

14 June 2018

Dear Members

## Meeting of the Sentencing Council – 22 June 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 22 June 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)JUN00 |
| ▪ Minutes of meeting held on 18 May                | SC(18)MAY01 |
| ▪ Action Log                                       | SC(18)JUN02 |
| ▪ Assault  | SC(18)JUN03 |
| ▪ Mental Health                                    | SC(18)JUN04 |
| ▪ Interim drugs guidance                           | SC(18)JUN05 |
| ▪ Guilty plea                                      | SC(18)JUN06 |
| ▪ Expanding factors in offence specific guidelines | SC(18)JUN07 |
| ▪ Annual Report                                    | SC(18)JUN08 |
| ▪ Child Cruelty                                    | SC(18)JUN09 |

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

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## COUNCIL MEETING AGENDA

**22 June 2018**  
**Royal Courts of Justice**  
**Queen's Building**

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| 09:45 – 10:00 | Minutes of the last meeting and matters arising (papers 1 & 2)                     |
| 10:00 – 11:00 | Assault – presented by Lisa Frost (paper 3)  |
| 11:00 – 12:15 | Mental Health – presented by Mandy Banks (paper 4)                                 |
| 12:15 – 12:30 | Interim Drugs Guidance – presented by Eleanor Nicholls (paper 5)                   |
| 12:30 – 13:00 | Lunch  |
| 13:00 – 13:30 | Update on Guilty Plea – presented by Ruth Pope (paper 6)                           |
| 13:30 – 14:30 | Expanded factors in offence specific guidelines – presented by Ruth Pope (paper 7) |
| 14.30 – 14:45 | Annual Report – presented by Phil Hodgson (paper 8)                                |
| 14:45 – 15.30 | Child Cruelty – presented by Eleanor Nicholls (paper 9)                            |

# Sentencing Council

## **COUNCIL MEETING AGENDA**

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## MEETING OF THE SENTENCING COUNCIL

18 MAY 2018

## MINUTES

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Members present:

Colman Treacy (Chairman)  
Rob Butler  
Mark Castle  
Rosina Cottage  
Rebecca Crane  
Rosa Dean  
Martin Graham  
Heather Hallett  
Tim Holroyde  
Maura McGowan  
Sarah Munro  
Alpa Parmar

Apologies:

Alison Saunders  
Julian Goose

Representatives:

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)

Members of Office in  
Attendance:

Steve Wade (Head of Office)  
Mandy Banks  
Eleanor Nicholls  
Ruth Pope  
Caroline Nauth-Misir

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

- 1.1. The minutes from the meeting of 13 April 2018 were agreed.

## **2. MATTERS ARISING**

- 2.1 The Chairman noted that this was Martin Graham's last meeting. The Chairman thanked him for his efforts over the last 3 years and, in particular, for his work on the Breach guideline, which was particularly helpful.

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

- 3.1 This was the last substantive consideration of the Child Cruelty guidelines, which will now be signed off at the June meeting. The Council considered several aspects of the "Failure to Protect a Girl from the Risk of FGM" guideline, including the assessment of harm, sentence levels, and aggravating and mitigating factors.
- 3.2 The Council decided to retain the approach to assessing harm which was set out in the guideline for consultation but made some changes to the wording of harm factors to take into account responses to consultation and to ensure consistency with the other offences in this guideline.
- 3.3 The Council also made some small changes to sentence levels and to aggravating and mitigating factors. These changes were, again, aimed at ensuring consistency across the guidelines where possible.
- 3.4 The Council also discussed some changes to the wording of factors relating to 'good character' in the "Cruelty to a Child" and "Causing or Allowing" guidelines and made some small changes, including incorporating some explanatory wording used in other guidelines.
- 3.5 Lastly, the Council discussed the wording of the new Step Five and made some changes to ensure it clearly applies to all cases, both those where the court is considering whether to impose custody, and those where the court is deciding on the appropriate length of a custodial sentence.

## **4. DISCUSSION ON ASSAULT – PRESENTED BY STEVE WADE AND CAROLINE NAUTH-MISIR, OFFICE OF THE SENTENCING COUNCIL**

- 4.1 The Council considered the scope of the proposed revision of the Assault Guideline and the approach to be taken. It was agreed to include 'Attempt Murder' within the scope, alongside all of the offences contained within the existing guideline. A number of suggestions for additional offences were also suggested for consideration by the policy team.

4.2 The Council also noted the additional analytical resource required and agreed it was necessary in order to inform fully the work to revise the guideline.

**5. DISCUSSION ON MENTAL HEALTH – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL**

5.1 The Council discussed the proposed scope and structure of the guideline and the timings for the work. The Council agreed that the guideline would have a narrative format. The Council also agreed the broad scope of the guideline to cover factual information of use to courts, guidance on how to assess the culpability of the offender, and guidance on the impact of different disposals on offenders with particular conditions.

5.2 The indicative timetable for the work was discussed and it was agreed that the timetable was likely to need to increase and that it would be important to give the project the time it needed.

5.3 The Council also noted other work on mental health within the broader criminal justice system, which might have implications for the guideline.

**6. DISCUSSION ON EXPLANATIONS FOR FACTORS IN GUIDELINES – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**

6.1 The Council discussed the approach to a guideline that would provide explanations for factors in offence specific guidelines. It was agreed that the explanations should be based on those developed for the 'General' guideline which is being consulted on from June 2018.

6.2 It was agreed that the explanations, alongside the 'General' guideline should be both a practical aid for sentencers and contribute to greater clarity and transparency in sentencing for the public.

**7. DISCUSSION ON BUSINESS PLAN – PRESENTED BY STEVE WADE, OFFICE OF THE SENTENCING COUNCIL**

7.1 The Council considered and agreed the Business Plan for FY 2018-19, subject to final fact-checking and proofreading. The Council agreed to move revision of its Drugs Guideline up the schedule in the light of recent changes in offending in this area.

7.2 The Council also agreed in principle to bring in standard 'in force' dates for future definitive guidelines and tasked the Office to build this into their future plans.

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

8.1 The Council reviewed all four guidelines and agreed minor amendments to factors to aid clarity and consistency.

- 8.2 The Council considered sentencing data and observed the trend towards higher sentences for these offences over time. The Council agreed to retain the sentence levels that had been consulted on, which were in line with current sentencing practice in most cases.
- 8.3 The definitive guidelines were signed off for publication in the summer.



## ACTION AND ACTIVITY LOG – as at 14 June 2018

	Topic	What	Who	Actions to date	Outcome
<b>SENTENCING COUNCIL MEETING 13 April 2018</b>					
2	Robbery	Full report for the robbery evaluation to be circulated to Council, once the time series analysis has been updated. Council will then decide whether or not to put robbery back on the workplan.	Sarah Poppleton	<b>ACTION ONGOING:</b> The report will be sent to Members in September.	
<b>SENTENCING COUNCIL MEETING 18 May 2018</b>					
3	Business Plan	Council agreed to implement 'standard' commencement dates for guidelines coming into force. Office to consider most appropriate dates and plan accordingly.	Steve Wade / Eleanor Nicholls	<b>ACTION ONGOING:</b> Business plan amended to include standard dates for upcoming guidelines and future dates to be considered at next planning meeting.	
4	Assault	CPS to share charging guidance for prosecutors once agreed by the Director.	Neil Moore		<b>ACTION CLOSED:</b> Charging guidance approved by Director and published.

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**Sentencing Council meeting:** 22 June 2018  
**Paper number:** SC(18)JUN03 – Assault  
**Lead Council member:** Julian Goose & Rob Butler  
**Lead officials:** Lisa Frost & Caroline Nauth-Misir  
0207 071 5784

## **1 ISSUE**

1.1 This paper sets out the issues identified with the existing guideline for common assault offences, and proposes a new draft guideline.

1.2 Decisions will be sought regarding structure and factors only at this meeting, with principles regarding sentence level development to be discussed.

## **2 RECOMMENDATION**

That the Council:

- considers the issues relating to the existing assault guideline and;
- considers and agrees factors for a revised guideline for common assault.

## **3 CONSIDERATION**

3.1 Assault and battery, sometimes collectively called “common assault” are the highest volume offences covered by the assault guideline, with around 42,200 adult offenders sentenced in 2017. An assault is committed when a person intentionally or recklessly causes another to apprehend the immediate infliction of unlawful force. A battery is committed when a person intentionally and recklessly applies unlawful force to another. Battery is any act of unlawful personal violence; mere touching is enough – no injury need be caused. “Unlawful” means that the physical contact was neither consented to nor justified in the circumstances. Assault and battery are summary offences and carry a maximum penalty of six months’ imprisonment. Racially aggravated versions of the offences are either way and carry a maximum penalty of two years’ imprisonment.

3.2 The consideration at this meeting is restricted to the basic offence of common assault only. The aggravated versions will be considered once feedback is available on aggravated approaches currently out for consultation (public order and arson and criminal damage offences).

### The existing guideline – issues

3.3 The existing guideline for this offence is contained within **Annex A**. The evaluation of the guideline highlighted a number of issues with the existing guideline (which are also relevant to some other assault guidelines). In interviews with sentencers and practitioners, issues relevant to common assault which emerged related to the guideline not adequately providing for ‘middling’ harm (where the injury is neither more nor less serious in the context of the offence), and while most thought the factors appropriate, issues were highlighted with interpretation of some of the factors. These included;

- The difficulty in establishing injury in cases of common assault, especially “in the context of the offence”;
- The potential for differing interpretations of “sustained or repeated assault on the same victim” in greater harm;
- Concerns over the potential to double-count victim vulnerability as it is included in both greater harm (‘victim is particularly vulnerable because of personal circumstances’) and higher culpability (‘deliberate targeting of a vulnerable victim’) – albeit with a different emphasis;
- The potential to interpret the phrase “a significant degree of premeditation” in different ways; it was suggested that the word ‘pre-planning’ may be more suitable for situations when the defendant has planned the assault well in advance of perpetrating it.
- The wish from several participants to see ‘spitting’ reintroduced as an important consideration within the guideline (particularly in the context of assault on a police officer). Most felt it should be a greater harm or higher culpability factor at step 1.
- Further consideration (raised by a small number only) of culpability factors such as “a greater degree of provocation than normally expected”.

3.4 As this offence is summary only, there were low volumes of transcripts available for this offence to assist in analysis of factors and current sentencing practice. Transcripts that were available related to offences which were dealt with at the Crown Court either by being sentenced with other offences or a plea to a common assault being accepted as an alternative to ABH. A feedback exercise was therefore recently undertaken with magistrates to gather their views on three aspects of the common assault guideline. This sought views on factors, the structure of the guideline and the sentence starting points and ranges. Other more general comments were also invited. Broad findings from the 47 responses received were;

- Factors which were raised as problematic corresponded with views in the evaluation of the guideline. A number of responses also expressed concern at the factor 'deliberately causes more harm than is necessary for commission of offence', questioning what this means. For the factor relating to injury in the context, the 'context' aspect was questioned and examples given of how this could be inconsistently interpreted.
- Views on the structure of the guideline varied, with some respondents finding the existing model clear and easy to follow, while others suggested changes to the layout.
- The majority of respondents thought the sentence starting points were too low, or the ranges too wide. The low starting point issue was particularly evident for a category 3 offence. Some of these responses related to the guideline factors not providing for medium harm cases adequately, resulting in a low categorisation of an offence and subsequent starting point where a high threshold of harm could not be demonstrated.
- In other comments, a number of responses mentioned undercharging of offences. This was discussed at the last meeting, and was also apparent in analysis of transcripts for common assault. Since the last meeting the CPS have published revised charging guidance, removing suggestions that offences should be charged as common assault rather than ABH to expedite proceedings. The guidance also states that common assault should not be preferred as an alternative charge where the offence is clearly ABH.

### Anticipated and actual impact of the common assault guideline

3.5 The assessment of the impact and implementation of the common assault guideline noted the following;

*“For common assault, there was a shift away from suspended sentences and community orders, and towards fines and discharges. The use of immediate custody was broadly similar before and after the guideline came into force, as was the adjusted ACSL of 0.3 years. Sentence severity also decreased, despite the overall trend of a steady increase since 2004. Analysis suggests these changes were caused by the new guideline, with actual sentencing going outside the “forecasted severity region”.*

*This impact of the guideline in decreasing sentence severity is broadly consistent with the impact anticipated in the resource assessment – which included between 400 to 900 fewer community orders and additional fines and conditional discharges (between 1,200 and 2,900, and 400 and 900, respectively). However, while the resource assessment anticipated between 1,300 and 3,000 fewer custodial sentences, analysis shows there was no change in the use of custodial sentences before and after the guideline came into force. It was also broadly in line with sentencers’ perceptions that sentences have decreased for common assault, which was attributed to the difficulty in establishing injury in cases of common assault, especially “in the context of the offence”. Observations of sentencers included the following;*

*It’s often hard to get into category 1 because there really has to be some injury...and common assault doesn’t usually involve injury (District judge)*

*We find that if you follow the guidelines properly that a lot of common assaults end up category 3...if there is no injury then you are automatically down a category (magistrate)”*

3.6 The main conclusion drawn from sentencer comments and evidence of sentencing trends is that the decrease in sentences is at the lower end of the scale, rather than at the top end as was anticipated at the introduction of the guideline. The fact that there was no change in custody rate or sentence length indicates that the cases at the upper end of seriousness were treated broadly the same pre and post the introduction of the guideline. The shift from community orders to fines appears to be largely attributable to a high threshold of harm being required for a case to be

captured by the top and middle categories of the guideline, with only the lowest category providing for less serious harm. As noted by sentencer comments, given the low level of harm required for this offence, it is likely that a high proportion of cases have been captured at category 3 which provides a starting point of a Band A fine, with a range of a discharge to a Band C fine. This is likely to be the predominant factor causing the decrease in sentences at the lower end of seriousness rather than at the top end.

3.7 As a result of these findings and observations of the Council at the last meeting, a revised guideline is proposed. This is in the format of more recent Council guidelines, and removes problematic factors and provides for three gradations of harm. Where research has indicated that factors are working well, these have been retained but reworded to be more consistent with recent guidelines.

3.8 The revised draft guideline is included at **Annex B**.

#### Culpability factors

3.9 Step one of assessment of seriousness in the existing guideline includes factors indicating greater or lesser harm, and factors indicating higher or lower culpability. These give rise to three categories of seriousness, depending on the level of harm and culpability identified.

3.10 As already noted, there are a number of factors which have proved problematic as they are difficult to define and result in inconsistent interpretation. It is also considered a number of existing step one factors would be more suitable as aggravating or mitigating factors. The table below includes the culpability and harm factors in the existing assault guideline, and sets out how it is proposed the factor will be addressed by the revised guideline;

	<b>Existing guideline</b>	<b>Revised guideline</b>
<b>Factors indicating higher culpability</b>	A significant degree of premeditation	Significant planning now included at high culpability
	Threatened or actual use of weapon or weapon equivalent	Threat or use of weapon included at high culpability
	Intention to commit more serious harm than actually	Removed

	resulted from offence	
	Deliberately causes more harm than is necessary for commission of offence	Removed
	Deliberate targeting of vulnerable victim	Retained
	Leading role in group or gang	Targeting of individual by group dealt with at high culpability – role dealt with in aggravating factors
<b>Factors indicating lower culpability</b>	Subordinate role in group or gang	Targeting of individual by group dealt with at high culpability – role dealt with in aggravating factors
	A greater degree of provocation than normally expected	Removed from culpability and added as mitigating factor, as the Council have previously expressed reservations regarding use of this factor
	Lack of premeditation	High culpability provides for significant planning. A spontaneous assault may be as serious as a premeditated one, so not proposed this factor be explicitly available to reduce seriousness.
	Mental disorder or learning disability where linked to commission of offence	Retained at lower culpability.
	Excessive self defence	Retained at lower culpability



3.11 The proposed revised guideline factors are accompanied by italicised text which is explanatory and included only for Council consideration. What are thought to be the most serious culpability factors are included at high culpability at step one. Lesser culpability retains some of the factors in this category in the existing guideline as well as including an 'all other cases' category. The factors 'lack of premeditation' and 'subordinate role' have been removed from step one, as a spontaneous assault may still be serious, and role is now assessed at step two. Additional asterisked guidance is included underneath the culpability assessment to provide some definitions of 'weapon equivalent', which are currently included with the factor in the existing guideline.

3.12 In developing factors consideration has also been given to similarities that common assault shares with the S4 Public Order offence. The S4 offence involves threatening or provocation of violence, for which a draft guideline was recently developed. While the S4 offence involves the fear or provocation of violence rather than the use or threat of force required for common assault, analysis of existing factors in both the existing assault and recent draft S4 guidelines has illustrated that they could have factors in common. The offences share the same statutory maximum of 6 months imprisonment and 2 years for the racially or religiously aggravated offence. As with the S4 guideline, the factors need to provide for both use or threat (or apprehension) of force.

**Question One: Does the Council agree with the proposed culpability factors?**

Harm

3.13 As already noted, the harm factors are the biggest concern with the existing guideline as they do not provide for cases of medium harm, and interpretation of the term 'within the context of the offence' has proved problematic.

3.14 The revised guideline proposes three harm categories, which describe and gradate harm more clearly. It is important to note that a common assault should never involve serious harm, as this would cause a more serious offence to be charged. The gradations are therefore expressed as no/minor/more than minor harm. Existing factors indicating greater harm have either been removed, included as an aggravating factor or incorporated at high culpability;

	Existing guideline	Revised guideline
<b>Factors indicating greater harm</b>	Injury or fear of injury which is serious in the context of the offence (must normally be present)	Removed. New factors describe level of harm required; ranging from more than minor to low or no harm
	Victim is particularly vulnerable because of personal circumstances	Removed from harm. 'Deliberate targeting of vulnerable victim' included at step one, so would double count to include at harm.
	Sustained or repeated assault on same victim	Factor now included at high culpability. Question as to whether 'repeated' necessary as would be likely to result in additional charges?
<b>Factors indicating lesser harm</b>	Injury which is less serious in the context of the offence	Removed. New factors describe level of harm required; ranging from more than minor physical or psychological to low or no.

**Question Two: Does the Council agree with the proposed harm factors?**

Aggravating factors

3.15 An additional aggravating factor of 'spitting' has been included in the draft guideline, as this has been raised in both the evaluation and recent feedback exercise as a factor which the guideline should provide for. It is not thought it should be a high culpability factor as there is no data as to how frequently this factor occurs, so there is a risk it would inflate sentences if included at high culpability.

3.16 The existing factors include a number of factors which are specifically relevant to domestic incidents. It is proposed that these should be removed and additional guidance be included to refer sentencers to the guideline overarching principles: domestic abuse where this is relevant. This has been included in the draft guideline before the culpability assessment.

3.17 The revised draft guideline includes factors which are thought to be the most relevant. Details of aggravating factors which were included in the previous guideline but have not been included or where wording has been amended are provided in the table below;

Existing guideline	Revised guideline
Location/Timing of offence	This factor is not included in current guidelines. New factor 'victim had no opportunity to escape situation'. This is a recently agreed public order factor.
Ongoing effect on the victim	Remove - Provided for by step 1 harm factor (more than minor psychological harm).
In domestic violence cases, victim forced to leave their home	Remove and include instruction to refer to DA guideline in relevant cases
Exploiting contact arrangements with a child to commit an offence	Remove and include instruction to refer to DA guideline in relevant cases
Established evidence of community impact	Remove – relevant to racially or religiously aggravated offences which will be addressed separately in guideline
An attempt to conceal or dispose of evidence	Remove – could apply to every offence and is not thought to be particularly relevant to common assault

**Question Three: Does the Council agree with the proposed aggravating factors?**

Mitigating factors

3.18 Upon reviewing the existing guideline it has been noted that a greater range of mitigating factors are included than is the case in more recent guidelines. Some of

these relate to broader considerations of the type of sentence which may be appropriate, such as serious medical conditions and demonstration of steps taken to address addiction or offending. While more recent guidelines may not have included some of these, they have been retained as they may help to address the broader consideration the Council have recently been undertaking in relation to achieving greater balance between aggravating and mitigating factors.

