factors in existing and new offence-specific guidelines. The Council will consult separately on this in late 2019/early 2020.

## **What is the Council consulting about?**

The Council has produced this consultation paper in order to seek the views of people interested in criminal sentencing.

Through this consultation process, the Council is seeking views on:

- the principal factors that make offences more or less serious;
- additional factors which should influence the sentence;
- the applicability of the guideline to a wide range of offences;
- the clarity and accessibility of the guideline; and
- anything else that you think should be considered.

The Council recognises that when all the additional information is taken into account this generic guideline is longer than most offence-specific guidelines and that not all aspects of the guideline will be of interest to all respondents. The Council welcomes responses to all or part of this consultation.

A list of the consultation questions can be found at Annex A.

## **What else is happening as part of the consultation process?**

This is a 12 week public consultation. During the consultation period, the Council will host a number of consultation meetings to seek views from interested organisations as well as with sentencers. Once the consultation exercise is over and the results considered, a final guideline will be published and used by all adult courts.

The Council has also produced a resource assessment and a statistical bulletin detailing current sentencing practice. These documents can be found on the Sentencing Council's website: [www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)

**Q1: *What is your name?***

**Q2: *What is your email address?***

**Q3: *What is your organisation?***

**Q4: *Which (if any) criminal offences are of particular interest to you in the context of this guideline?***

# Developing the guideline

## General considerations

This generic guideline is for use when sentencing offences for which there is no offence-specific guideline. As such it is designed to provide guidance for sentencing a very wide range of offences with very different characteristics and very different maximum sentences. Of necessity, therefore, the guideline cannot specify sentence levels.

The Council is aware of the difficulty faced by courts when sentencing offenders for offences that are only rarely seen, and this is particularly the case for offences most commonly sentenced in magistrates' courts where there are no judgments of the Court of Appeal (Criminal Division) to assist.

The guideline aims to provide a framework for sentencing cases and to provide additional context to factors to assist courts in arriving at a just and proportional sentence.

The guideline inevitably leaves very wide discretion to the sentencer but aims to ensure that all relevant factors are considered and given appropriate weight in arriving at the final sentence.

In developing the guideline the Council has had regard to:

- submissions from parties seeking guidelines for specific offences;
- decisions of the Court of Appeal (Criminal Division) on the application of sentencing factors;
- the SGC Seriousness guideline;
- research with sentencers on offence-specific and overarching guidelines;
- the report on how the Sentencing Council can best exercise its functions by Professor Sir Anthony Bottoms (the Review);<sup>2</sup>

## Digital guidelines

The basic structure of the generic guideline is very similar to all Sentencing Council offence guidelines, but this guideline will take advantage of the digital format by providing additional information about the factors to be accessed from within the guideline.

A text version of the draft guideline is available here [link] but in order to see how the guideline will operate in practice it is recommended that you open the digital draft guideline in a separate window [link]

If you have any difficulty accessing the draft guideline please contact us [link].

***Q5: Have you been able to access the digital guideline to respond to this consultation?***

---

<sup>2</sup> THE SENTENCING COUNCIL IN 2017, A Report on Research to Advise on how the Sentencing Council can best Exercise its Statutory Functions [link]

# The proposals in detail

## Applicability of guideline

The guideline applies to sentencing adults and organisations only. For sentencing children and young people refer to the definitive guideline: *Overarching Principles – Sentencing Children and Young People*.

## Step one

The first step is to arrive at a provisional sentence. The guideline sets out the three main sources of information which may assist a sentencer to identify an appropriate sentence (and reminds sentencers not to have regard to draft sentencing guidelines). Sentencers are then directed to assess the seriousness of the offence by considering culpability and harm, which is in accordance with section 143(1) of the Criminal Justice Act 2003 which provides:

‘In considering the seriousness of any offence, the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.’

The guideline provides additional information on the assessment of culpability and of harm which is accessed by clicking on the relevant words in the digital version (see further below).

The guideline also refers to sentencing offences for which a fixed penalty notice was available and provides additional information on the approach to be taken in such cases.

Finally, at step one the guideline directs sentencers to have regard to the five purposes of sentencing which are taken from section 142(1) of the Criminal Justice Act 2003 which provides:

‘Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing-

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.’

## Additional information at step one

By clicking on ‘harm’, ‘culpability’ or ‘penalty notices’ the user will access further information on these topics. Views are sought on the clarity, relevance and helpfulness of the information.