3.19 As well as retaining the majority of mitigating factors in the existing guideline, some existing factors indicating lower culpability have been transposed to step two (including role and provocation).

3.20 The table below includes factors which currently mitigate the offence which it is proposed be removed, and the rationale for doing so;

Existing guideline	Revised guideline
Isolated incident	Removed. Isolated or 'one off' incident could still be serious. If minor would be assessed at lesser culpability.
Single blow	Removed. Single blow could still be serious. Minor physical contact provided for at lesser culpability.

#### **Question Four: Does the Council agree with the proposed mitigating factors?**

##### Sentences

3.21 Existing sentence starting points and ranges for this offence are included at **Annex A**. As already noted, a key finding in assessing evidence to revise the guideline is that due to the existing guideline factors a high proportion of cases appear to be falling within category 3, therefore attracting a low starting point. The other categories require a greater level of harm, which is not required for the offence to be charged.

3.22 Those cases which have attracted a higher categorisation are likely to include cases which were charged as common assault when they were actually ABH cases, or where common assault was accepted as an alternative to ABH.

3.23 As has been noted, it has not been possible to analyse a broad range of transcripts for this offence due to the lower level assault offences being sentenced primarily in the magistrates' courts.

3.24 **Annex C** includes statistical information on sentencing trends between the period 2007-2017, including how sentence outcomes have changed over time. This illustrates the point made earlier that custodial sentences remained broadly consistent following the guideline's introduction in June 2011, contrary to the anticipated impact of a reduction in custodial sentences. Instead, the change in disposal type has occurred at the lower end of the scale, with a shift from community orders to fines.

3.25 It is thought that the introduction of revised CPS charging guidance will significantly impact the current distribution of common assault sentences. As a result of this, it is likely a significant proportion of the custodial common assault sentences will be redistributed across ABH offence outcomes. By revising the factors and providing for three categories of harm, it is intended that common assault cases will be captured in the appropriate categories.

3.26 Before sentence levels are developed, the Council are asked to consider whether the revised guideline should seek to achieve the original intended impact of the guideline. Specifically, this would be to reduce the volumes of custodial sentences for this offence, although it should be noted that this is likely to occur without the guideline if ABH type offences are not charged or sentenced as common assault. Consideration will also be required as to whether the current deflationary impact of the guideline should be reviewed, and a lower proportion of fines imposed as a disposal. These decisions will need to be made in view of factor placement, to determine which principles should underpin the sentence level development (i.e. should cases involving high harm and culpability attract a custodial sentence).

**Question Five: Does the Council wish to change or maintain current sentencing practice in relation to this offence? Are there specific principles which should apply to sentence development?**

#### Wider issues with factors and structure of guideline

3.27 The existing guideline includes specific imposition related guidance, directing courts to consider the type of sentence which may be appropriate in each category. This can be seen at the top of page 2 of **Annex A**. The Council is asked to consider

whether this information should be retained in the revised guideline. The Imposition guideline has since been introduced which includes these considerations, but the existing guideline requires sentencers to consider the custody threshold question before identifying aggravating and mitigating factors. Embedding similar text from the Imposition guideline would provide a mechanism for ensuring Imposition is fully and consistently considered in each case, without the need for it to be referred to separately. The broader mitigating factors included may assist the court in determining whether the custody threshold is crossed in appropriate cases, and provide for adjustment of the sentence. However, this is a point the Council may wish to consider more broadly in relation to all guidelines.

**Question Six: Does the Council wish to retain the additional step two guidance directing the court to undertake the Imposition related assessment?**

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

4.1 It will be important reputationally to ensure a thorough assessment of the evidence available and for principled decisions to be made regarding sentences for this offence.

4.2 Early testing of the guidelines with sentencers will be undertaken to identify potential issues and impact prior to sign off of the guideline.

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

The court should determine the offence category using the table below.

<b>Category 1</b>	Greater harm (injury or fear of injury must normally be present) <b>and</b> higher culpability
<b>Category 2</b>	Greater harm (injury or fear of injury must normally be present) <b>and</b> lower culpability; <b>or</b> lesser harm and higher culpability
<b>Category 3</b>	Lesser harm <b>and</b> lower culpability

The court should determine the offender's culpability and the harm caused, or intended, by reference **only** to the factors below (as demonstrated by the presence of one or more). These factors comprise the principal factual elements of the offence and should determine the category.

<b>Factors indicating greater harm</b>	Threatened or actual use of weapon or weapon equivalent (for example, shod foot, headbutting, use of acid, use of animal)
Injury or fear of injury which is serious in the context of the offence (must normally be present)	Intention to commit more serious harm than actually resulted from the offence
Victim is particularly vulnerable because of personal circumstances	Deliberately causes more harm than is necessary for commission of offence
Sustained or repeated assault on the same victim	Deliberate targeting of vulnerable victim
<b>Factors indicating lesser harm</b>	Leading role in group or gang
Injury which is less serious in the context of the offence	Offence motivated by, or demonstrating, hostility based on the victim's age, sex, gender identity (or presumed gender identity)
<b>Factors indicating higher culpability</b>	<b>Factors indicating lower culpability</b>
<i>Statutory aggravating factors:</i>	Subordinate role in group or gang
Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)	A greater degree of provocation than normally expected
Offence motivated by, or demonstrating, hostility to the victim based on the victim's disability (or presumed disability)	Lack of premeditation
<i>Other aggravating factors:</i>	Mental disorder or learning disability, where linked to commission of the offence
A significant degree of premeditation	Excessive self defence

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

Having determined the category, the court should use the corresponding starting points 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 in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

<b>Offence Category</b>	<b>Starting Point</b> ( <i>Applicable to all offenders</i> )	<b>Category Range</b> ( <i>Applicable to all offenders</i> )
<b>Category 1</b>	High level community order	Low level community order – 26 weeks' custody
<b>Category 2</b>	Medium level community order	Band A fine – High level community order
<b>Category 3</b>	Band A fine	Discharge – Band C fine

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 starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When sentencing **category 1** offences, the court should also consider the custody threshold as follows:

- has the custody threshold been passed?
- if so, is it unavoidable that a custodial sentence be imposed?
- if so, can that sentence be suspended?

When sentencing **category 2** offences, the court should also consider the community order threshold as follows:

- has the community order threshold been passed?

Factors increasing seriousness		
<i>Statutory aggravating factors:</i>		
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	Exploiting contact arrangements with a child to commit an offence	
Offence committed whilst on bail	Established evidence of community impact	
<i>Other aggravating factors include:</i>	Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution	
Location of the offence	Offences taken into consideration (TICs)	
Timing of the offence		
Ongoing effect upon the victim		
Offence committed against those working in the public sector or providing a service to the public		
Presence of others including relatives, especially children or partner of the victim		
Gratuitous degradation of victim		
In domestic violence cases, victim forced to leave their home		
Failure to comply with current court orders		
Offence committed whilst on licence		
An attempt to conceal or dispose of evidence		
Failure to respond to warnings or concerns expressed by others about the offender’s behaviour		
Commission of offence whilst under the influence of alcohol or drugs		
Abuse of power and/or position of trust		
	Factors reducing seriousness or reflecting personal mitigation	
	No previous convictions <b>or</b> no relevant/recent convictions	
	Single blow	
	Remorse	
	Good character and/or exemplary conduct	
	Determination and/or demonstration of steps taken to address addiction or offending behaviour	
	Serious medical conditions requiring urgent, intensive or long-term treatment	
	Isolated incident	
	Age and/or lack of maturity where it affects the responsibility of the offender	
	Lapse of time since the offence where this is not the fault of the offender	
	Mental disorder or learning disability, where <b>not</b> linked to the commission of the offence	
	Sole or primary carer for dependent relatives	

**Section 29 offences only:** The court should determine the appropriate sentence for the offence without taking account of the element of aggravation and then make an addition to the sentence, considering the level of aggravation involved. It may be appropriate to move outside the identified category range, taking into account the increased statutory maximum.



**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 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.**

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**Where the offence is committed in a domestic context, consideration must be given to the definitive guideline 'Overarching Principles: Domestic Abuse'**

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

**A - High culpability:**

- Targeting of individual(s) by a group (*new factor as included in public order offences as would increase seriousness. Role assessed at step two instead of existing guideline step one*)
- Deliberate targeting of vulnerable victim (*existing higher culpability factor*)
- Sustained or repeated assault (*replaces greater harm factor of sustained or repeated assault on same victim*)
- Use of substantial force (*replaces higher culpability factors: intention to commit more serious harm and deliberately causes more harm than necessary*)
- Threatened or actual use of weapon or weapon equivalent\* (*including shod foot, headbutting, use of acid, use of animal*) retained from existing guideline
- Significant planning (*replaces higher culpability factor significant degree of premeditation*)
- Intention to cause fear of serious harm (*to capture assault offences where victim apprehends use of force but force not actually used*)

**B – Lesser culpability**

- Minor or no physical contact;
- Excessive self defence
- Mental disorder or learning disability, where linked to the commission of the offence
- All other cases not captured by category 1 factors

\*Examples of a weapon equivalent can include but are not limited to: a shod foot, headbutting, use of acid, use of animal in commission of offence

<b>Harm</b> 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.	
<b>Category 1</b>	More than minor physical or psychological harm
<b>Category 2</b>	Minor physical or psychological harm
<b>Category 3</b>	No physical injury Very low level of distress

**STEP TWO**

Having determined the category, the court should use the corresponding starting points 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 in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

**(SENTENCE TABLE TO BE INSERTED WHEN DEVELOPED)**

**Aggravating and mitigating factors****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 of the victim: disability, sexual orientation or transgender identity

**Other aggravating factors:**

Spitting

Offence committed against those working in the public sector or providing a service to the public

Leading role in group

History of antagonising the victim

Victim had no opportunity to escape situation (ie: on public transport)

Presence of others including relatives, particularly children or partner of the victim

Gratuitous degradation of victim

Abuse of power and/or position of trust

Failure to respond to warnings or concerns expressed by others about the offender's behaviour

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Other offences taken into consideration (TICs)

Commission of offence whilst under the influence of alcohol/drugs

Offence committed whilst on licence or subject to post sentence supervision

History of failure to comply with court orders

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

No previous convictions or no relevant/recent convictions

Remorse

Good character and/or exemplary conduct

Minor or peripheral role in group activity

Significant degree of provocation

Age and/or lack of maturity where it affects the responsibility of the offender

Mental disorder or learning disability, where not linked to the commission of the offence

Sole or primary carer for dependent relatives

Determination and/or demonstration of steps taken to address addiction or offending behaviour

Serious medical conditions requiring urgent, intensive or long-term treatment

Lapse of time since the offence where this is not the fault of the offender

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## Sentencing trends for common assault, 2007-2017<sup>1,2</sup>

### Proportion of adult offenders sentenced for common assault, by sentence outcome, all courts, 2007-2017

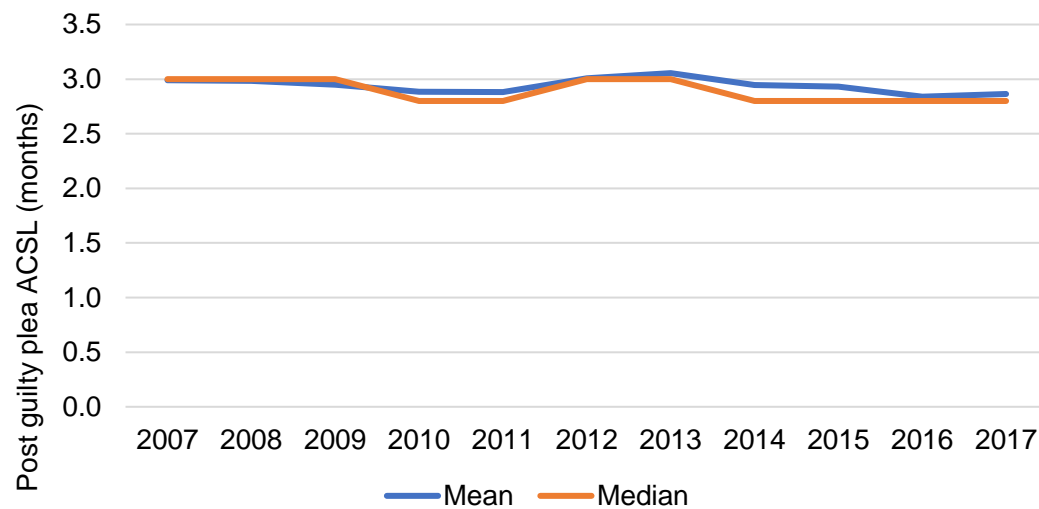
Outcome	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Absolute and conditional discharge	20%	16%	13%	15%	15%	15%	15%	16%	15%	15%	14%
Fine	11%	11%	12%	11%	13%	14%	14%	15%	16%	16%	16%
Community sentence	42%	44%	46%	45%	43%	42%	39%	37%	39%	38%	39%
Suspended sentence	10%	10%	12%	12%	12%	11%	12%	12%	13%	14%	14%
Immediate custody	14%	15%	15%	14%	15%	15%	14%	14%	14%	14%	14%
Otherwise dealt with	4%	4%	2%	3%	3%	3%	5%	5%	3%	3%	3%

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<sup>1</sup> Source: Court Proceedings Database, Ministry of Justice

<sup>2</sup> Excludes youths, section 29 offences (racially/religiously aggravated), and custodial sentences of over 6 months (the statutory maximum for this offence)

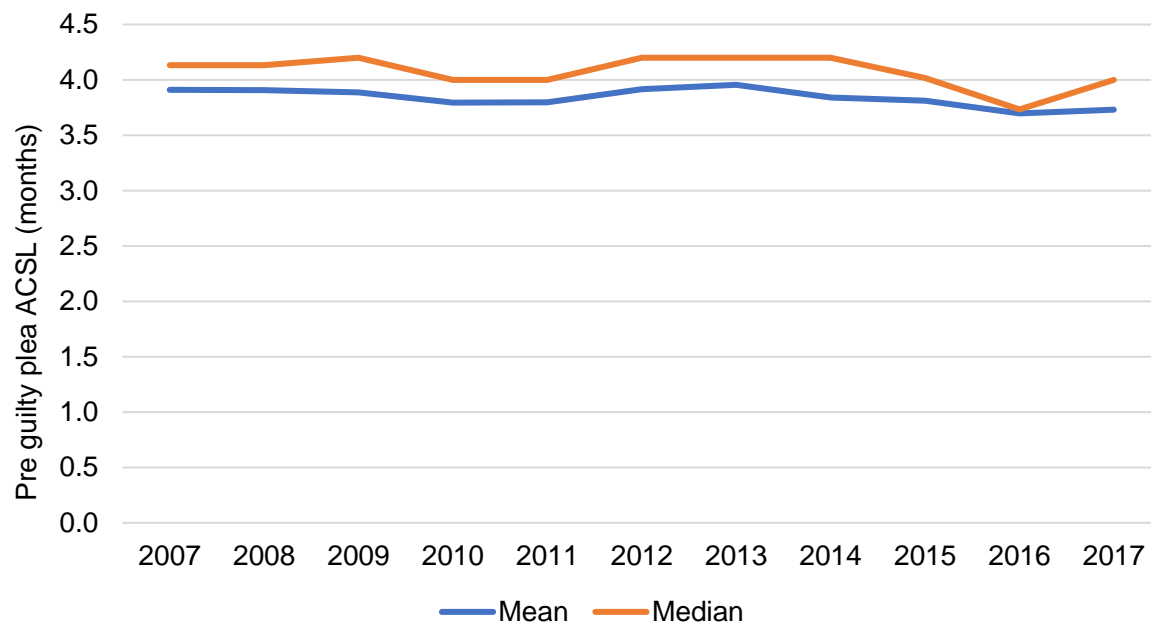
**Post guilty plea average custodial sentence lengths (ACSLs) received by adult offenders sentenced to immediate custody for common assault, all courts, 2007-2017**



**Post guilty plea sentence length bands received by adult offenders sentenced to immediate custody for common assault, all courts, 2007-2017**

Sentence length band	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
1 month or less	13%	13%	12%	13%	14%	13%	13%	14%	14%	16%	16%
Between 1 and 2 months	22%	21%	21%	22%	21%	19%	18%	20%	20%	21%	21%
Between 2 and 3 months	24%	23%	25%	25%	24%	23%	22%	22%	22%	23%	21%
Between 3 and 4 months	27%	27%	26%	24%	24%	25%	25%	23%	22%	21%	21%
Between 4 and 5 months	8%	10%	11%	10%	11%	13%	13%	13%	13%	12%	13%
Between 5 and 6 months	6%	6%	6%	5%	6%	8%	9%	8%	8%	8%	8%

**Estimated pre guilty plea average custodial sentence lengths (ACSLs) received by adult offenders sentenced to immediate custody for common assault, all courts, 2007-2017**



**Estimated pre guilty plea sentence length bands received by adult offenders sentenced to immediate custody for common assault, all courts, 2007-2017**

Sentence length band	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
1 month or less	4%	4%	5%	5%	5%	5%	4%	5%	5%	6%	7%
Between 1 and 2 months	14%	13%	13%	13%	14%	13%	12%	14%	14%	15%	14%
Between 2 and 3 months	20%	20%	19%	20%	21%	17%	18%	19%	19%	20%	19%
Between 3 and 4 months	12%	12%	12%	12%	12%	12%	12%	11%	12%	11%	11%
Between 4 and 5 months	19%	19%	20%	20%	20%	20%	19%	20%	18%	19%	18%
Between 5 and 6 months	31%	32%	31%	29%	29%	33%	34%	32%	32%	29%	31%

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

**22 June 2018**  
**SC(18)JUN04 – Mental Health**  
**Rosa Dean**  
**Mandy Banks**  
**0207 071 5785**

## **1 ISSUE**

1.1 Following the last Council meeting at which the Council agreed the scope of the guideline, a first draft of a mental health guideline has been developed, this is attached at **Annex A**. This early draft aims to facilitate a discussion on what the objective of the guideline is. At the last meeting it was suggested that officials should meet with Charles de Lacey, Clinical Nurse Specialist at the Old Bailey, this has happened and the guideline has been developed with his input. The draft guideline has also benefited from substantial input from Rosa, the Council lead for this guideline, and from an assessment of the available international literature in this area conducted by the A&R team.

1.2 At the last meeting the question of the age applicability of the guideline was discussed, whether it should be for adults and children/young people, or whether there were particular issues relating to adolescent offenders and mental health that meant this would not be feasible. It was suggested that officials contact Professor Dame Sue Bailey, a Consultant adolescent forensic Psychiatrist, to discuss this issue with her. Initial contact has been made but no substantive discussions have yet taken place, so it is recommended that the question of the age applicability of the guideline is discussed at a future meeting. Further Council meetings have been made available to discuss the draft guideline, than the initial four meetings scheduled.

## **2 RECOMMENDATION**

2.1 At this meeting the Council are asked:

- To consider what the objective of the guideline is
- To note that the question of the age applicability of the guideline and issues relating to gender will be discussed at a future meeting
- To ask for feedback from the Council on this early first draft of the guideline, as posed in the various questions contained within the paper

### 3 CONSIDERATION

#### *Scope of the guideline*

3.1 At the last meeting the Council agreed that the guideline would cover three broad areas: factual information to assist courts, (for example, available disposals); guidance on how to assess culpability; and guidance on how different disposals may affect offenders with certain conditions. The Council also agreed that the guideline would cover: mental disorders, learning disability/difficulty, Autism Spectrum Disorders (ASD), acquired brain injury (ABI) and dementia. It was agreed that the guideline would not apply to defendants who were unfit to plead, and would only relate to matters post conviction.