**Q6: What are your views on the general guidance given at step one?**

**Q7: What are your views on the additional information on harm and culpability?**

**Q8: What are your views on the additional information on fixed penalty notices (if relevant to you)?**

## **Step two**

In offence-specific guidelines, step two would include a sentence table with starting points and category ranges. In this generic guideline no such table can be provided. However, in most other respects the generic guideline follows the same format as offence-specific guidelines at step two. The sentencer is required to consider a non-exhaustive list of aggravating and mitigating factors and determine whether the sentence arrived at thus far should be adjusted.

The digital guideline will provide links to information on community and custodial sentences (taken from the *Imposition of community and custodial sentences* definitive guideline) and on fine bands.

Importantly the sentencer is reminded not to double count when applying the factors at step two.

## **Statutory aggravating factors**

These factors are set out in statute and sentencers are obliged to apply them in relevant cases. The generic guideline provides additional information for each factor including reference to the statutory provisions. In the case of previous convictions, evidence shows that this factor can be very influential in sentencing and the Council wants to ensure that sentencers take all relevant matters into consideration in determining the effect of previous convictions on sentences.

**Q9: What are your views on the additional information provided for the statutory aggravating factors?**

## **Other aggravating factors**

The Council has listed all of the factors that seem likely to be relevant to a range of different offending, but the list is not exhaustive and many of the factors will not be relevant to any particular case. The digital guideline will provide additional information on each factor to assist sentencers in applying the factor consistently and fairly.

The first two factors in the list:

- Commission of offence whilst under the influence of alcohol or drugs
- Offence was committed as part of a group or gang

are commonly used in guidelines and may be applicable to a wide range of offences. The information is designed to ensure these factors are only used to increase the sentence when they are relevant to the offending and indicate increased harm and/or culpability. Importantly, sentencers are referred to the guidance on the mitigating factor relating to age and immaturity when considering the significance of group offending in young adults. This is because immature offenders are more likely to take risks and behave in an impulsive manner when in company with their peers. The Council considers that it is important that sentencers take account of all the relevant information to ensure fair treatment of offenders.

The next factor ‘offence involved the use or threat of a weapon’ is relevant to many offences of violence.

Responses to consultations on offence-specific guidelines have highlighted that sentencers would welcome guidance on how these factors should be applied.

‘Planning of an offence’ can be a relevant factor in many types of offending and may have already been taken into account at step one; the warning against double counting will be relevant to this factor.

***Q10: What are your views on the above four factors and the additional information provided in the guideline?***

**Other aggravating factors (continued)**

- Commission of the offence for financial gain
- High level of profit from the offence

These factors are related and the offences to which they may be relevant will include (but are not limited to) regulatory offences and some wildlife offences. They may apply to offences committed by individuals or by organisations. Stakeholders have made representations to the Council about the need for guidance in this area to ensure that financial penalties in particular are commensurate with the seriousness of the offending and represent an effective deterrent against future offending. The information provided aims to give courts the framework to ensure that any financial sanction imposed is appropriate to the offending.

***Q11: What are your views on the above two factors relating to financial gain and the additional information provided in the guideline?***

**Other aggravating factors (continued)**

- Abuse of trust or dominant position
- Gratuitous degradation of victim / maximising distress to victim
- Vulnerable victim
- Victim was providing a public service or performing a public duty at the time of the offence
- Other(s) put at risk of harm by the offending
- Offence committed in the presence of other(s) (especially children)

The above aggravating factors all relate to victims and the harm caused by the offending and/or the culpability of the offender.

The issue of when it is appropriate to aggravate an offence for abuse of trust in the context of sexual offending has been considered by the Court of Appeal (Criminal Division).<sup>3</sup> The additional information is designed to provide some more general guidance on this issue.

Evidence from responses to previous consultations and from research with sentencers suggests that information about how vulnerability should be interpreted would be useful.

The factor relating to those working in the public sector may need to be amended if legislation is passed relating specifically to emergency workers as victims, but the Council

---

<sup>3</sup> Case reference

intends to continue to recognise the need for additional protection for all those whose public facing roles expose them to the possibility of harm.

***Q12: What are your views on the above six factors relating to victims and the additional information provided in the guideline?***

**Other aggravating factors (continued)**

The following two factors relate to the behaviour of the offender after the offence has been committed:

- Actions after the event including but not limited to attempts to cover up/ conceal evidence
- Blame wrongly placed on other(s)

The additional information in relation to the 'blame' factor makes it clear that it does not apply where an offender simply fails to accept responsibility for the offence. The factor should not be interpreted in any way that undermines the presumption of innocence.