3.2 At this early stage of development it would be helpful if the Council considered and agreed what the objectives of the guideline are. It would be instructive if the Council were to articulate what it is that the guideline is to achieve, for example, does the Council wish to promote any particular approach (for example, particular types of sentence, or hospital orders, or greater understanding of mental health conditions and offending) within this area of sentencing? Or should the guideline aim to discourage any particular approach currently seen within this area of sentencing? Or is the guideline simply to provide all the relevant information in one place, with some very general guidance?

***Question 1: What does the Council wish to achieve in producing a new guideline on mental health?***

3.3 The scope of the guideline is set out in paragraph 1, on page 2 of **Annex A**. It provides a brief list of what conditions/disorders are covered by the guideline, but no definitions, instead providing a link to the World Health Organisation's International Classification of Diseases, which Charles de Lacey recommended as the appropriate expert authority. It is suggested that it would be impractical to do anything else, there are a wide number of possible mental disorders, conditions, and so on, to attempt to provide definitions of them would be difficult and very lengthy. In any case, difficulties of definition are common, the draft guideline emphasises: '*what is important is what the available evidence says about the nature, extent and effect of the impairment experienced by the offender at the relevant time*'. (page 3 of Annex A)

***Question 2: Are the Council content with the wording of the scope of the guideline section? Are the Council content that the guideline does not provide definitions of conditions?***

#### *Sentencing principles*

3.4 Paragraph 2 of Annex A sets out the suggested principles for the guideline, that the approach to sentencing should be individualistic, as levels of impairment will vary, that care should be taken to avoid making assumptions, as some conditions are not obvious, or offenders may have not previously been diagnosed, possibly due to fears around the stigmatisation around mental health conditions.

3.5 Paragraph 3 deals with the importance of pre-sentence and medical reports, and has been developed in conjunction with Charles de Lacey. When the guideline was discussed with him, he suggested that getting reports sufficiently specific (and on time) is invaluable to the appropriate sentencing of these offenders. For this reason the paragraph gives examples of information that could be requested by courts, to try and avoid courts receiving reports that are incomplete on key issues, which can then delay the progression of cases (something he says is not uncommon).

3.6 He also suggested including a reference to interim hospital orders (s.38 Mental Health Act (MHA), in order to facilitate the completion of effective reports, which can be seen on page 4. However, Rosa has expressed concern about this reference, pointing out that in *R v Vowles*<sup>1</sup> (paras 22,23, 50(ii)) courts were told to think long and hard before making these orders due to severe pressures on hospital beds. Charles has since clarified this wording to say '*when requested by Clinicians*', which perhaps might act as a curb on making these orders, as Clinicians in making such a request would be best placed to know about bed availability and so on. However this reference could be a potential risk.

***Question 3: Is the Council content with the proposed emphasis on courts obtaining effective reports and the wording of paragraphs 2 and 3?***

***Question 4: Does the Council wish to include the reference to s.38 orders on page 4?***

#### *Assessing culpability*

3.7 Paragraph 4 provides guidance on how to assess whether or not culpability is reduced. It makes the point that just having one of the conditions listed in paragraph 1, doesn't necessarily mean it will have an effect on culpability, assessments will vary due to the nature and severity of symptoms. Conversely for some offenders, their condition may significantly impact their level of culpability. Parts of this paragraph and the list of ways in which impaired mental functioning may reduce an offender's culpability have been influenced by *R v Verdins*<sup>2</sup> a prominent Australian case.

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<sup>1</sup> R v Vowles [2015] EWCA Crim 45

<sup>2</sup> R v Verdins [2007] VSCA 102

3.8 Paragraph 5 alludes to conditions such as autism, where a limited ability to express remorse or show empathy can be a feature of the condition. The wording in paragraphs 6 and 7 has been taken from the wording recently agreed by the Council for the manslaughter guideline.

***Question 5: Is the Council content with the proposed wording and approach to assessing culpability? Is there any other information or guidance that the Council thinks should be included within this section?***

*Deciding on the appropriate sentence*

3.9 Paragraph 8 sets out how sentencing should work for these offenders: courts should assess the level of culpability using both the relevant offence specific guideline and the guidance in paras 4 to 7 to arrive at a preliminary sentence, then consider whether an offender's condition at the time of sentence has any additional bearing on the sentence to be imposed. It states that courts may be justified in stepping outside of the guideline, for example to impose a community order, if this is not included within the sentence table for an offence. While in reality a holistic approach is often taken where the issues of culpability and the appropriate disposal are interlinked (particularly in cases where a hospital order is recommended), the guideline nevertheless sets out the appropriate structure for courts to follow.

3.10 Paragraph 9 discusses the sentencing of these offenders in relation to the purposes of sentencing, and suggests that both punishment and the rehabilitation of offenders is particularly important, having respectfully noted the discussion on these points in *R v Edwards*.<sup>3</sup>

3.11 Paras 10 and 11 set out guidance for courts on how an offender's condition may have a bearing on the type of sentence imposed. The wording and approach has again been influenced by some of the principles set out in *R v Verdins*, and also the discussion in *R v Stevenson*<sup>4</sup>. This section is not without controversy, deciding what impact an offender's condition might have on a potential sentence, particularly for serious offences, is a difficult balancing exercise. The reference to being in prison potentially exacerbating poor mental health and increasing the risk of self-harm has been included after noting the findings of the National Audit Office's 2017 report<sup>5</sup> into mental health in prisons which stated that the prison and Probation Ombudsman found that 70% of prisoners who had committed suicide between

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<sup>3</sup> R v Edwards [2018] EWCA Crim 595

<sup>4</sup> R v Stevenson [2018] EWCA Crim 318

<sup>5</sup> <https://www.nao.org.uk/report/mental-health-in-prisons/>.

2012 and 2014 had mental health needs, and that the number of self-harm incidents has risen by 73% between 2012 and 2016.

3.12 There can be a number of different factors that might make it more difficult for offenders with mental health problems to cope in custody compared to prisoners without these problems. These can include the regimental prison environment making it more difficult for offenders to manage their mental illness, moving in and out of custody making the delivery of treatment difficult, poor information sharing between prison staff and healthcare, inadequate staff training and problems with the availability of treatments.

***Question 6: Are the Council content with the wording and approach set out in paras 8,9 10 and 11?***

3.13 Paragraph 12 relates to the sentencing of offenders with dementia. Offenders with this condition may pose additional difficulties for the courts at sentencing, they may have committed the offences some time ago, before they had the condition, they may not be suitable for hospital orders, but may have committed serious offences. Possibly the Council may feel that it is not helpful to try and articulate anything further for this offenders with this condition, other than the considerations already set out within paras 8 to 11.

***Question 7: Does the Council wish to include some guidance on offenders with dementia? If so, are the Council content with the proposed wording at paragraph 12, or should it be amended?***

3.14 Paragraph 13 suggests that courts consider whether a community order with a mental health treatment requirement (MHTR) might be appropriate. The Council are aware of the very low usage of MHTRs currently (in 2017 less than 0.5% of court orders started had a MHTR attached to the order), and there is concern amongst stakeholders that these are under used, and custody over used for this group of offenders. In addition, a recent study by MOJ<sup>6</sup> showed that for offenders with identified mental health issues, MHTRs attached to court orders were associated with significant reductions in reoffending where they were used, compared with similar cases where they were not. The reoffending rate was around 3.5 percentage points lower over a 1year follow-up period. There may be difficulties with the availability of these programmes for all courts, but the Council may feel that it is appropriate to include a clear reference to them in the guideline given the low rates of usage and the link to lower reoffending rates.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/706597/do-offender-characteristics-affect-the-impact-of-short-custodial-sentences.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706597/do-offender-characteristics-affect-the-impact-of-short-custodial-sentences.pdf).

**Question 8: Does the Council agree to including this paragraph on MHTRs?**

3.15 Paragraph 14 has been included at the suggestion of Charles de Lacey, who felt it was important to have a reference to the forwarding of psychiatric reports to prison to ensure the health and welfare of prisoners. However, as this provision is set out in the Criminal Procedure Rules, which the guideline provides a link to within paragraph 3, the Council may feel that this is superfluous information.

**Question 9: Does the Council wish to include paragraph 14? If so, is Council content with the proposed wording?**

3.16 Paragraph 15 deals with the importance of ensuring that offenders can understand proceedings, otherwise there is a risk that there could be further offending or recalls. This reference is kept quite brief as there is further information on this and other related issues regarding offenders with a mental disability within the Equal Treatment Bench Book, so a link to this is attached within the guideline.

**Question 10: Is the Council content with the proposed wording of paragraph 15?**

3.17 Paragraph 16 moves on to outlining the available sentencing disposals, and has been taken (save for the non-custodial option part) from the recently agreed diminished responsibility guideline.

**Question 11: Is the Council content with the information within paragraph 16?**

3.18 The information that follows paragraph 16 in a separate annex provides further detail and explanation about the various orders that are available to courts, as it is thought that this information might be helpful. The information, which is reasonably lengthy, is taken from Department of Health guidance<sup>7</sup> and does contain detail on rarely used Guardianship orders. As they are so rarely used the Council may feel that it is not appropriate to provide information on them, and it could be removed.

**Question 12: Does the Council agree that providing further information on the various orders in a separate annex will be a useful part of the draft guideline? If so, should the information on Guardianship orders be included or not?**

3.19 The Justice report, 'Mental Health and fair trial'<sup>8</sup> makes a recommendation, discussed at para 6.23 of their report, regarding Supervision orders, a disposal where a court finds a defendant has done the act but is not fit to plead. These would be out of the scope of the

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/417412/Reference\\_Guide.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/417412/Reference_Guide.pdf)

<sup>8</sup> <https://justice.org.uk/our-work/areas-of-work/criminal-justice-system/mental-health-fair-trial/>.

guideline as the Council agreed last month that the guideline will only include matters relating to sentencing post-conviction. The recommendation also seems to suggest that courts should have oversight of community orders imposed with a MHTR. Legislation does not appear to give any provision for this to happen (unlike for drug rehabilitation requirements where there can be regular reviews). Accordingly it is recommended that the guideline does not pursue this recommendation.

***Question 13: Does the Council agree not to pursue this recommendation by Justice?***

***Question 14: Is there any guidance not currently included within this draft that the Council thinks should be?***

#### **4 IMPACT/RISK**

4.1 In terms of the impact of the guideline, the CPD data, which is the court data usually used to develop guidelines, does not include information about whether the offender had a mental health disorder or learning difficulty. The A&R team is continuing to explore what other data is available in this area, including looking at the CCSS, to see if it contains any data to help assess the numbers involved/what the impact of the guideline might be. Officials are maintaining close links with officials in the MOJ and other Government departments to keep up to speed with developments on the various initiatives, review of the Mental Health Act, and so on.

***Question 15: is the Council content that the impact/risks have been sufficiently considered at this stage?***

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# Overarching Principles: Mental Health

### **Applicability of guidelines**

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all offenders aged xx and older, who are sentenced on or after xxxx, regardless of the date of the offence.

Section 125(1) of the 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.”

### **Scope of the Guideline**

1. This guideline identifies the principles relevant to the sentencing of offenders who have:
  - A mental disorder
  - A learning disability
  - A learning difficulty
  - Autism Spectrum Disorder
  - An acquired or traumatic brain injury
  - Dementia

This guideline applies only to the sentencing of convicted offenders; it does not address issues of fitness to plead or disposals for those found unfit to plead.

More information on these conditions can be found within the World Health Organisation’s International Classification of Diseases, which can be found here:

<http://apps.who.int/classifications/icd10/browse/2016/en#/F00-F09>.

However, difficulties of definition and classification in this field are common, there may be differences of expert opinion and diagnosis in relation to the offender, or it may be that no specific condition can be identified. What is important is what the available evidence says

about the nature, extent and effect of the impairment experienced by the offender at the relevant time.

### **Sentencing principles**

2. There are a wide range of mental health conditions and developmental disorders, and the level of impairment caused will vary between individuals, for this reason the approach to sentencing should be individualistic and focused on the particular issues relevant to each case. Care should be taken to avoid making assumptions, as unlike physical disabilities, many mental health conditions are not easily visible, some people have not been formally diagnosed, and some offenders may not have previously declared a condition due to fear of stigmatisation. In addition, it is not uncommon for people to have a number of different conditions, and for drug and/or alcohol dependence to be a factor.
  
3. If an offender has any of the conditions listed in paragraph 1, this may affect their level of responsibility for an offence, and it may also impact upon the suitability of sentencing options in the case. For this reason, when it is known or suspected that an offender has any of the conditions listed in paragraph 1, sentencers should seek further information to inform their sentencing decisions. This can include pre-sentence and medical reports. In asking for a report courts should make the request sufficiently specific so that the report writer is clear as to **what** is required, and **when** the report is required by. Examples of information that might be requested are:
  - background/history of the condition
  - diagnosis, symptoms, treatment of the condition
  - the level of impairment due to the condition
  - how the condition relates to the offences committed
  - dangerousness
  - risk to self and others
  - if there has been a failure of compliance (e.g not attending appointments, failing to take prescribed medication) what is thought to be driving that behaviour
  - the suitability of the available disposals in a case
  - the impact of any such disposals on the offender
  - any communication difficulties and/or requirement for an intermediary
  - and any other information the court considers relevant.

Having a detailed report should assist in the prompt progression of cases, avoiding delays caused by incomplete reports or lack of pertinent information. Courts may want to consider

the effective use of interim hospital orders (s.38 Mental Health Act) when requested by Clinicians wanting to undertake an inpatient assessment prior to the Court to ensure that appropriate recommendations are made.

Further information on requests for reports can be found within the Criminal Procedure Rules, which can be found here:

<https://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015#Anchor8>.

### **Assessing Culpability**

4. The presence of any of the conditions listed within paragraph 1 may impact on an offender's level of culpability, in some cases potentially very significantly, in others the condition will have no relevance to culpability. Assessments of culpability will vary between cases due to the differences in the nature and severity of conditions, and the nature and seriousness of the offences, it is not possible to be prescriptive in this regard. However courts may find the following list helpful, of ways in which impaired mental functioning may reduce culpability:

Impaired mental functioning at the time of the offending may reduce the offender's culpability if it had the effect of:

- Impairing the offender's ability to exercise appropriate judgement
- Impairing the offender's ability to make calm and rational choices, or to think clearly
- Making the offender disinhibited
- Impairing the offender's ability to appreciate the wrongfulness of the conduct
- Obscuring the intent to commit the offence
- Contributing causally to the commission of the offence

**This is not an exhaustive list.**

5. Courts should note that certain behaviours, such as a lack of empathy or limited ability to express remorse can be features of a particular condition, this can be relevant when considering aggravating and mitigating factors in offences.

6. Any assessment of culpability must be made with reference to the medical evidence and all the relevant information available to the court. The degree to which the offender's acts or omissions contributed to the impact of their condition at the time of the offence may be a relevant consideration. For example, where an offender exacerbates their condition by voluntarily abusing drugs or alcohol or by voluntarily failing to seek or follow medical advice this may increase responsibility. In considering the extent to which the offender's behaviour was voluntary, the

extent to which a condition has an impact on the offender's ability to exercise self-control or to engage with medical services will be relevant.

7. The degree to which the condition was undiagnosed and/or untreated may be a relevant consideration. For example, where an offender has sought help but not received appropriate treatment this may reduce responsibility.

### **Deciding on the appropriate sentence**

8. Referring to offence specific guidelines, courts should assess culpability taking into account the points outlined above to arrive at a preliminary sentence, then courts should consider whether an offender's condition at the time of sentence has any bearing on the type of sentence that could be imposed. This may mean that, in considering both the condition's impact on culpability and on types of sentence, it may be justified to reduce culpability to the lowest level, and it may justify stepping outside of the guideline entirely for sentence.
9. Courts should consider all the purposes of sentencing during the sentencing exercise, the punishment of offenders, reduction of crime, rehabilitation of offenders, protection of the public, and reparation. Deciding on the appropriate sentence should go some way to fulfilling all of those considerations, however particularly important is the punishment *and* the rehabilitation of an offender. For offenders whose condition has contributed to their offending the effective treatment of their condition should in turn reduce further offending and protect the public.
10. The court will need to consider as potentially significant mitigation that an offender's condition at the point of sentence could have a bearing on the type of sentence that is imposed. The existence of a condition at the date of sentencing (or its foreseeable recurrence) could mean that a given sentence could weigh more heavily on the offender than it would on an offender without that particular condition. Being in prison for example can exacerbate poor mental health and in some cases increase the risk of self-harm, and for some prisoners their condition may mean a custodial sentence may have a greater punitive effect than it would for a prisoner without the condition. Also, many community orders may be impractical.
11. If there was a serious risk of imprisonment having a gravely adverse effect on the offender's mental health, courts will need to consider this risk very carefully, in exceptional cases potentially looking at alternatives to custody. Where the offence is very serious and culpability high, custody may be inevitable but the condition may still properly impact on sentence length. Courts should refer to any medical evidence or expert reports on this point to assist them.

12. Courts will need to consider carefully the appropriate sentencing of offenders with dementia. The condition may be untreatable (in the sense that it is irreversible) and they may not be suitable for a hospital order. However they may have committed a very serious offence, and in some cases, the offence may have been committed some time before the onset of the condition.

13. Courts should consider whether a community order with a mental health treatment requirement (MHTR) might be appropriate (where available). Use of MHTRs attached to court orders for those offenders with identified mental health issues may result in reductions in reoffending, compared to the use of short term custodial sentences. Courts may also wish to consider a drug rehabilitation requirement and/or an alcohol treatment requirement in appropriate cases. A community order may be appropriate where the defendant's culpability is substantially mitigated by their mental state at the time of the commission of the offence, and where the public interest is served by ensuring they continue to receive treatment. It is not usually suitable for an offender who is unlikely to comply with the treatment or who has a chaotic lifestyle.

14. In cases where custody is the only option for an offender as hospital disposals are not appropriate, then courts should forward psychiatric pre-sentence reports to the prison, to ensure that the prison has appropriate information about the offender's condition and can ensure their welfare.

15. Courts should always be alive to the impact of a condition for the defendant to understand and participate in proceedings. To avoid misunderstandings, which could lead to further offences, (or recall) it is important to ensure that offenders understand their sentence and what will happen if they reoffend and or breach the terms of their licence or supervision). Courts should therefore consider putting the key points in an accessible way. Further information can be found at Chapter Four, within the Equal Treatment Bench Book:

<https://www.judiciary.uk/publications/new-edition-of-the-equal-treatment-bench-book-launched/>.

### **Sentencing disposals**

16. 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 limitation direction will cease to have effect at the automatic release date 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**

If a s.45A direction is not appropriate the court must then consider 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 (with or without a restriction order under s.41) the most suitable disposal. The court should explain why a penal element is not appropriate.

**Non-custodial option**

If a non-custodial option is considered, and where an offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be appropriate. The offender should express a willingness to comply with the requirement.

Further details on relevant orders and directions are below in **Annex A**.