***Q13: What are your views on the above two factors relating to behaviour after the offence and the additional information provided in the guideline?***

**Other aggravating factors (continued)**

- Failure to respond to warnings or concerns expressed by others about the offender's behaviour

This factor has been included to reflect the fact that the culpability of the offender may be increased where warnings have been received but ignored. There are many factual scenarios to which this factor could apply. One is where an offender ignores warnings that his acts or omissions may give rise to an offence in a regulatory context, for example a warning that premises are not compliant with fire regulations. Another is where an offender is warned shortly before committing an offence that it is dangerous and/or unlawful, for example a member of a jury warned not to research a defendant on the internet. Rather than give examples the guideline provides guidance of general application.

- Offence committed on licence or post sentence supervision or while subject to court order(s)
- Offence committed in custody

The additional information for these factors sets out the way in which they can make an offence more serious but also reminds sentencers not to double count matters already taken into account in considering previous convictions. The 'offence committed in custody' factor includes a link to the Totality guideline.

- Offences taken into consideration

The additional information for this factor is an extract from the *Offences taken into consideration definitive guideline*.

***Q14: What are your views on the above four factors and the additional information provided in the guideline?***



### **Other aggravating factors (continued)**

- Offence committed in a domestic context
- Offence committed in a terrorist context
- Location and/or timing of offence

The first two factors above, simply refer users to other relevant guidelines which they will be able to access digitally. The third factor is one that is used in several offence-specific guidelines. The Council considers that there is a danger that without further explanation 'location' and 'timing' may be applied too widely, but that there are situations to which factor would legitimately apply; the additional information aims to clarify where it is appropriate to apply the factor.

***Q15: What are your views on the above three factors and in particular the additional information on timing and location provided in the guideline?***

### **Other aggravating factors (continued)**

- Established evidence of community/ wider impact
- Prevalence

These two factors may be linked and the additional information seeks to clarify when they may properly be applied.

***Q16: What are your views on the above two factors and the additional information provided in the guideline?***

***Q17: Are there any other aggravating factors that you think should be included in the generic guideline?***

### **Factors reducing seriousness or reflecting personal mitigation**

As with the aggravating factors, the Council has listed all of the mitigating factors that seem likely to be relevant to a range of different offending, but the list is not exhaustive and many of the factors will not be relevant to any particular case. The digital guideline will provide additional information on each factor to assist sentencers in applying the factor consistently and fairly.

The Council did consider a recommendation in the Review by Professor Bottoms to separate out personal mitigation from offence mitigation. The Council concluded there was not always a clear distinction between the two types of mitigation and that some mitigating factors will apply to both.

- No previous convictions or no relevant/recent convictions
- Good character and/or exemplary conduct

The first two factors are common to all sentencing guidelines. Although the term 'good character' is often used to mean no previous convictions, in the context of sentencing guidelines the factors are different and the additional information sets out the relevance of each to sentencing. The additional information on good character contains the caveat that good character does not always mitigate.

***Q18: What are your views on the additional information on the mitigating factors relating to no previous convictions and good character?***

- Remorse
- Self-reporting
- Co-operation with the investigation/ early admissions

Remorse is a factor common to all Sentencing Council guidelines and is frequently referenced in transcripts of sentencing remarks. The other two factors above are different but related (and may be evidence of genuine remorse). The additional information makes it clear that these are to be considered separately from the reduction in sentence for any guilty plea.

***Q19: What are your views on the additional information on the three mitigating factors above?***

To be continued.....

# Sentencing offences for which there is no offence-specific sentencing guideline

## Applicability of guideline

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this draft guideline. Following consultation, when a definitive guideline is produced it will apply to all offenders aged 18 and older, and to organisations who are sentenced on or after [date to be confirmed], regardless of the date of the offence.

Section 125(1) Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

“Every court -

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so.”