**Annex A**

<b>Hospital order (section 37)</b>		
<b>May be made by:</b>	A magistrates' court or Crown Court	
	<i>Where made by a magistrates' court:</i>	<i>Where made by the Crown Court:</i>

<b>In respect of a defendant who is:</b>	Convicted by that court of an offence punishable on summary conviction with imprisonment, or Charged before that court with such an offence but who has not been convicted or whose case has not proceeded to trial, if the court is satisfied that the person did the act or made the omission charged	Convicted before that court for an offence punishable with imprisonment (other than murder)
<b>If the court is satisfied</b>	On the written or oral evidence of two doctors, at least one of whom must be approved under section 12, that <ul style="list-style-type: none"> <li>• the offender is suffering from mental disorder of a nature or degree which makes it appropriate for the offender to be detained in a hospital for medical treatment, and</li> <li>• appropriate medical treatment is available.</li> </ul>	
<b>And the court is of the opinion</b>	Having regard to all the circumstances, including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with the offender, that a hospital order is the most suitable method of dealing with the case	
<b>And it is also satisfied</b>	On the written or oral evidence of the approved clinician who would have overall responsibility for the offender's case, or of some other person representing the managers of the relevant hospital, that arrangements have been made for the offender to be admitted to that hospital within the period of 28 days starting with the day of the order.	

A hospital order is, essentially, an alternative to punishment. The court may not, at the same time as making a hospital order in respect of an offender, pass a sentence of imprisonment, impose a fine or make a community order, a youth rehabilitation order, or a referral order. Nor can the court make an order for a young offender's parent or guardian to enter into a recognizance to take proper care of and exercise proper control over the offender. The court may make any other order which it has the power to make, eg a compensation order.

**Effect of unrestricted hospital orders on patients once detained [section 40(4)]**

The hospital order lasts for six months initially, but can be renewed. The initial six month maximum period of detention runs from the day that the hospital order is made by the court, Patients admitted under a hospital order may not apply to the Tribunal until six months after the date of the making of the order (assuming the order is then renewed).



<b>Restriction Order (section 41)</b>	
<b>A restriction order (section 41) may be imposed by the Crown Court if a hospital order has been made and:</b>	
<b>If</b>	At least one of the doctors whose evidence is taken into account by the Court before deciding to give the hospital order has given evidence orally
<b>And, having regard to</b>	<ul style="list-style-type: none"> <li>• the nature of the offence</li> <li>• the antecedents of the offender, and</li> <li>• the risk of the offender committing further offences if set at large</li> </ul>
<b>The Court thinks</b>	It necessary for the protection of the public from serious harm for the person to be subject to the special restrictions which flow from a restriction order

A restriction order lasts until it is lifted by the Secretary of State under section 42, or the patient is absolutely discharged from detention by the responsible clinician or hospital managers with the Secretary of State's consent under section 23 or by the Tribunal under section 73.

While the restriction order remains in force, the hospital order also remains in force and does not have to be renewed.

### **Hospital and limitation direction (section 45A)**

A hospital direction is a direction for a person's detention in hospital. A limitation direction is a direction that they be subject to the special restrictions in section 41 of the Act which also apply to people given restriction orders. A hospital direction may not be given without an accompanying limitation direction (although, as described below, a hospital direction may remain in force after the limitation direction has expired).

<b>Hospital and limitation directions (section 45A)</b>	
<b>May be given by:</b>	Crown Court
<b>In respect of a person who is</b>	Aged 21 or over and convicted before that court of an offence punishable with imprisonment (other than murder)
<b>If the court is satisfied</b>	On the written or oral evidence of two doctors, at least one of whom must be approved under section 12, and at least one of whom must have given evidence orally, that: <ul style="list-style-type: none"> <li>• the offender is suffering from mental disorder of a nature or degree which makes it appropriate for the offender to be detained in a hospital for medical treatment, and</li> <li>• appropriate medical treatment is available</li> </ul>
<b>And the Court</b>	Has first considered making a hospital order under section 37, but has decided instead to impose a sentence of imprisonment
<b>And it is also satisfied</b>	On the written or oral evidence of the approved clinician who would have overall responsibility for the offender's case or of some other person representing the managers of the relevant hospital, that arrangements have been made for the offender to be admitted to that hospital within the 28 days starting with the day of the order.

A limitation direction ends automatically on the patient's 'release date'. The patient's release date is the day that the patient would have been entitled to be released from custody had the patient not been detained in hospital. Discretionary early release such as home detention curfew is not taken into account. For these purposes, any prison sentence which the patient was already serving when the hospital direction was given is taken into account as well as the sentence(s) passed at the same time as the direction was given. If the patient is serving a life sentence, or an indeterminate sentence, the release date is the date (if any) on which the person's release is ordered by the parole board.

Although the limitation direction ends on the release date, the hospital direction does not. So if patients are still detained in hospital on the basis of the hospital direction on their release date, they remain liable to be detained in hospital from then on like unrestricted hospital order patients. This includes patients who are on leave of absence from hospital on their release date, but not those who have been conditionally discharged and who have not been recalled to hospital.

Unlike hospital order patients, hospital and limitation direction patients are detained primarily on the basis of a prison sentence. While the limitation direction remains in effect, the Secretary of State may direct that they be removed to prison (or equivalent) to serve the remainder of their sentence, or else release them on licence. This is only possible where the Secretary of State is notified by the offender's responsible clinician, any other approved clinician, or by the Tribunal, that:

- the offender no longer requires treatment in hospital for mental disorder, or
- no effective treatment for the disorder can be given in the hospital in which the offender is detained.

When notified in this way by the responsible clinician, or any other approved clinician, the Secretary of State may:

- direct the offender's removal to a prison (or another penal institution) where the offender could have been detained if not in hospital, or
- discharge the offender from the hospital on the same terms on which the offender could be released from prison.

If the Tribunal thinks that a patient subject to a restriction order would be entitled to be discharged, but the Secretary of State does not consent, the patient will be removed to prison. That is because the Tribunal has decided that the patient should not be detained in hospital, but the prison sentence remains in force until the patient's release date.

<b>Committal to the Crown court (section 43)</b>	
<b>A magistrates' court may commit a person to the Crown Court with a view to a restriction order if (s43(1))</b>	
<b>The person</b>	Is aged 14 or over, and Has been convicted by the court of an offence punishable on summary conviction by imprisonment
<b>And</b>	The court could make a hospital order under section 37
<b>But having regard to</b>	The nature of the offence The antecedents of the offender, and The risk of the offender committing further offences if set at large
<b>The court thinks</b>	That if a hospital order is made, a restriction order should also be made.

<b>Guardianship order (section 37)</b>		
<b>May be made by</b>	a magistrates' court or the Crown Court	
<b>In respect of a person who is aged 16 or over and who is</b>	where made by a magistrates' court	where made by the Crown Court
	convicted by that court of an offence punishable (in the case of an adult) on summary conviction with custody or charged before (but not convicted by) that court with such an offence, if the court is satisfied that the person did the act or made the omission charged	convicted before that court for an offence punishable with imprisonment (other than murder)
<b>if the court is satisfied</b>	on the written or oral evidence of two doctors, at least one of whom must be approved under section 12, that the offender is 16 or over, and is suffering from mental disorder of a nature or degree which warrants the offender's reception into guardianship under the Act	
<b>and the court is of the opinion</b>	having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with the offender, that a guardianship order is the most suitable method of dealing with the case	
<b>and it is also satisfied</b>	that the local authority or proposed private guardian is willing to receive the offender into guardianship	

Guardianship enables patients to receive care outside hospital where it cannot be provided without the use of compulsory powers. The Act allows for people ('patients') to be placed under the guardianship of a guardian. The guardian may be a local authority, or an individual ('a private guardian'), such as a relative of the patient, who is approved by a local authority. Guardians have three specific powers: residence, attendance and access. The *residence power* allows guardians to require patients to live at a specified place. The *attendance power* lets guardians require the patient to attend specified places at specified times for medical treatment, occupation, education or training. This might include a day centre, or a hospital, surgery or clinic. The *access power* means guardians may require access to the patient to be given at the place where the patient is living, to any doctor, approved mental health professional, or other specified person. This power could be used, for example, to ensure that patients do not neglect themselves.

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

**22 June 2018**  
**SC(18)JUNE05 – Interim Drugs Guidance**  
**Rebecca Crane/Sarah Munro**  
**Eleanor Nicholls**  
**020 7071 5799**

## **1 ISSUE**

1.1 Further to the discussion on business planning at the last Council meeting, this is the consideration of a statement on applying the existing Drug Offences guidelines to drugs which are not specifically named in those guidelines, primarily Fentanyl and other synthetic opioids.

## **2 RECOMMENDATION**

2.1 That the Council agrees to the publication of the statement at Annex A as the first step in revision of the drug offences guidelines.

## **3 CONSIDERATION**

3.1 At the May meeting, Council discussed issuing a statement on how to apply the existing guideline to drugs which are not explicitly named in the assessment of harm in current guidelines. This follows public and police concern about the increase in use of synthetic opioids, particularly Fentanyl. These drugs have a potency many times that of heroin (100 times in the case of some Fentanyl products). Whilst the courts may not see these drugs very frequently, their approach to dealing with them is clear; as set out in the cases of *R v Boayke and Others [2012] EWCA Crim 838*, and *R v Healey and Others [2012] EWCA 1005*, the quantity of drugs is only indicative of the appropriate category. The court needs to seek evidence from experts as to their potency and the equivalent harm of one of the named drugs.

3.2 In April the CPS released guidance for crown prosecutors on how to deal with these drugs at sentencing. The guidance advised prosecutors to bring to the court's attention the evidence of the impact of the offending on the community, the particular dangers of even small quantities of Fentanyl, and the evidence of an expert witness setting out how the drug equates to more familiar drugs, for example, 1 gram of Fentanyl is the equivalent of XX grams of heroin. Prosecutors are advised to use this to show the court which sentencing range within the current guideline is appropriate.

3.3 In light of these concerns and the prosecution guidance, we therefore propose to put up the following brief statement on our website, similar to that put out in July last year in relation to possession and use of acid and corrosive substances. This statement is aimed at

sentencers, but also at the press and wider public, to make it clear that the current guidelines do cover all these controlled drugs.

The Drug Offences Guideline came into force in 2012 and we have recently published [\[link\]](#) our assessment of the impact of that guideline. The guideline covers the main possession, supply, importation and production offences in the Misuse of Drugs Act 1971.

For most of the offences, the guideline uses quantity of drugs as the key element of assessing the harm caused by the offence, with higher quantities indicating higher harm. The current guideline covers all drugs included in the Misuse of Drugs Act 1971. However, as indicators of the level of harm, the guideline gives the indicative quantities of only the most common drugs: heroin, cocaine, ecstasy, LSD, amphetamine, cannabis and ketamine.

For example, for the offence of supplying or offering to supply a controlled drug, if the drug is amphetamine, 20kg would put the offence in the most serious category whereas if the drug is heroin or cocaine, only 5kg would be needed to put the offence into that category. The Council intended, and case law has clearly shown, that where the drug in question is not listed in the guidelines, the assessment of harm will be based on the equivalent level of harm caused by the relevant quantity of that drug.

Since publication of this guideline, there has been an increase in the number of cases before the courts involving newer drugs, such as synthetic opioids, which may have much higher potency and potential to cause harm than more common drugs. These newer drugs are covered by the guideline but not specifically listed in the section on assessment of harm. The approach to assessing harm in these cases should be as with all cases of controlled drugs not explicitly mentioned in the guidelines; courts should seek advice of expert witnesses to assist in determining the potency of the particular drug and the equivalence of the quantity in the case to the quantities set out in the guidelines in terms of the harm caused. For example, in a supply cases as above, if the quantity of the drug would cause as much harm as 5kg of heroin, the offence would be in the most serious category.

Recent CPS guidance [\[link\]](#) means that prosecutors will be providing courts with this information and expert evidence to ensure that the court can make a correct assessment of harm in cases involving drugs not explicitly listed in the guidelines. This is likely to include evidence on the potency of the drug in question, and the value of sales, along with evidence on the wider harm caused to the community as well as to the drug users and others immediately affected in the case.

***Question One: Does the Council wish to publish this statement on its website as soon as possible?***

3.4 When we published the statement on corrosive substances, we explained what we were going to do next, by publishing the Bladed Articles guideline. If we publish the above statement on drugs after the Business Plan, we can include reference to the fact that we are now reviewing the drugs guideline. If we publish the statement before the Business Plan, we could give an indication of further work in this area without giving details.

***Question Two: When does the Council wish us to publish the statement? If we publish before the Business Plan, does the Council wish to indicate that we will be reviewing the drug guideline more fully?***

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**Sentencing Council meeting:**  
**Paper number:**  
**Lead officials:**

**22 June 2018**  
**SC(18)JUN06 – Guilty Pleas**  
**Ruth Pope & Emma Marshall**

## **1 ISSUE**

1.1 The Reduction in Sentence for a Guilty Plea Guideline has been in force for 12 months. The Council decided to set up a steering group to monitor the effects of the guideline to ensure that if the guideline did not work as anticipated and there were unintended consequences, remedial action could be considered.

1.2 The steering group consisting of representatives from the Council, MoJ, HMCTS, CPS, Police, Probation, Victim Support and the judiciary met in October 2017 and will meet again on 5 July 2018. As well as input from the members of the group, the Solicitor's panel has provided feedback on how the guideline is operating in practice. We will provide a short update at the Council meeting of the latest information we have in relation to this.

1.3 In advance of the July steering group meeting, Council members are asked for any views or evidence they may have on how the guideline is working and whether they are aware of any problems.

## **2 RECOMMENDATION**

2.1 That Council members provide feedback on how the guilty plea guideline is working in their area either orally at the Council meeting or in writing to:

[emma.marshall@sentencingcouncil.gov.uk](mailto:emma.marshall@sentencingcouncil.gov.uk)

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**Sentencing Council meeting:**  
**Paper number:**

**22 June 2018**  
**SC(18)JUN07 – Expanded factors in  
offence specific guidelines**

**Lead Council members:**  
**Lead official:**

**Maura McGowan**  
**Ruth Pope**  
**0207 071 5781**

## **1 ISSUE**

1.1 At the May 2018 meeting the Council agreed to go ahead with the second phase of the project to replace the SGC Seriousness guideline by making expanded explanations available in the digital version of offence specific guidelines. The Council decided that the explanations should be standard across all of the guidelines, suitably worded to cater for the differences that exist between offences and guidelines.

1.2 In January the Council had considered how the factors in the General guideline could be applied to the assault, burglary, sex, robbery, drugs, fraud, environmental offences, possession of offensive weapon/ bladed article and theft guidelines. Following the decisions made in May, rather than look at each guideline the approach for this meeting will be to consider each factor in the round.

1.3 At this meeting aggravating factors will be considered, mitigating factors will be considered in October.

1.4 The first phase of the project, the draft General guideline, is due to be launched for consultation on Tuesday 19 June 2018. Feedback from that consultation will inform the wording of the factors to be consulted on for the second phase to be finalised at the October 2018 meeting.

## **2 RECOMMENDATION**

2.1 That the Council considers and agrees:

- A title for this phase of the project.
- Which aggravating factors can be used without modification across offence specific guidelines.
- Wording to modify other aggravating factors.
- How the Council can examine the detail of this phase of the project before consultation.

### 3 CONSIDERATION

3.1 At the May meeting it was agreed that this project should not be referred to as 'seriousness'. The suggestion is to call it 'Expanded factors in offence specific guidelines'.

#### Question 1: What should this project be called?

3.2 In the light of the decisions made at the May meeting, factors across all guidelines<sup>1</sup> have been reviewed to assess whether and where the proposed factors in the General guideline appear in each guideline and if so whether the expanded explanations apply and are helpful. The factors referred to in this paper have been numbered for ease of reference, these numbers will not appear in the guidelines. The General guideline is at **Annex A**.

3.3 All decisions as to the wording of factors taken at this meeting will be subject to review in the light of responses to the General guideline consultation.

3.4 The statutory aggravating factors are set out in the table below:

Factor	Notes
<b>SA1:</b> 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	This factor appears at step 2 in every offence specific guideline.  The explanation proposed for the General guideline is applicable to individual offenders, it is less relevant to organisations.
<b>SA2:</b> Offence committed whilst on bail	Appears at step 2 of every individual guideline.  The explanation applies in all cases.
<b>SA3:</b> 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.	Factor is not consistently used across guidelines (for good reason). In some guidelines the protected characteristics are split across steps 1 & 2. The explanation can be used in all cases where the statutory aggravating characteristics apply.

3.5 There are two issues relating to SA3. Firstly how to treat occurrences of SA3 that also refer to characteristics or elements which are not statutory aggravating factors as in the Burglary guideline:

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<sup>1</sup> This exercise has not yet been carried out for summary offences that appear only in the MCSG

Victim or premises deliberately targeted (for example, due to vulnerability or hostility based on disability, race, sexual orientation)

3.6 Secondly, where there is a racially or religiously aggravated version of an offence (assault, public order, criminal damage etc) other considerations apply. It is proposed that the following additional wording could be added at the beginning of the explanation at Annex A:

- Where an offence is motivated by, or demonstrates hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity the court **must** treat this as an aggravating factor.
- Hostility based on other characteristics **may** be treated as an aggravating factor.
- Where an aggravated form of an offence is charged that factor will be inherent in the offence and the court should follow the steps in the relevant guideline.
- Where a religiously or racially aggravated form of the offence is available but the offender is convicted of the simple offence it is not permissible to increase the sentence based solely on the presence of religious or racial aggravation.

**Question 2: Does the Council agree to include the explanations for SA1 & SA2 in all guidelines in which they appear without amendment?**

**Question 3: Does the Council agree to the additional wording for SA3?**

3.7

<b>Factor</b>	<b>Notes</b>
<b>A1:</b> Commission of offence whilst under the influence of alcohol or drugs	Always at step 2 – explanation can be added wherever it appears
<b>A2:</b> Offence was committed as part of a group or gang	Mixed step 1 and 2. Only burglary contains factor without qualification
<b>A3:</b> Offence involved use or threat of use of a weapon	References to weapons are often used at step 1.

3.8 The explanation for A1 applies across all offences where it appears. Factors relating to group offending (A2) are more varied. In Burglary there is a higher culpability factor of ‘member of a group or gang’, in other guidelines where group offending is referenced at step one it is always in relation to role. In other guidelines such as Bladed Articles there is a step two factor ‘offence was committed as part of a group or gang’. It is proposed that with the

exception of burglary, the explanation should only be attached to the factor when it appears at step 2.

3.9 At the January meeting the Council agreed to add the explanation at A3 relating to weapons at step 1 of the to the Robbery guideline. It is proposed that in all other guidelines it should only be used if reference to weapons is made without explanation at step 2.

**Question 4: Does the Council agree to include the explanation for A1 in all guidelines in which it appears without amendment?**

**Question 5: Does the Council agree to include the explanations for A2 and A3 only in the limited circumstances outlined above?**

3.10

<b>Factor</b>	<b>Notes</b>
<b>A4:</b> Planning of an offence	Mainly used at step 1 – query whether the explanation is useful
<b>A5:</b> Commission of the offence for financial gain	Rarely applies – where it does (H&S, Environmental) guideline already contains relevant information
<b>A6:</b> High level of profit from the offence	Does not appear as a factor in offence specific guidelines.

3.11 The above three factors only appear rarely in guidelines and where they do the explanation would not add anything useful to the content already in the guideline.

**Question 6: Does the Council agree not to include these explanations in offence specific guidelines?**

3.12

<b>Factor</b>	<b>Notes</b>
<b>A7:</b> Abuse of trust or dominant position	Steps 1 & 2. May need to add wording for situation where there is no identifiable victim e.g. benefit/ revenue fraud

3.13 The explanation agreed for the General guideline for A7 was based on a judgment relation to sex offences. The explanation works well for all offences where there is an individual

identifiable victim, but it would not apply for example in Revenue fraud to the high culpability factor 'Abuse of position of power or trust or responsibility'.

3.14 Suggested additional wording is provided below:

Abuse of position may make an offence more serious where an offender has used their position or status to facilitate the commission of an offence. The greater the level of trust or responsibility which is vested in the offender (for example where the offender holds a relevant professional qualification) the greater the culpability attached.

3.15 Views are sought as to whether the explanation should be expanded to cover such situations or whether the explanation should be reserved only to those cases to which the current explanation applies.

**Question 7: Does the Council wish to expand the explanation at A7 to cover situations where there is no individual victim?**

3.16

Factor	Notes
<b>A8:</b> Gratuitous degradation of victim / maximising distress to victim	Step 2 factor – may need to expand examples to give wider applicability
<b>A9:</b> Vulnerable victim	Appears at steps 1 and 2. May need to revise wording to take account of step one.

3.17 The explanation for the factor at A8, gives an example of such behaviour relating to posting images on social media. This factor appears in some guidelines in a slightly different form, for example, in Robbery: 'Restraint, detention or additional degradation of the victim' is a step 2 factor.

3.18 It is proposed that further examples could be included to make it clear that the factor is of wider application. Suggested wording is:

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);
- restraining or detaining the victim (where not separately charged)

3.19 At the January meeting tailored explanations were proposed for vulnerability across different guidelines. Following the decision to have a standard definition to cover all offences additional wording is proposed before the explanation for A9 at page 7 of Annex A:

The following guidance is of general application to issues of vulnerability; courts should have regard to the precise wording of the factor and its position in an offence specific guideline in applying this guidance and should avoid double counting.

**Question 8: Does the Council agree to add further examples to the explanation for A8?**

**Question 9: Does the Council agree to the additional wording proposed for A9?**

3.20

Factor	Notes
<b>A10:</b> Victim was providing a public service or performing a public duty at the time of the offence	Step 2 factor – ok where it appears
<b>A11:</b> Other(s) put at risk of harm by the offending	Rarely appears in existing guidelines
<b>A12:</b> Offence committed in the presence of other(s) (especially children)	Step 2 wording of factor varies so caution needed

3.21 At the January meeting the Council agreed that the explanation for A10 should be provided wherever the factor appears.

3.22 Wording similar to the factor at A11 appears at step 1 of the Theft and Health and Safety guidelines, but the explanation would not provide any useful additional guidance in that context. The factor will be at step 2 of the forthcoming Manslaughter guidelines and the explanation would apply without amendment there.

3.23 Wording similar to the factor at A12 appears at step 2 of several guidelines. The explanation would apply without amendment where the wording of the factor is sufficiently close to that at A12.

**Question 10: Does the Council agree to provide the standard explanations where the factors A10, A11 and A12 appear at step 2 of offence specific guidelines?**

3.24

Factor	Notes
<b>A13:</b> Actions after the event including but not limited to attempts to cover up/ conceal	Step 2 – some g/l have a factor: Steps taken to prevent the victim



evidence	reporting or obtaining assistance and/or from assisting or supporting the prosecution. (robbery) Obstruction of justice (H&S) Explanation would work for both
<b>A14:</b> Blame wrongly placed on other(s)	Step 2 (mainly fraud) explanation is ok
<b>A15:</b> Failure to respond to warnings or concerns expressed by others about the offender's behaviour	Mainly step 2. Exception is Dogs step 1. Suggest use only at step 2

3.25 The short explanation for the factor at A13 will also apply to other aggravating factors in guidelines that apply to the offender's actions after the offence, such as attempt to prevent victims reporting the offence.

3.26 The explanation for A14 would apply without amendment where it occurs in guidelines.

3.27 The factor at A15 appears in several guidelines. It is proposed that the explanation should be provided wherever it appears at step 2.

**Question 11: Does the Council agree to provide the standard explanations for factors A13, A14 and A15 where they appear at step 2 of guidelines?**

3.28

Factor	Notes
<b>A16:</b> Offence committed on licence or post sentence supervision or while subject to court order(s)	This is split across 2 factors at step 2 in almost all g/l. Could split the explanation
<b>A17:</b> Offence committed in custody	Only appears in Terrorism step 2
<b>A18:</b> Offences taken into consideration	Appears in most g/l's
<b>A19:</b> Offence committed in a domestic context	Not mentioned except in intimidatory Consider how best to add?
<b>A20:</b> Offence committed in a terrorist context	Not mentioned Consider how best to add for relevant offences?

3.29 The factor at A16 is in fact two separate factors at step 2 of almost all guidelines. It is proposed to provide explanations as follows:

Offence committed on licence or post sentence supervision

- An offender who is subject to licence or post sentence supervision is under a particular obligation to desist from further offending.
- Care should be taken to avoid double counting matters taken into account when considering previous convictions.

Failure to comply with current court orders

- 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.

**Question 12: Does the Council agree to the proposed wording relating to A16?**

3.30 The link to the Offences Taken into Consideration information can be provided in all guidelines where the factor at A18 appears.

3.31 A17 'Offence committed in custody' appears only in the Terrorism guideline. However, the explanation is of possible relevance to other offences. The Council has received representations from Kent Police about the need for guidance on sentencing offences committed in custody. Some of these will be offences specifically relating to prisons (such as conveying prohibited articles into prisons) which in the medium term will be catered for by the General guideline, but others may be offences for which there are existing offence specific guidelines. Views are sought on whether it would be helpful to provide a link to this guidance from existing guidelines and, if so, which ones.

3.32 The Council may also wish to consider providing links to the Domestic Abuse guideline from other offence specific guidelines (currently it is only referred to in the forthcoming Intimidatory offences guideline). Again views are sought as to which guidelines should have this link.

3.33 A similar issue arises with regard to linking to the Terrorism guideline for offences in a terrorist context, though as such cases are rarer and will be dealt with by experienced judges, it may be safe to assume that the court would refer to the Terrorism guideline in any event.

**Question 13: Where and how does the Council wish to provide links to the information on domestic abuse, terrorism and offences committed in custody?**

3.34

Factor	Notes
A21: Location and/or timing of offence	Location step 2 dogs, robbery (except dwelling), assault, sex Timing step 2 robbery, assault, sex

3.35 At the January meeting the Council agreed tailored wording for the explanation for the factors of 'Timing' and 'Location' in different guidelines. Following the decision to provide standard wording for all offence specific guidelines the following wording is suggested:

Location

- In general, an offence is not made more serious by the location of the offence except in ways already taken into account by other factors in this guideline. Care should be taken to avoid double counting.
- Courts should be cautious about aggravating an offence by reason of it being committed for example, 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

Timing

- In general, an offence is not made more serious by the timing of the offence except in ways already taken into account by other factors in this guideline. 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 unless it also indicates increased harm or culpability not already accounted for.

**Question 14: Does the Council agree to the proposed wording for timing and location above?**

3.36

Factor	Notes
<b>A22:</b> Established evidence of community/ wider impact	Step 2: eg Theft, burglary, assault Explanation ok
<b>A23:</b> Prevalence	Only appears in Theft where explanation is given in guideline

3.37 The explanation for the factor at A22 applies in all cases where the factor appears. Prevalence is only referred to in the Theft guideline where an explanation is already provided as follows:

**Prevalence**

There may be exceptional local circumstances that arise which may lead a court to decide that prevalence should influence sentencing levels. The pivotal issue in such cases will be the harm caused to the community.

It is essential that the court before taking account of prevalence:

- has supporting evidence from an external source, for example, Community Impact Statements, to justify claims that a particular crime is prevalent in their area, and is causing particular harm in that community, and
- is satisfied that there is a compelling need to treat the offence more seriously than elsewhere.

3.38 In order that information on prevalence is available for other relevant guidelines it is suggested that the explanation for A23 could be added to the second bullet point for A22 either as an integral part of that explanation or as a link from it:

Established evidence of community/ wider impact

- 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 below:

Prevalence

- 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 a 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 the sentence for such a factor in the particular case being sentenced.

**Question 15: Does the Council agree with the proposed treatment of factor A22 and A23?**

*Medium harm and Culpability*

3.39 At the January meeting the Council agreed to consult on changing the wording of the medium culpability and harm factors in Robbery, Fraud and Theft which are all defined by the lack of characteristics for high and low. Typically they are worded as 'Other cases where

characteristics for A or C are not present.’ Feedback from road testing has consistently been that sentencers find this concept difficult or are reluctant to make a finding of harm or culpability based on a lack of factors. This is despite the fact that guidelines include wording instructing sentencers to balance factors.

3.40 It was therefore agreed to amend the medium culpability factors to read ‘Other cases that fall between categories A and C’ and to provide expanded explanations as shown on page below.

#### Culpability factor

Other cases where characteristics for categories A or C are not present

#### **Change to:**

#### **Other cases that fall between categories A and C**

#### Expanded explanation

A case may fall between categories A and C because:

- Factors are present in A and C which balance each other out (see the instruction regarding balancing characteristics above) **and/or**
- The offender’s culpability falls between the factors described in A and C

#### Harm factor

Other cases where characteristics for categories 1 or 3 are not present

#### **Change to:**

#### **Other cases that fall between categories 1 and 2**

#### Expanded explanation

A case may fall between categories 1 and 3 because:

- Factors are present in 1 and 3 which balance each other out **and/or**
- The level of harm falls between the factors described in 1 and 3

**Question 16: Does the Council still wish to consult on changing the wording of the ‘medium’ factors and providing the proposed explanations?**

## **4 NEXT STEPS**

4.1 Working through the factors and their application to offence specific guidelines is time consuming and it will not be possible for the Council to consider the application of every factor to every guideline. Over the next three months officials can look in detail at each guideline and, using the newly created digital guidelines, create a version with proposed explanations for consultation.

4.2 It may be helpful to set up a 'virtual' working group of Council members to review the proposed changes before the next Council meeting in October, so that only the contentious issues need be considered in detail by the full Council.

**Question 17: Does the Council agree to set up a working group for this project?**

## **5 IMPACT AND RISKS**

5.1 The aim of providing expanded explanations is to encourage best practice and therefore no significant impact on sentence levels is anticipated. However, as the project is wide in scope there is the potential for a significant impact. Road testing and the consultation process will highlight any issues that are likely to have unintended consequences.

## Statutory aggravating factors

### SA1:

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. If a custodial sentence is it should be proportionate and 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.

**SA2:**

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.

**SA3:**

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.

**A1:**

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.
- 

**A2:**

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.

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**A3:**

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.

**A4:**

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

**A5:**

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.**

**A6:**

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.**
- 

**A7:**

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.
- 

**A8:**

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).

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**A9:**

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.
- 

**A10:**

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.
- 

**A11:**

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.
- 

**A12:**

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.
- 

**A13:**

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.

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**A14:**

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.
- 

**A15:**

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.
- 

**A16:**

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.
-

**A17:**

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](#) for detailed guidance.
  - Care should be taken to avoid double counting matters taken into account when considering previous convictions.
- 

**A18:**

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

**A19:**

Offence committed in a domestic context

**More information:**

Refer to the [Overarching Principles: Domestic Abuse Definitive Guideline](#)

**A20:**

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](#)

**A21:**

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 context, 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.

**A22:**

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.

**A23:**

## 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 a 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 the sentence for such a factor in the particular case being sentenced.
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**Sentencing Council meeting:** 22 June 2018  
**Paper number:** SC(18)JUN08 – Annual Report  
**Lead official:** Phil Hodgson  
020 7071 5788

## **1 ISSUE**

1.1 This paper presents the Sentencing Council Annual Report 2017/18 for consideration by members of the Council.

## **2 RECOMMENDATION**

2.1 That the Council approves the Annual Report for submission to the Lord Chancellor and subsequent laying before Parliament.

## **3 CONSIDERATION**

3.1 The Annual Report is a summary of the activities and achievements of the Sentencing Council between 1 April 2017 to 31 March 2018.

3.2 The document follows the same structure as was used last year, including the change we made last year to move the reports on sentencing factors and non-sentencing factors into the main body from the appendices.

3.3 The Council is required by statute to provide the Lord Chancellor with a report on the exercise of the Council's functions during the year. The Lord Chancellor must lay a copy of the report before Parliament, after which the Council will publish it.

3.4 The schedule for the Report is:

- Friday 29 June – submission to the Lord Chancellor
- Thursday 19 July – laid in Parliament (am) and published (pm)

3.5 The report will also be seen, prior to publication, by the Bail, Sentencing and Release Policy Team in MoJ, who are our sponsorship team.

3.6 Changes and amendments suggested by the Council's Governance Sub-group have already been taken in.

3.7 Members are asked to discuss any substantive corrections or suggestions for changes to the Report at the Council meeting on Friday 22 June, and to forward any further minor changes to Phil ([phil.hodgson@sentencingcouncil.gov.uk](mailto:phil.hodgson@sentencingcouncil.gov.uk)) by end of Monday 25 June.

**Question: Subject to any minor changes, does the Council approve the Annual Report 2017/18 for submission to the Lord Chancellor?**

# Sentencing Council



**Sentencing Council  
Annual Report 2017/18**



# Sentencing Council

## **Sentencing Council Annual Report 2017/18**

The Sentencing Council is an independent, non-departmental public body of the Ministry of Justice

This report is presented to Parliament pursuant to Section 119(2) of the Coroners and Justice Act 2009



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# Foreword

## by the Chairman



I am delighted to introduce the Sentencing Council's annual report for 2017/18. It is my fifth annual report as Chairman, and my final one.

I am immensely proud of all that the Sentencing Council has achieved throughout my four and a half years as Chairman; this last year has been no exception. At its inception, the Council set itself the goals of issuing guidelines covering all the most frequently sentenced either-way offences and to have replaced the guidelines produced by our predecessor body, the Sentencing Guidelines Council (SGC), by the time of our tenth anniversary in 2020. We have continued to make great strides towards these goals in the past year.

Since April 2017 we have consulted on four draft guidelines and published three definitive guidelines. Unusually for the Council, we both consulted on and published one of our guidelines, relating to terrorism offences, within the year. As I noted in last year's annual report, development on this guideline began in November 2016 but the Council considered that there was an urgent need for such a guideline and, in light of the raised threat of terrorism in England and Wales, we made a commitment to seek opportunities to expedite production of the guideline, which we have done.

The new guideline, which came into force on 27 April 2018, reflects the changing nature of terrorism; today's terrorists use much less sophisticated methods than their forbears. One of our aims was to target those lower-level offences that, until now, might have been seen as less serious. Our purpose is to make sure that appropriate sentences are passed not only to punish offenders but, importantly, to disrupt their activities.

The Council also showed itself to be responsive to evolving requirements in February 2018 with the publication of a definitive guideline providing overarching principles for sentencing offences involving domestic abuse.

This new guideline replaced the existing SGC guideline on domestic violence. By broadening the focus from 'domestic violence' to 'domestic abuse' our guideline reflects changes in thinking and social attitude that have taken place over the last decade. It is now generally recognised that controlling or coercive behaviour in a domestic setting constitutes abuse just as physical violence does. The guideline, of course, goes much further, emphasising that offences committed in a domestic context can be more serious than those committed in a non-domestic context.

The third definitive guideline we published this year covers sentencing of adult and young offenders convicted of possessing bladed articles or offensive weapons, such as acid, in public or using them to threaten people. The guideline is designed to make sure that those convicted of offences

involving knives or particularly dangerous weapons, as well as those who repeatedly offend, will receive the highest sentences. It reflects concerns expressed in both Parliament and the Court of Appeal about the serious social problems caused by knife offences, and its publication on 1 March 2018 would appear sadly to be timely, given the apparent increase in recent months of knife-related violence and the rise in the use of acid as a weapon.

The *Domestic Abuse and Bladed Articles and Offensive Weapons* guidelines, which came into force on 24 May and 1 June 2018 respectively, represent significant progress in meeting our 2020 goals and updating the sentencing guidelines for today's criminal justice challenges.

We continue to consult widely as we prepare our guidelines and, as well as the terrorism guideline, we have run consultations this year on guidelines for child cruelty, manslaughter, arson and criminal damage offences.

Consultation is of the utmost importance to the Council. The development of our guidelines is influenced enormously, and invariably for the better, as a result of feedback from consultees. We continue to be most grateful to the sentencers, other legal experts, professional bodies and individuals who contribute their time and expertise to our consultations. This year, as in every other year, their responses have helped to refine our thinking and shape the definitive sentencing guidelines.

Consultation is just one step of the continuing cycle of research, development, consultation, delivery, evaluation and review that characterises the work of the Sentencing Council. And as the Council's earlier guidelines come to maturity, evaluation and review will become increasingly important.

On 13 July 2017 we concluded our analysis of the *Burglary* guideline. Coming into force in January 2012, this guideline was one of the Council's first, and replaced an SGC guideline covering non-domestic burglary. We also published an assessment on 6 March 2018 of the Council's *Allocation* guideline, which came into force on 1 March 2016. There will, of course, be other forces at play but our analysis suggests that the guideline has had the intended effect of encouraging the retention of cases for trial in magistrates' courts, while not changing overall sentencing severity for triable, either-way cases.

With an eye on the future, we ran a data collection exercise between November 2017 and March 2018 across a sample of 80 magistrates' courts, asking magistrates and district judges to collect data about how they sentence six offences for which we are developing guidelines. This exercise will allow us to assess the impact of the guidelines on sentencing behaviour and outcomes.

During the last year we have seen a number of new definitive guidelines come into force: *Reduction in Sentence for a Guilty Plea*; *Sentencing Children and Young People: Overarching Principles and offence specific guidelines for Sexual Offences and Robbery*; and, as a step forward in our programme to

modernise the *Magistrates' Court Sentencing Guidelines* (MCSG), 27 revised guidelines for summary-only offences.

We have also given the MCSG a fresh digital platform in the form of a new version of the Sentencing Council application. Magistrates have been generous with their time, helping us to test our ideas, and with their feedback, and this has enabled us to develop a more powerful and flexible digital tool that is responsive to the needs of sentencers at work in the busy magistrates' courts.

The digitisation of the Crown Court guidelines continues apace. Again, we have benefited enormously from the willingness of judges to help us gain insight into the needs of the sentencers who will be using the digital guidelines. It remains only for us to test the guidelines with judges during summer 2018, with a view to launching in the autumn.

The support we have received from judges, magistrates and other legal practitioners has enabled us to further advance the Council's ambition to digitise all sentencing guidelines and ensure we remain in step with the drive by HM Courts and Tribunals Service to build a modern, more efficient, digital court service.

In December 2017 we commissioned an external agency to conduct a review of the Council's website. With more than a million unique visitors this year, our website is a vital channel for reaching our audiences, both across and beyond the criminal justice system. The aim of the review was to consider how we might continue to

provide immediately accessible and clear digital guidelines for our professional audiences, while also furthering the Council's objective of improving public confidence in sentencing by providing a source of useful, easy-to-understand information tailored for non-specialists. We will incorporate the recommendations from this review into our rolling programme of digital transformation.

Also, to further our public confidence objective, we commissioned research designed to give the Council an insight into the public's attitudes towards, and understanding of, sentencing and criminal justice issues. The findings of this research will be used to inform the Council's confidence and communication strategy.

The website review and public attitude research were just two strands of work to emerge from the Council's consideration during the year of its longer-term strategic priorities. I outlined in last year's annual report our intention to consider our priorities, particularly in light of the internal review we commissioned from independent academic, Professor Sir Anthony Bottoms.<sup>1</sup> Among his recommendations, Professor Bottoms suggested the Council would benefit from fostering stronger links with the academic community. To this end we co-hosted a seminar on sentencing research with Cambridge University's Centre for Penal Theory and Penal Ethics in December 2017. The seminar marked the beginning of what we hope will become an ongoing and productive dialogue between academics and the Council.