When issued as a definitive guideline this guideline will apply only to offenders aged 18 and older. General principles to be considered in the sentencing of youths are in the Sentencing Council’s definitive guideline, *Overarching Principles – Sentencing Children and Young People*.<sup>1</sup>

---

<sup>1</sup> [Add link](#)

### STEP ONE – reaching a provisional sentence

Where there is no definitive sentencing guideline for the offence, to arrive at a provisional sentence the court should take account of all of the following (if they apply):

- the statutory maximum sentence (and if appropriate minimum sentence) for the offence;
- sentencing judgments of the Court of Appeal (Criminal Division) for the offence; and
- definitive sentencing guidelines for analogous offences

for the avoidance of doubt the court should **not** take account of any draft sentencing guidelines or definitive guidelines that are not yet in force.

When considering definitive guidelines for analogous offences the court must make adjustments for any differences in the statutory maximum sentence and in the elements of the offence.

- Where possible the court should follow the stepped approach of sentencing guidelines to arrive at the sentence.
- The seriousness of the offence is assessed by considering the **culpability** of the offender and the **harm** caused by the offending.
- The initial assessment of harm and culpability should take no account of plea or previous convictions.

When sentencing an offence for which a **fixed penalty notice** was available the reason why the offender did not take advantage of the fixed penalty will be a relevant consideration.

The court should consider which of the five purposes of sentencing,

- the punishment of offenders,
- the reduction of crime (including its reduction by deterrence),
- the reform and rehabilitation of offenders,
- the protection of the public, and
- the making of reparation by offenders to persons affected by their offences

it is seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence.

## STEP TWO

Once a provisional sentence is arrived at the court should take into account factors that may make the offence more serious and factors which may reduce seriousness or reflect personal mitigation.

- Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.
- It is for the sentencing court to determine how much weight should be assigned to the aggravating and mitigating factors taking into account all of the circumstances of the offence and the offender. Not all factors that apply will necessarily influence the sentence.
- The presence of an aggravating factor that is an integral part of the offence being sentenced cannot be used as justification for increasing the sentence further.
- **If considering a community or custodial sentence refer also to the *Imposition of community and custodial sentences* definitive guideline. [link/ or drop down]**
- **If considering a fine – see information on fine bands [drop down on fine bands]**

**Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence**

### ***Statutory aggravating factors***

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity.

***Other aggravating factors: (factors are not listed in any particular order and are not exhaustive)***

**Care should be taken to avoid double counting factors already taken into account in assessing culpability or harm or those inherent in the offence**

- Commission of offence whilst under the influence of alcohol or drugs
- Offence was committed as part of a group or gang
- Offence involved use or threat of use of a weapon
- Planning of an offence
- Commission of the offence for financial gain
- High level of profit from the offence
- Abuse of trust or dominant position
- Gratuitous degradation of victim / maximising distress to victim
- Vulnerable victim
- Victim was providing a public service or performing a public duty at the time of the offence

- Other(s) put at risk of harm by the offending
- Offence committed in the presence of other(s) (especially children)
- Actions after the event including but not limited to attempts to cover up/ conceal evidence
- Blame wrongly placed on other(s)
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed on licence or post sentence supervision or while subject to court order(s)
- Offence committed in custody
- Offences taken into consideration
- Offence committed in a domestic context
- Offence committed in a terrorist context
- Location and/or timing of offence
- Established evidence of community/ wider impact
- Prevalence

**Factors reducing seriousness or reflecting personal mitigation** (factors are not listed in any particular order and are not exhaustive)

- No previous convictions or no relevant/recent convictions
- Good character and/or exemplary conduct
- Remorse
- Self-reporting
- Cooperation with the investigation/ early admissions
- Little or no planning
- The offender was in a lesser or subordinate role if acting with others / performed limited role under direction
- Little or no financial gain
- Involved through coercion, intimidation or exploitation
- Limited awareness or understanding of the offence
- Delay since apprehension
- Activity originally legitimate
- Age and/or lack of maturity
- Sole or primary carer for dependent relatives
- Physical disability or serious medical conditions requiring urgent, intensive or long-term treatment
- Mental disorder or learning disability
- Determination and /or demonstration of steps having been taken to address addiction or offending behaviour

### **STEP THREE**

#### **Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR**

**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

**STEP FIVE**

**Dangerousness**

**Where the offence is listed in Schedule 15 and/or Schedule 15B of the Criminal Justice Act 2003**

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 224A or section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

**STEP SIX**

**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality guideline*.

**STEP SEVEN**

**Compensation and ancillary orders**

In all cases the court should consider whether to make compensation and/or other ancillary orders. The Court will be assisted by the parties in identifying relevant ancillary orders.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

**STEP EIGHT**

**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP NINE**

**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Blank page