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<sup>1</sup> <https://www.sentencingcouncil.org.uk/news/item/council-publishes-independent-review/>

Other initiatives to emerge from Professor Bottoms' review include: developing a methodology for assessing the consistency of sentencing; reviewing evidence relating to effectiveness of sentencing; and, developing a generic guideline on how to sentence offences for which there is currently no guideline. A number of these projects are already well under way.

The Sentencing Council is approaching its tenth anniversary. We have already achieved an extraordinary amount, producing guidelines covering over 250 offences. I am fortunate to have been able to play a part in this achievement, and proud to have done so. My time here would not have been so productive or rewarding were it not for my colleagues on the Council, without whose knowledge, expertise and insight none of this excellent work would have been possible.

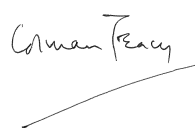
In October this year we welcomed the Rt Hon Lord Justice Burnett as the new President of the Sentencing Council. He took up the post on his appointment as Lord Chief Justice, following the retirement of the Rt Hon the Lord Thomas of Cwmgiedd. I am indebted to Lord Thomas for his guidance and support.

In terms of new members, I welcome District Judge Rebecca Crane, who joined the Council on 1 April 2017. I would like to congratulate Jill Gramann JP, the magistrate member of the Council, on her appointment during the year to the Criminal Cases Review Commission. Congratulations must also go to three of the Council's other judicial members: the Rt Hon Lord Justice Holroyde, who was appointed Lord Justice of Appeal in October 2017; the

Hon Mr Justice Goose, appointed to the High Court, Queen's Bench Division, also in October; and, Her Honour Judge Munro QC, promoted in July 2017 to Senior Circuit Judge sitting at the Central Criminal Court. I would like to thank Chief Constable Olivia Pinkney for the valuable contribution she has made to the Council in the latter half of the year, and those Council members who have served on our three sub-groups: analysis and research; confidence and communication; and governance. Our work benefits greatly from their experience, challenge and scrutiny.

I and my fellow members of the Council would not be able to do our work without the excellent support of the staff of the Office of the Sentencing Council (OSC) under the leadership of Head of the OSC, Steve Wade. I am continually impressed by their expertise, professionalism and dedication.

This is my final annual report for the Sentencing Council. It has been a challenge and an enormous privilege to lead this influential and successful body. The work of the Council plays a significant role in the delivery of justice that is consistent and fair – and can be seen to be consistent and fair. The Council continues to grow in stature and reputation, and I have every confidence that it will do so long into the future.



Colman Treacy  
**Lord Justice Treacy**  
July 2018

# Introduction

The Sentencing Council is an independent, non-departmental public body of the Ministry of Justice. It was set up by Part 4 of the Coroners and Justice Act 2009 to promote greater transparency and consistency in sentencing, while maintaining the independence of the judiciary.

The aims of the Sentencing Council are to:

- promote a clear, fair and consistent approach to sentencing;
- produce analysis and research on sentencing; and
- work to improve public confidence in sentencing.

This annual report covers the period from 1 April 2017 to 31 March 2018. For information on past Sentencing Council activity, please refer to our earlier annual reports, which are available on our website at:

**[www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)**

In 2017/18 the Council's work was aligned to the following four objectives:

1. Prepare sentencing guidelines that meet their stated aims, with particular regard to the likely impact on prison, probation and youth justice services, the need to consider the impact on victims, and to promote consistency and public confidence.
2. Monitor and evaluate the operation and effect of guidelines and draw conclusions.
3. Promote awareness of sentencing and sentencing practice.
4. Deliver efficiencies, while ensuring that the Council continues to be supported by high-performing and engaged staff.

The activities for 2017/18 that have contributed to the delivery of these objectives are outlined in this report.

Also in this report, produced in accordance with the Coroners and Justice Act 2009, are two reports considering the impact of sentencing (pp20–3) and non-sentencing factors (pp24–7) on the resources required in the prison, probation and youth justice services to give effect to sentences imposed by the courts in England and Wales.

# Key events of 2017/18

2017		
April	1	District Judge Rebecca Crane appointed as member of the Council
	24	<i>Magistrates' Court Sentencing Guidelines</i> : revised guidelines for 27 summary-only offences come into force
June	1	<i>Reduction in Sentence for Guilty Plea Definitive Guideline</i> comes into force
	1	<i>Sentencing Children and Young People Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery Definitive Guideline</i> comes into force
	13	Consultation opens on proposed <i>Child Cruelty guideline</i>
July	4	Consultation opens on proposed <i>Manslaughter guideline</i>
	13	Assessment of the impact of the <i>Burglary Definitive Guideline</i> published
October	2	Appointment of the Rt Hon Sir Ian Burnett as Lord Chief Justice of England and Wales and President of the Sentencing Council
	12	Consultation opens on proposed <i>Terrorism Offences guideline</i>
November	7	<i>Sentencing Council Annual Report 2016/17</i> published
December	1	Seminar on Sentencing Research, co-hosted with Centre for Penal Theory and Penal Ethics, Institute of Criminology, University of Cambridge
	5	New <i>Magistrates' Court Sentencing Guidelines</i> digital app released
	19	<i>Sexual Offences Definitive Guideline</i> updated to include explanatory guidance for sentencing offences of sexual exploitation under section 2 of the Modern Slavery Act 2015



2018		
<b>February</b>	22	<i>Overarching Principles: Domestic Abuse Definitive Guideline</i> published
<b>March</b>	1	<i>Bladed Articles and Offensive Weapons Definitive Guideline</i> published
	6	Assessment of the impact of the <i>Allocation Definitive Guideline</i> published
	27	Consultation opens on proposed <i>Arson and Criminal Damage</i> guideline
	28	<i>Terrorism Offences Definitive Guideline</i> published



# Guidelines

Guidelines are intended to help ensure a consistent approach to sentencing, while preserving judicial discretion. If, in any particular case, the judge feels it is in the interests of justice to sentence outside the guideline, this is specifically allowed by the Council's founding legislation, the Coroners and Justice Act 2009.

Consultations are not only a statutory duty but also a valuable resource for the Council. They are publicised via mainstream and specialist media, on Twitter and on the Sentencing Council website. We make a particular effort to publicise them with relevant professional organisations and representative bodies, especially those representing the judiciary and criminal justice professionals, but also others with an interest in a particular offence or group of offenders. Many of the responses come from organisations representing large groups so the number of replies does not fully reflect the comprehensive nature of the input.

The work conducted on all the guidelines during the period from 1 April 2017 to 31 March 2018 is set out here, separated into four key stages: development, consultation, post-consultation, and evaluation and monitoring. Because guidelines were at different stages of development during the year, reporting varies between guidelines.

## Allocation

### *Evaluation and monitoring*

The *Allocation* definitive guideline was published in December 2015 and came into force in March 2016.

To assess the impact of the guideline, the Council conducted analysis of data from the Ministry of Justice's Court Proceedings Database.

A summary of this analysis was published in March 2018.

## Arson and Criminal Damage Offences

### *Development*

During this reporting period the Council developed draft guidelines for arson, criminal damage (including the racially or religiously aggravated form of the offence), criminal damage/arson with intent to endanger life or reckless as to whether life endangered, and threats to destroy or damage property.

### *Consultation*

The Council launched a consultation on the draft proposals on 27 March 2018, at the same time publishing a draft resource assessment and statistical bulletin.

Qualitative research was commenced with sentencers to explore how these guidelines might work in practice and ascertain whether there might be any implementation issues.

The majority of the consultation period fell outside the timeframe for this annual report so we will include details of the consultation and research findings in next year's report.

We publicised the consultation to a range of general and specialist media, and received positive coverage in ten print and online articles. Two interviews by Council spokespeople were broadcast, along with bulletin content on 36 other radio stations.

### ***Evaluation and monitoring***

From November 2017 to March 2018, the Council collected data on how criminal damage cases are currently sentenced across a sample of magistrates' courts. These data will be used to help assess the impact and implementation of the new guideline, once in force.

## **Bladed Articles and Offensive Weapons**

### ***Development***

The Council has developed separate guidelines for sentencing adults and children/young people for a number of offences of possession or threatening with a bladed article or offensive weapon. There had previously been some guidance available for sentencing adult offenders in the magistrates' courts but none for sentencing adult offenders in the Crown Court, or for sentencing children or young people.

We concluded our work on the development of the guideline this year.

### ***Consultation***

The consultation opened on 6 October 2016 and closed on 6 January 2017. We published a resource assessment of the anticipated impact of the new guidelines on correctional resources alongside the consultation, in addition to a statistical bulletin.

### ***Post-consultation***

As a result of the consultation responses, we made a number of changes to the guidelines by:

- including additional guidance on the definition of 'highly dangerous' weapon;
- providing additional guidance on when it may be 'unfair in all of the circumstances' to impose a statutory minimum sentence;
- making changes to the 'possession' guideline, changing the culpability factors to incorporate four levels to show a clearer gradation of seriousness. The structure of the guideline has also been changed to include two levels of harm rather than three since, upon analysis, too few cases would fall into the middle category. This has led to a change to the sentencing table; and
- making similar changes to the structure of the 'threats' guideline to include two levels of harm rather than three, which has also impacted on the sentence levels.

The definitive guideline was published on 1 March 2018 to come into force on 1 June 2018.

A final resource assessment and response to consultation were published alongside the guideline.

The publication of the guideline was positively received and generated 17 print and online news items, four broadcast interviews and bulletin content on 47 other radio stations.

### ***Evaluation and monitoring***

From November 2017 to March 2018, the Council collected data on how cases of possession of a bladed article or offensive weapon were being sentenced across a sample of magistrates' courts. These data will be used to help assess the impact and implementation of the new guideline.

## **Breach Offences**

### ***Post-consultation***

Our consultation on breach offences ran between 25 October 2016 and 25 January 2017.

Due to a lack of available information on current sentencing practice for breaches of community orders and suspended sentence orders, the Council decided to collect new data to inform an estimate of the impact of the guideline.

From November 2017 to March 2018, the Council collected data on how breaches of protective orders, community orders and suspended sentence orders were being sentenced across a sample of magistrates' courts. These data will be used to help assess the potential impact of the new guideline and form the basis of the resource assessments for these guidelines.

The definitive guideline, consultation response, final resource assessments and updated statistics tables will be published in June 2018.

## **Burglary Offences**

### ***Evaluation and monitoring***

In January 2016 we published an assessment of the impact of the *Burglary* guideline, which indicated some unintended impacts for some offences. The Council subsequently undertook further analysis to explore potential reasons for the changes observed, and published a summary report of the findings in July 2017.

As a result of the assessment, the Council agreed to review the guideline, and we have included the project in our three-year work plan.

## Child Cruelty

### ***Development***

During this reporting period the Council continued to develop a guideline for child cruelty offences, having finalised the draft guideline for consultation at the end of the 2017/18 period. This guideline replaces the existing Sentencing Guidelines Council guideline for the offence of cruelty to a child. It also covers the offences of causing or allowing a child to die or suffer serious physical harm and failing to protect a girl from the risk of female genital mutilation (FGM).

### ***Consultation***

The consultation period began on 13 June 2017 and concluded on 13 September 2017. A resource assessment of the anticipated impact of the new guideline on correctional resources was published alongside the consultation, in addition to a statistical bulletin.

The publication of the consultation led to 15 news items in print and online, three interviews and bulletin content on 47 other radio stations.

The announcement was positively received overall.

### ***Post-consultation***

During the second half of this reporting period, we considered consultation responses and transcripts of more-recent cases (the draft guideline was based on cases from

2014). As a result, we made some changes to the guidelines for each of the three offences. The Council has continued to discuss changes and expects to approve the definitive guideline for publication in autumn 2018.

The response to consultation, resource assessment and statistical bulletin will be published alongside the definitive guideline.

## Domestic Abuse

### ***Consultation***

Between 30 March 2017 and 30 June 2017, the Council ran a consultation on a revised guideline for domestic abuse offences. The draft guideline proposed overarching principles for use in any criminal offence that takes place within a domestic context.

At the same time, we also consulted on a draft guideline for intimidatory offences such as harassment, stalking and controlling or coercive behaviour (see p14). The joint consultation received 54 responses. We held two consultation events and studied transcripts of sentencing remarks of cases involving domestic abuse.

A draft resource assessment of the anticipated impact of the guideline on correctional resources was also published.

### ***Post-consultation***

The responses we received were broadly supportive of the revised guideline. As a result, the Council retained the general approach outlined in the guideline but with amendments. In particular, we have included

new guidance on Victim Personal Statements and the use of technology to perpetrate offences.

The definitive guideline was published on 22 February 2018, alongside a final resource assessment. Its release generated 29 print and online items, including a front-page article in *The Telegraph*, four TV interviews and six radio interviews. Thirty-four other radio stations carried bulletin content.

The Council will monitor the effect of the guideline.

We will publish the *Intimidatory Offences* definitive guideline separately during 2018.

## Drug Offences

### ***Evaluation and monitoring***

The Council's *Drug Offences* definitive guideline came into force on 27 February 2012.

To assess the impact of the guideline, during 2017/18 we continued a programme of data analysis, using the following sources:

- sentencing data from the Ministry of Justice's Court Proceedings Database;
- survey data from the Crown Court Sentencing Survey (which ran in Crown Courts between 2010 and 2015); and
- survey data collected across a sample of magistrates' courts in 2015/16.

We published our analysis in June 2018, outside the period covered by this report. In light of the analysis, the Council has agreed to commence a review of the guideline.

## Fraud, Bribery and Money Laundering Offences

### ***Evaluation and monitoring***

The definitive guideline *Fraud, Bribery and Money Laundering Offences* was published in May 2014 and came into force in October 2014.

To assess the impact of the guideline, the Council commissioned an analysis of data from the Crown Court Sentencing Survey (which ran between 2010 and 2015) and data from the Ministry of Justice's Court Proceedings Database.

A summary of this analysis will be published later in 2018.

## Guilty Plea

### ***Evaluation and monitoring***

The definitive guideline for *Reduction in Sentence for a Guilty Plea* was published on 7 March 2017 and came into force on 1 June 2017.

The Council has put in place a group, including representatives of the Sentencing Council, the police, the Crown Prosecution Service, Her Majesty's Courts and Tribunal Service, Victim Support, Judicial Office, Her Majesty's Prison and Probation Service, the Justices' Clerks Society and the Ministry of

Justice, to steer work to collect a range of information that will feed into an assessment of the implementation and impact of the guideline. This work may include, for example, interviews with sentencers and other criminal justice professionals, analysis of transcripts of judges' sentencing remarks, case-file analysis, and analysis of data from other criminal justice agencies.

The group, which met for the first time in October 2017, will review the findings from these data and advise the Council if they suggest the need for a review of the guideline.

## Health and Safety

### ***Evaluation and monitoring***

The *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences* definitive guideline was published in November 2015 and came into force in February 2016.

In 2017/18, the Council commenced analysis of data from the Ministry of Justice's Court Proceedings Database to assess the impact of the guideline. Further analysis is planned, including analysis of transcripts of judges' sentencing remarks, and we will publish a summary of the findings in 2018/19.

## Intimidatory Offences

### ***Consultation***

During the period of this report the Council ran a consultation on a guideline for harassment, stalking, threats to kill, disclosing private sexual images and controlling or coercive behaviour offences. The consultation ran between 30 March 2017 and 30 June 2017, in conjunction with a consultation on a revised *Domestic Abuse* guideline (see p12). Our proposals were discussed at four consultation meetings, and the Justice Committee published a report on these and the domestic abuse draft proposals.

During the consultation period we published a draft resource assessment and a statistics bulletin. We received 54 joint consultation responses.

Publicity for the consultation led to 30 print and online news items, three interviews and bulletin coverage on 30 other radio stations.

### ***Post-consultation***

The joint responses received were broadly supportive of the proposed guideline. As a result, the Council expects to retain the general approach outlined in the draft guidelines and we aim to publish the definitive guideline in summer 2018.

The *Domestic Abuse* definitive guideline was published separately on 22 February 2018.



### ***Evaluation and monitoring***

From November 2017 to March 2018, the Council collected data on how harassment/stalking cases were being sentenced across a sample of magistrates' courts. These data will be used to help assess the impact and implementation of the new guideline, once it is in force.

## **Manslaughter**

### ***Development***

In 2014 the Council received a request from the Lord Chancellor to consider producing a guideline for so-called 'one punch' manslaughter offences. In considering this request, the Council decided it was necessary to undertake a comprehensive review of manslaughter sentencing with a view to producing guidelines for a range of types of manslaughter:

- Unlawful act manslaughter
- Gross negligence manslaughter
- Manslaughter by reason of loss of control
- Manslaughter by reason of diminished responsibility

### ***Consultation***

Between July and October 2017, the Council consulted on draft guidelines for these offences and, at the same time, carried out research interviews with sentencers to discuss the consultation version of the guidelines and ascertain whether they are likely to have any unanticipated

consequences. Twenty-eight interviews were carried out with Crown Court and High Court judges who had recently sentenced a manslaughter case. A draft resource assessment and statistical bulletin were published alongside the draft guideline.

The announcement generated 12 print and online news items, two interviews with Council spokespeople and coverage in bulletins on 39 other radio stations.

### ***Post-consultation***

The Council is reviewing the guidelines in light of the consultation responses and the results of the research, and aims to publish the definitive guideline by September 2018.

The response to consultation, resource assessment and statistical bulletin will be published alongside the definitive guideline.

## **Mental Health**

### ***Development***

During the period of this annual report the Council decided to start work on an overarching principles guideline for the sentencing of offenders with mental health disorders or learning disabilities. During this early stage of development, we conducted research into the issues such a guideline would encompass.

The Council plans to consider a draft guideline later in 2018.

## Public Order Offences

### ***Development***

The Council commenced the development of a package of guidelines for public order offences in January 2017. These are relatively high-volume offences and, although some guidance exists for magistrates, there is currently no guidance for judges in the Crown Court.

### ***Consultation***

We finalised the draft guidelines in early 2018 and opened a consultation in May 2018. At the same time, we commenced a programme of qualitative research with sentencers to examine systematically how the guideline may work in practice and to ascertain whether there may be any implementation issues. A resource assessment and statistical bulletin will be published alongside the consultation.

## Robbery

### ***Evaluation and monitoring***

The Council's definitive guideline on robbery offences came into force on 1 April 2016.

To assess the impact of the guideline, during 2017/18 we carried out a programme of data analysis, using the following sources:

- Sentencing data from the Ministry of Justice's Court Proceedings Database
- Survey data from the Crown Court Sentencing Survey (which ran in Crown Courts between 2010 and 2015)

- Survey data collected across all Crown Courts for a six-month period in 2016/17

We expect to publish this analysis in 2018/19.

## Seriousness

### ***Development***

The Council commenced the development of a project to replace the Sentencing Guidelines Council (SGC) *Overarching Principles: Seriousness* guideline in July 2017. The SGC guideline, published in 2004, provides general guidance on the approach to be taken to assessing culpability and harm and lists aggravating and mitigating factors that may apply to a range of offences.

The replacement guideline will take advantage of the digitisation of sentencing guidelines to provide additional, linked guidance to contextualise the factors in a new general guideline for use where there is no offence specific guideline.

The Council plans to develop a second phase of the project to provide additional information on factors in offence specific guidelines.

### ***Consultation***

The Council consulted on the first phase of this project in June 2018.

## Sexual Offences

### *Evaluation and monitoring*

The Council's definitive guideline on Sexual Offences came into force on 1 April 2014.

To assess the impact of the guideline, during 2017/18 we carried out a programme of data analysis, using the following sources:

- sentencing data from the Ministry of Justice's Court Proceedings Database; and
- survey data from the Crown Court Sentencing Survey (which ran in Crown Courts between 2010 and 2015).

We expect to publish this analysis in summer 2018.

## Sexual Offences: Modern Slavery

### *Development*

Representation was made to the Council advising that guidance on sentencing for modern slavery would be useful to the courts.

We responded by providing explanatory guidance for sentencing offences of sexual exploitation under section 2 of the Modern Slavery Act 2015, and we have included this guidance in the *Sexual Offences* guideline (see above).

The *Sexual Offences* guideline, which came into force in April 2014, includes a guideline for sentencing the offence of trafficking people for sexual exploitation. This offence was created by section 59A of the Sexual Offences Act 2003.

The Modern Slavery Act 2015 has since repealed section 59A but the Council considers that the sentencing guideline may still be of use for sentencing cases of sexual exploitation prosecuted under section 2 of the Modern Slavery Act 2015. We have added the explanatory guidance to the existing sentencing guideline to help those wanting to use the guideline for this purpose. In addition, the *Sexual Offences* guideline provides a list of ancillary orders that can be made when sentencing a relevant sexual offence. The list has been amended to include relevant orders that can be made under the Modern Slavery Act 2015.

## Terrorism Offences

### *Development*

The Council began work on terrorism offences in November 2016. We decided to work on guidelines for the following offences which, by volume, appeared to be the most common:

- Encouragement of terrorism, section 1 Terrorism Act 2006
- Dissemination of terrorist publications, section 2 Terrorism Act 2006
- Preparation of terrorist acts, section 5 Terrorism Act 2006

- Possession for terrorist purposes, section 57 Terrorism Act 2000
- Collection of information, section 58 Terrorism Act 2000
- Membership, section 11 Terrorism Act 2000
- Support, section 12 Terrorism Act 2000
- Explosive substances, sections 2–4 Explosive Substances Act 1883
- Fundraising, section 15 Terrorism Act 2000
- Use and possession, section 16 Terrorism Act 2000
- Funding arrangements, section 17 Terrorism Act 2000
- Money laundering, section 18 Terrorism Act 2000
- Information about acts of terrorism, section 38B Terrorism Act 2000

The Council accelerated the work on this project in light of the evolving nature of terrorist offending as evidenced by the terrorist offences that took place in 2017. The Council felt it was vital for the courts to have a consolidated, up-to-date package of guidelines available for use as soon as possible.

We concluded our work on the development of these guidelines during this reporting year.

### **Consultation**

The consultation period began on 12 October 2017 and concluded on 22 November 2017. A draft resource assessment of the anticipated impact of the new guideline on correctional resources was published alongside the consultation, in addition to a statistical bulletin. During the consultation period, to support the development of the guideline, we carried out qualitative research with judges to explore how the draft guideline might work in practice. We conducted 16 in-depth interviews with judges who hear terrorism cases.

There was very significant media interest in the launch of the consultation for this guideline, with 19 print and online news items, 12 interviews with Council spokespeople and bulletin coverage on a great many other TV and radio stations.

### **Post-consultation**

As a result of the consultation responses and our research, we made a number of changes to the guidelines by:

- including high-level community orders as a sentencing option within the *Encouragement of Terrorism; Membership; Support; Funding; Failure to Disclose Information; and Collection* guidelines. This sentence option is available only for the least-serious cases (it is included at the lowest part of the range for the least-serious offence);

- reducing the top of the sentence range in the *Funding and Failure to Disclose Information* guidelines to ensure there is ‘headroom’ for a sentencer to sentence outside the guideline in an exceptional case;
- including the following mitigating factors in all nine guidelines: ‘Age or level of maturity of the offender’; ‘Sole or primary carer for dependent relatives’; and ‘Offender involved through coercion, intimidation or exploitation’;
- adding the aggravating factor of ‘Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection’ to several of the guidelines; and
- changing the harm model of the *Preparation of Terrorist Acts, Explosive Substances, Possession for Terrorist Purposes and Collection of Terrorist Information* guidelines to include consideration of the likelihood of harm. This change was made in response to a number of comments that the initial draft harm models were too simplistic.

The definitive guideline was published on 28 March 2018, to come into force on 27 April 2018. Publicity for the guideline generated 11 news items along with six interviews with Council spokespeople and bulletin coverage on 48 other radio stations.

A final resource assessment and response to consultation were published alongside the guideline.

## Theft Offences

### ***Evaluation and monitoring***

The Council’s definitive guideline on theft offences came into force on 1 February 2016.

To assess the impact of the guideline, during 2017/18 we continued a programme of data analysis, using the following sources:

- sentencing data from the Ministry of Justice’s Court Proceedings Database;
- survey data from the Crown Court Sentencing Survey (which ran in Crown Courts between 2010 and 2015); and
- survey data collected across a sample of magistrates’ courts in 2015/16.

We expect to publish this analysis in 2018/19.

# Sentencing factors report

In accordance with section 130 of the Coroners and Justice Act 2009 this report considers changes in the sentencing practice of courts and the possible effects on the resources required in the prison, probation and youth justice services.

Sentencing guidelines are a key driver of change in sentencing practice. Some guidelines aim to increase the consistency of approach to sentencing while maintaining the average severity of sentencing. Other guidelines explicitly aim to cause changes to the severity of sentencing, albeit rarely.

Changes in sentencing practice can also occur in the absence of new sentencing guidelines and could be the result of many factors such as Court of Appeal guideline judgments, legislative amendments and changing attitudes towards different offences.

This report considers changes in sentencing practice caused by the sentencing guidelines only.

## Sentencing guidelines

During its eighth year (to 31 March 2018), the Council published the following definitive guidelines:

- *Overarching Principles: Domestic Abuse*
- *Bladed Articles and Offensive Weapons*
- *Terrorism Offences*

## Overarching Principles: Domestic Abuse

A large number of offenders are convicted each year for offences related to domestic abuse so any impact that the guideline may have on increasing sentencing severity could result in a substantial cumulative effect on prison places and probation resources. However, the evidence collected to inform the resource assessment indicated that many sentencers already increase their sentences where the offence has been committed within a domestic context. For those who do not, some may increase their sentence as a result of the new guideline but others may opt for a community order, following the guideline's emphasis on rehabilitation and the need to consider the most appropriate sentence to address the offending behaviour.

Overall, it is likely that there will be an increase in severity as courts apply the new guideline, which ensures that sentencers treat cases committed in a domestic context as more serious than those committed in a non-domestic context. However, the exact magnitude of any increase, or any change in the distribution of cases across different disposals, is impossible to predict with any greater precision.

It should be noted that most of the evidence collected to inform this assessment has been for adults (those aged 18 and over) only, whereas the guideline applies to anyone aged 16 or over. However, when sentencing offenders aged 16 to 18 for offences related to domestic abuse, sentencers are instructed to refer to the Council's *Sentencing Children and Young People – Overarching Principles* guideline, alongside the *Domestic Abuse* guideline. The children and young people guideline, which came into effect on 1 June 2017, states that: “Custodial sentences must be a last resort for children and young people”, and emphasises the aim of the youth justice system as being to prevent reoffending, with a focus on rehabilitation. It is expected that the new *Overarching Principles: Domestic Abuse* guideline will not change average sentencing practice for 16- and 17-year olds but, even if some small changes were observed, the volumes are low enough that there would be little impact on correctional resources.

## **Bladed Articles and Offensive Weapons**

### ***Bladed Articles and Offensive Weapons – Possession (adults)***

Under the new guideline, any offences involving possession of a bladed article will fall within high culpability (category A). At the lower level of harm (category A2), this will attract a minimum starting point of six months' custody, with a sentence range from 3 to 12 months' custody. Because a high proportion of offenders currently receive a non-custodial sentence, it is anticipated that, under the new guideline, more offenders convicted for possession of a bladed article will receive a custodial sentence compared with current sentencing practice. This will have an impact on prison and probation resources.

An estimate of the potential uplift in custodial sentences that may occur can be calculated by assuming that all offenders who currently receive a non-custodial sentence for possession of a bladed article will now receive a short custodial sentence. Using 2016 Court Proceedings Database (CPD) data as a guide and, assuming that custodial sentences are suspended at the same rate as in 2016, this would result in the need for around 80 additional prison places per year, at a net cost of around £2.5 million. This breaks down as a cost of around £1.9 million in prison costs and £620,000 in probation costs (comprised of a saving from fewer community orders and a cost due to more suspended sentence orders and more offenders requiring post-sentence supervision when released from custody).

However, as sentences over the last decade have gradually become more severe for possession of a bladed article, with substantial increases in both the custody rate and the average custodial sentence length (ACSL), it could be expected that sentencing severity would continue to rise in absence of the guideline. Any increase observed following the introduction of the guideline may be largely due to a long-term increase and not solely due to the guideline itself. It is therefore likely that the costs directly related to the guideline will be lower than estimated.

The new guideline also reflects recent legislation, which states that offenders convicted of a second or subsequent offence of possession of a bladed article or offensive weapon should receive a minimum custodial sentence of six months' imprisonment. As a result, there may be an increase in the number of offenders receiving custodial sentences for a second or subsequent offence. However, this impact would be as a result of the legislation and not due to the sentencing guideline.

### ***Bladed Articles and Offensive Weapons – Threats (adults)***

Under the new guideline, threatening offences attract a starting point of custody, with an offence range of six months' custody up to three years. Current sentencing practice shows that in 2016 only around 20 offenders received either a conditional discharge, a fine or a community sentence for these offences.

While there is currently no specific guideline for these offences, there is a statutory minimum sentence for threatening offences of six months' custody. The new guideline, therefore, reflects the legislation and, as a result, any increase in the number of offenders receiving custodial sentences is the impact of the legislation and not the sentencing guideline. It is, therefore, not anticipated that the guideline will have any impact on prison and probation resources for these offences.

### ***Bladed Articles and Offensive Weapons – Possession/Threats (children and young people)***

The Council's aim in developing this guideline was not to change sentencing practice but rather to produce a guideline that is accessible and useful to sentencers and to promote a more consistent approach to sentencing.

The new guideline incorporates recent legislation, which states that 16- and 17-year olds convicted of a threats offence, or a second or subsequent offence of possession of a bladed article or offensive weapon, should receive a minimum sentence of a four-month detention and training order (DTO). As a result, any increase in the number of offenders receiving DTOs for threats or for a second or subsequent offence of possession will reflect the impact of the legislation and not the sentencing guideline.



The Council does not anticipate that the guideline will have an effect on the number of community orders or custodial sentences imposed, or the length of community or custodial sentences. As a result, no significant impact on correctional resources is anticipated.

### **Terrorism Offences**

This guideline is anticipated to increase sentences in some cases. However, the expected increases are mainly anticipated to affect offenders categorised at the lowest levels of harm and culpability. Because very few offenders overall are sentenced for these offences (because few are prosecuted), it is expected that the anticipated longer sentences imposed as a result of the guideline will have only a minimal impact on the prisons, with fewer than five additional prison places expected to be required as a result of the guideline.

There is expected to be a negligible impact on probation services as a result of the guideline. The vast majority of offenders sentenced for these offences are given immediate custodial sentences. For some of the offences with lower statutory maximum sentences, a high-level community order is available at the bottom of the sentencing range. A small number of offenders who are placed at the lowest levels of culpability and harm under the new guideline may now receive community orders when previously they may have received custodial sentences. Conversely, for some other parts of the guideline, a small number of offenders that receive suspended sentences under current

sentencing practice may receive immediate custodial sentences under the new guideline but, as only ten offenders were given suspended sentence orders between 2006 and 2016 for the offences covered by the guideline, any change would have only a very small impact.

The recent increases in UK-based terrorist activity may lead to greater numbers of defendants coming before the courts for these offences and, therefore, more offenders being sentenced. This would mean that the guideline would affect a larger number of offenders. However, as the overall number of offenders sentenced is very small, it is expected that an increase in volumes would have only a minor effect on the prison population and probation services.

We are aware that there may be changes to legislation in this area but, as no Bill had yet been announced at the time of publishing this report, the Council decided to publish the existing guidelines and will look to review or amend them at a future stage, if necessary.

# Non-sentencing factors report

The Sentencing Council is required under the Coroners and Justice Act 2009 to prepare a report of non-sentencing factors to identify the quantitative effect that non-sentencing factors are having, or are likely to have, on the resources needed or available to give effect to sentences imposed by courts in England and Wales.

We begin this report by defining non-sentencing factors and explaining their importance to resource requirements in the criminal justice system. We then signpost the most recently published evidence on these factors.

## Definition of non-sentencing factors and their significance

The approach taken by the courts to sentencing offenders is a primary driver of requirements for correctional resources in the criminal justice system. We discuss this in our report on sentencing factors (see p20–2). However, non-sentencing factors also exert an important influence on requirements for correctional resources.

Non-sentencing factors are factors that do not relate to the sentencing practice of the courts but which may affect the resources required to give effect to sentences. For

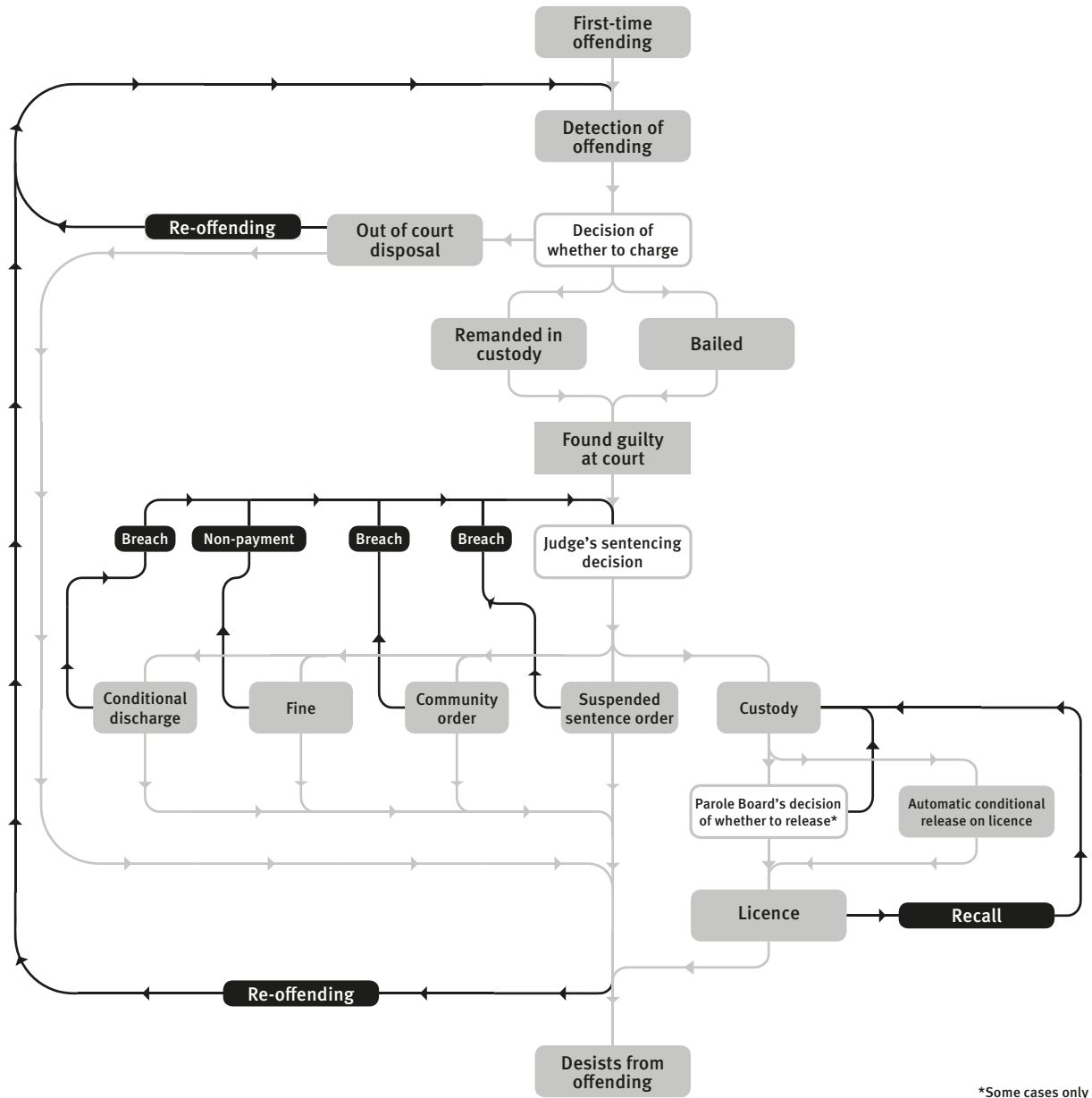
example, the volume of offenders coming before the courts is a non-sentencing factor: greater sentencing volumes lead to greater pressure on correctional resources, even if the courts' treatment of individual cases does not change. Release provisions are another example: changes in the length of time spent in prison for a given custodial sentence have obvious resource consequences.

## Statistics on the effect of non-sentencing factors on resource requirements

It is relatively straightforward to analyse the available data on non-sentencing factors. However, it is extremely difficult to identify why changes have occurred and to isolate the resource effect of any individual change to the system. This is because the criminal justice system is dynamic and its processes are interconnected.

Figure 1 shows a stylised representation of the flow of offenders through the criminal justice system. This figure demonstrates the interdependence of the system and how changes to any one aspect will have knock-on effects in many other parts.

Figure 1



The remainder of this report examines the available data on non-sentencing factors. Because of the complexities explained above, we have not attempted to untangle the interactions between different non-sentencing factors to explain the causes of observed changes and their impact on resources.

## **Volume of sentences and composition of offences coming before the courts**

The Ministry of Justice (MoJ) publishes *Criminal Justice System Statistics Quarterly*, which gives quarterly statistics on the volume of sentences and the offence types for which offenders are sentenced.<sup>2</sup>

For the most detailed information on sentencing outcomes, follow the link to *Criminal Justice System Statistics Quarterly: December 2017* to use the sentencing tool. The tool provides statistics on the total number of sentences passed and how this has changed through time. The statistics can be broken down by sex, age group, ethnicity, court type and offence group.

## **The rate of recall from licence**

An offender is recalled to custody by the Secretary of State if they have been released from custody but then breach the conditions of their licence or appear to be at risk of doing so. Because time served in custody is considerably more costly than time spent on licence, recall decisions have a substantial resource cost.

Statistics on recall from licence can be found in the MoJ publication, *Offender Management Statistics Quarterly*.<sup>3</sup>

The tables concerning licence recalls, Table 5.1 to Table 5.11, can be found via the link *Offender Management Statistics Quarterly: October to December 2017*. For example, Table 5.1 contains a summary of the number of licence recalls since 1984.

## **Post-sentence supervision**

The Offender Rehabilitation Act 2014 expanded licence supervision, which means that since 1 February 2015 all offenders who receive a custodial sentence of less than two years are subject to compulsory post-sentence supervision (PSS) on their release for 12 months. MoJ publishes statistics on the number of offenders under PSS in *Offender Management Statistics Quarterly*.<sup>4</sup> See Table 4.7 in the probation tables.

## **The rate at which court orders are breached**

If an offender breaches a court order, they must return to court. Their revised sentence will typically add or augment requirements to the order or involve custody. Breaches can therefore have significant resource implications.

Statistics on breaches can also be found in *Offender Management Statistics Quarterly*.<sup>5</sup> Refer to the probation tables, specifically Table 4.11, which gives a breakdown of terminations of court orders by reason.

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<sup>2</sup> <https://www.gov.uk/government/collections/criminal-justice-statistics-quarterly>

<sup>3</sup> <https://www.gov.uk/government/collections/offender-management-statistics-quarterly>

<sup>4</sup> *ibid*

<sup>5</sup> *ibid*

## Patterns of reoffending

MoJ publishes reoffending statistics in *Proven Reoffending Statistics*.<sup>6</sup>

The frequency and severity of reoffending is an important driver of changes in requirements for criminal justice resources. Detailed statistics of how reoffending rates are changing through time can be found in the report. Additional statistics can be found in supplementary tables.

## Release decisions by the Parole Board

Many offenders are released from prison automatically under release provisions that are set by Parliament and MoJ. However, in a minority of cases, which are usually those of very high severity, the Parole Board makes release decisions.

Statistics on release rates for these cases can be found in the annual reports of the Parole Board for England and Wales.<sup>7</sup>

## Remand

Decisions to hold suspected offenders on remand are a significant contributor to the prison population. The remand population can be broken down into the untried population and the convicted but yet to be sentenced population.

Statistics on the number of offenders in prison on remand can be found in MoJ's *Offender Management Statistics Quarterly*.<sup>8</sup>

The prison population tables can be found via the link *Offender Management Statistics Quarterly: October to December 2017*. For example, Table 1.1 contains data on how the remand population has changed through time.

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<sup>6</sup> <https://www.gov.uk/government/collections/proven-reoffending-statistics>

<sup>7</sup> <https://www.gov.uk/government/publications?departments%5B%5D=parole-board>

<sup>8</sup> <https://www.gov.uk/government/collections/offender-management-statistics-quarterly>

# Communication

One of the aims of the Council is to work to improve public confidence in sentencing; one of its objectives is to promote awareness of sentencing and sentencing practice. The following pages outline our principal strands of work in these areas.

## Working with the media

The Council has continued to publicise its work to general and specialist media, aiming to ensure that sentencers, criminal justice practitioners and the wider public are aware of what work the Council is undertaking, are kept informed about the publication of new guidelines and hear about consultations so that they can respond if interested. The press office has also continued to advise media on sentencing issues more generally and provide spokespeople for interview.

The five consultations and three definitive guidelines published over the period were communicated to the media, including criminal justice publications, national and regional print and broadcast channels and other specialist titles whenever relevant. Council members were available to talk to the media for each announcement and undertook a variety of interviews, including on high-profile, national programmes such as the BBC Breakfast TV, Sky News and Good Morning Britain, as well as on regional radio.

The work of the Council remained of significant interest to the media and, over the course of the year, there were 372 mentions of the Council in print media, 1,080 broadcast mentions and 2,275 mentions online, not including social media.

Our press office also routinely answers media enquiries about sentencing issues and provides spokespeople, where appropriate.

## Working to engage the public and victims of crime

As in previous years, the Council has worked with partner organisations to improve understanding of sentencing among victims, witnesses and the public. The Witness Service continued to use our materials about sentencing, and these have also been supplied to the Magistrates in the Community initiative. The Council has advised other organisations, such as the National Justice Museum, on sentencing materials drafted by those organisations for use with the public.

The Council has also engaged with other criminal justice professionals, especially where they may act as a conduit to the public, to improve their understanding of sentencing. This has included for example, the police service. Activity has included ensuring police publications are reached with Council announcements, working with *Police Professional* magazine to provide articles

and features on aspects of sentencing and establishing relationships with relevant groups of officers, such as Family Liaison Officers, to establish how we can work together to ensure they have the information they need about sentencing.

Videos on our YouTube channel reached more than 137,000 views by the end of this period, with the videos describing how sentencing works generating consistent levels of interest and exceeding 100,000 views by year end, with 38,564 during the period of this report.

In December 2017, we commissioned an agency to undertake research into public attitudes to sentencing. The aim of the research was to gather insight for the Council into the public's attitudes towards, and their knowledge and understanding of, issues related to sentencing and the wider criminal justice system. It also investigated what sources of information most influence how people think about sentencing.

The findings of this research will be used to inform the Council's confidence and communication strategy, specifically our objective to provide members of the public with access to information that will demystify sentencing and dispel common misconceptions.

### **Developing relationships with partners and interested parties**

To further our work to engage stakeholders and build relationships across the criminal justice system, Council members and staff from the Office of the Sentencing Council gave more than 20 speeches or presentations

covering all aspects of sentencing and developing guidelines. Our audiences included magistrates, judges, the police, academics, NGOs, solicitors and barristers.

We also accepted invitations to raise the profile of the Council in other jurisdictions, sharing our expertise on sentencing with senior judiciary in Australia and Uganda, and contributing to the work of the Sentencing Advisory Committee of the Supreme Court of the Eastern Caribbean.

### **Developing digital capability**

#### ***Improving the digital Magistrates' Court Sentencing Guidelines***

In June 2016 the Council launched an offline version of the Magistrates' Court Sentencing Guidelines (MCSG), representing a significant step forward in our move to providing fully digital guidelines.

The offline version of the MCSG is available on the iPads supplied free of charge to every magistrates' court by HM Courts and Tribunals Service (HMCTS). The app runs in parallel with the online version of the MCSG, which can be found on the Council's website. Together they provide magistrates with easy access to offence specific sentencing guidelines, overarching guidelines and explanatory materials, as well as a tool to help sentencers calculate fines.

Following extensive consultation with magistrates, legal advisers and other professional users of the digital guidelines, in December 2017 we launched a new version of the app. This new version included functionality to support magistrates and other professionals

in their work and give them easier, quicker access to guidelines and tools.

### ***Digital guidelines for the Crown Court***

We continued to make progress this year on our project to develop digital sentencing guidelines for the Crown Court.

The aim of this work is to deliver digital sentencing guidelines that meet the needs of judges and other professional practitioners, work effectively in the context of the Crown Court and are in line with HMCTS digital reforms.

During 2017, we undertook initial user research with Crown Court judges and other potential users to gain a clear understanding of the way in which the guidelines are used and what sentencers consider their priorities to be.

Informed by this research and what we have learned from developing digital guidelines for the magistrates' courts, we have prepared digital versions of all the sentencing guidelines used in the Crown Court. We will be testing the guidelines with users throughout summer 2018 with a view to launching on the Sentencing Council website in the autumn.

### ***Welsh-language digital guidelines***

In September 2016, the Sentencing Council agreed to produce a Welsh-language version of the digital MCSG. Translation of the first tranche of guidelines, including all the Council's overarching guidelines, is complete and work has started on the offence specific guidelines.

The Council is most grateful for the generous assistance of HMCTS Welsh Language Services with this work.

### ***Website***

The Council's website, [www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk), has continued to be a source of information for sentencers and others in the criminal justice system, as well as for victims, witnesses, the public and journalists. Traffic to the website has increased significantly, with the number of unique visitors rising above a million for the first time: from 1 April 2017 to 31 March 2018, there were 1,214,518 unique visitors, compared with 814,713 in the previous year.

In December 2017 we commissioned an external agency to review our website and advise us on how we might improve the functionality and content to make it more accessible and useful to different audiences. The purpose of this work is to enable the Council to continue to serve our professional users while creating more compelling public-facing content that would contribute to meeting our objective of improving public confidence in sentencing.



# Budget

## Financial report

### *The cost of the Sentencing Council*

The Sentencing Council's resources are made available through the Ministry of Justice (MoJ); the Council is not required to produce its own audited accounts. However, the Council's expenditure is an integral part of MoJ's resource account, which is subject to audit. The summary below reflects expenses directly incurred by the Council and is shown on an accrual basis.

	2017/18 (actual) £000s
<b>Total funding allocation</b>	<b>1,455</b>
Staff costs	1,116
Non-staff costs	323
<b>Total expenditure</b>	<b>1,439</b>

# Appendices

## Appendix A: About the Sentencing Council

The primary function of the Sentencing Council is to prepare sentencing guidelines,<sup>9</sup> which the courts must follow unless it is in the interest of justice not to do so.<sup>10</sup>

The Council also fulfils other statutory functions:

- Publishing the resource implications in respect of the guidelines we draft and issue<sup>11</sup>
- Monitoring the operation and effect of our sentencing guidelines, and drawing conclusions<sup>12</sup>
- Preparing a resource assessment to accompany new guidelines<sup>13</sup>
- Consulting when preparing guidelines<sup>14</sup>
- Promoting awareness of sentencing and sentencing practice<sup>15</sup>

- Publishing a sentencing factors report<sup>16</sup>
- Publishing a non-sentencing factors report<sup>17</sup>
- Publishing an annual report<sup>18</sup>

## Governance

The Sentencing Council is an advisory non-departmental public body (NDPB) of the Ministry of Justice (MoJ). Unlike most advisory NDPBs, however, the Council's primary role is not to advise Government ministers but to provide guidance to sentencers.

The Council is independent of the government and the judiciary with regard to the guidelines we issue to courts, our impact assessments, our publications, how we promote awareness of sentencing and our approach to delivering these duties.

The Council is accountable to Parliament for the delivery of our statutory remit set out in the Coroners and Justice Act 2009. Under section 119 of the Act, the Council must make

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9 s.120 Coroners and Justice Act 2009

10 s.125(1) *ibid*

11 s.127 *ibid*

12 s.128 *ibid*

13 s.127 *ibid*

14 s.120(6) *ibid*

15 s.129 *ibid*

16 s.130 *ibid*

17 s.131 *ibid*

18 s.119 *ibid*

an annual report to the Lord Chancellor on how we have exercised our functions. The Lord Chancellor will lay a copy of the report before Parliament, and the Council will publish the report.

Ministers are ultimately accountable to Parliament for the Council's effectiveness and efficiency, for our use of public funds and for protecting our independence.

Section 133 of the 2009 Act states that the Lord Chancellor may provide the Council with such assistance as we request in connection with the performance of our functions.

The Council is accountable to the Permanent Secretary at MoJ as Accounting Officer and to ministers for the efficient and proper use of public funds delegated to the Council, in accordance with MoJ systems and with the principles of governance and finance set out in *Managing Public Money*, and other relevant Treasury instructions and guidance.

The budget is delegated to the Head of the Office of the Sentencing Council from the Director General, Justice and Courts Policy Group at MoJ. The Head of the Office of the Sentencing Council is responsible for the management and proper use of the budget.

The Director General, Offender Reform and Commissioning Group is accountable for ensuring that there are effective arrangements for oversight of the Council in its statutory functions and as one of MoJ's arm's-length bodies.

## How the Council operates

The Council is outward-facing, responsive and consultative. We draw on expertise from relevant fields where necessary while ensuring the legal sustainability of our work. The Council aims to bring clarity in sentencing matters, in a legally and politically complex environment.

The Council aims to foster close working relationships with judicial, governmental and non-governmental bodies while retaining our independence. These bodies include: the Attorney General's Office; the College of Policing; the Council of Circuit Judges; the Council of Her Majesty's District Judges (magistrates' courts); the Criminal Procedure Rules Committee; the Crown Prosecution Service; the Home Office; the Judicial Office; the Justices' Clerks' Society; the Magistrates Association; the Ministry of Justice; the National Bench Chairs' Forum and the National Police Chiefs' Council.

The Council engages with the public on sentencing, offers information and encourages debate.

The Council meets 10 times a year to discuss current work and agree how it should be progressed. The minutes of these meetings are published on our website.<sup>19</sup>

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<sup>19</sup> <https://www.sentencingcouncil.org.uk/>

The Council has sub-groups to enable detailed work on three key areas of activity:

- Analysis and research – to advise and steer the Analysis and Research strategy, including identifying research priorities so that it aligns with the Council’s statutory commitments and work plan.
- Confidence and Communication – to advise on and steer the work programme for the Communication team so that it aligns with the Council’s statutory commitments and work plan.
- Governance – to support the Council in responsibilities for issues of risk, control and governance, by reviewing the comprehensiveness and reliability of assurances on governance, risk management, the control environment and the integrity of financial statements.

The sub-groups’ roles are mandated by the Council, and all key decisions are escalated to the full membership.

## Relationship with Parliament

The Council has a statutory requirement to consult Parliament, specifically the House of Commons Justice Select Committee.<sup>11</sup>

In order to facilitate the work of the Committee, the Council informs all organisations and individuals who respond to our consultations that their responses may be shared with the Justice Select Committee.

## The Office of the Sentencing Council

The Council is supported in its work by the Office of the Sentencing Council (OSC), in particular in:

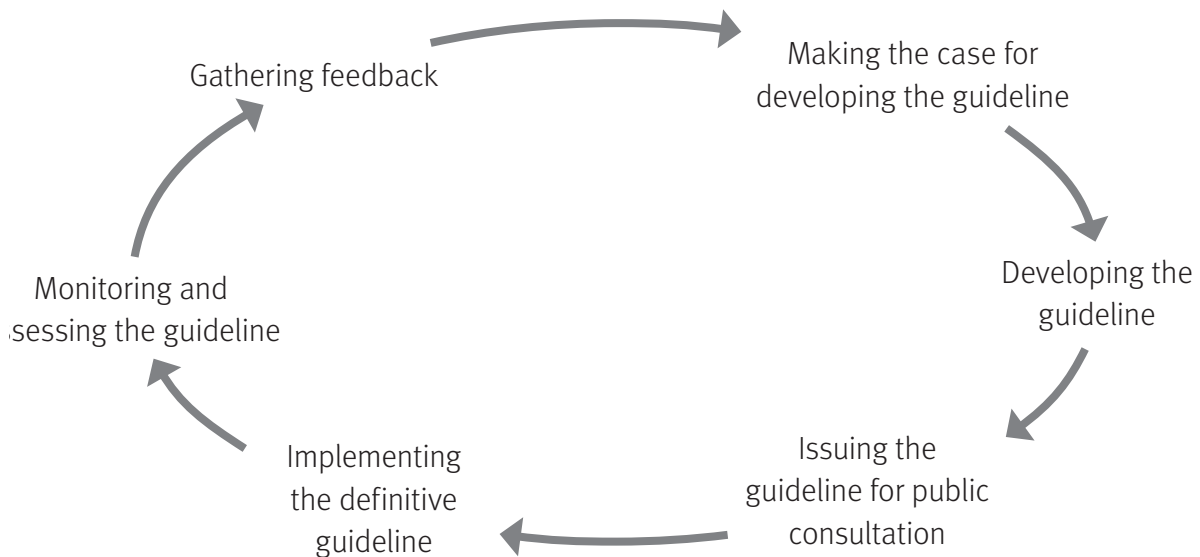
- preparing draft guidelines for consultation and publication, subject to approval from the Council;
- ensuring that the analytical obligations under the Act are met;
- providing legal advice to ensure that the Council exercises its functions in a legally sound manner;
- delivering communication activity to support the Council’s business; and
- providing efficient and accurate budget management, with an emphasis on value for money.

At 31 March 2018 there were 18 staff, including the Head of the Office of the Sentencing Council.

In the 2017 Civil Service Staff Engagement Survey, the OSC recorded a staff engagement index of 82 per cent. This places the Office well ahead of other arm’s-length bodies and high-performing units across the Civil Service.

## Guideline development

The diagram below sets out the process involved in developing a guideline, which is done through a guideline development cycle. This is based on the policy cycle set out by HM Treasury in the *Green Book on Appraisal and Evaluation in Central Government* (2003) and allows a culture of continuous improvement to be embedded in the development process. The process, from first consideration by the Council to publication of a definitive guideline, can extend to 18 months or more. However, if the Council believes there to be a pressing need, as in the case of the *Terrorism Offences* guideline (see p17), the process can be expedited.



## Appendix B: Membership of the Sentencing Council

The Lord Chief Justice of England and Wales, the Rt Hon Lord Justice Burnett, is President of the Council. In this role he oversees Council business and appoints judicial members, with the agreement of the Lord Chancellor.<sup>20</sup>

Lord Justice Treacy, a Court of Appeal judge, has been Chairman of the Sentencing Council since November 2013.

The Lord Chancellor and Secretary of State for Justice appoints non-judicial members, with the agreement of the Lord Chief Justice.

### Membership of the Council on 31 March 2018

Judicial members:

- The Right Honourable Lord Justice Treacy, appointed 6 April 2010, appointed as Chairman 4 November 2013
- Her Honour Judge Sarah Munro QC, appointed 6 April 2013
- The Right Honourable Lady Justice Hallett, appointed 27 November 2013
- The Honourable Mr Justice Goose QC, appointed 26 June 2014
- The Right Honourable Lord Justice Holroyde, appointed 6 April 2015
- Jill Gramann JP, appointed 6 April 2015

- The Honourable Mrs Justice McGowan, appointed 2 January 2017
- District Judge Rebecca Crane, appointed 1 April 2017

Non-judicial:

- Professor Julian Roberts, Professor of Criminology, University of Oxford, appointed 6 April 2010
- Alison Saunders, Director of Public Prosecutions and Head of the Crown Prosecution Service, appointed 1 November 2013
- Martin Graham, former Chief Executive of the Norfolk and Suffolk Community Rehabilitation Company, appointed 1 June 2015
- Mark Castle OBE, Chief Executive of Victim Support, appointed 1 August 2015
- Rosina Cottage QC, barrister, appointed 18 July 2016
- Chief Constable Simon Byrne QPM, Chief Constable, Cheshire Constabulary, appointed 1 September 2016

### Register of members' interests

At 31 March 2018, no member of the Council had any personal or business interests to declare.

<sup>20</sup> The Rt Hon Lord Justice Burnett was appointed the Lord Chief Justice from 2 October 2017, following the retirement of the Rt Hon The Lord Thomas of Cwmgiedd as Lord Chief Justice and President of the Sentencing Council.

Copies of this report are available at **[www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)**

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# CROWN COURT



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

**22 June 2018**  
**SC(18)JUN09 – Child Cruelty**  
**Maura McGowan**  
**Eleanor Nicholls**  
**020 7071 5799**

## **1 ISSUE**

1.1 This is the final consideration of the child cruelty guidelines prior to publication which is currently scheduled for early September. The Council is asked to review all the changes to the three guidelines which we have made post-consultation, including those made since the last meeting in May, and sign off the guidelines for publication.

## **2 RECOMMENDATION**

2.1 That the Council considers the changes to the three guidelines and signs them off for publication.

2.2 That the Council agrees the intended impact of each guideline on sentence levels and which will inform the resource assessment.

## **3 CONSIDERATION**

### *Cruelty to a Child – risk of sentence inflation*

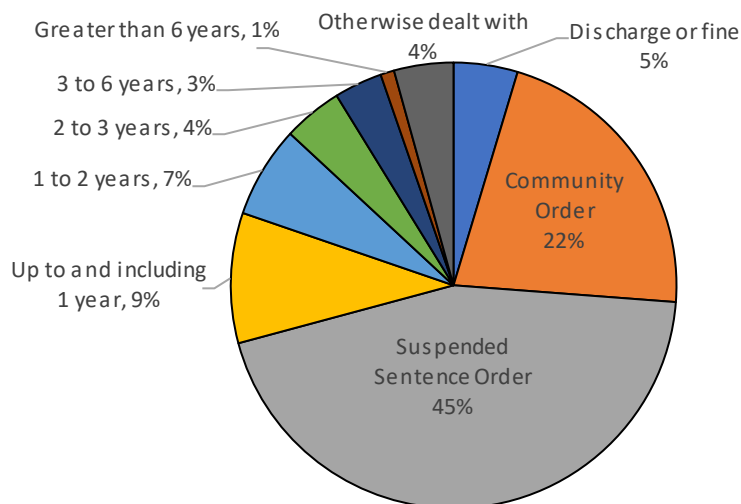
3.1 Since the last meeting, we have reviewed in more detail the 2017 sentencing data (which has only just become available) and compared it, with the data for previous years, against the sentence levels and culpability factors as currently drafted in the guidelines. For Child Cruelty, this has raised concerns and analysis may suggest that the combination of sentence levels and culpability/harm factors presents a significant risk of sentence inflation.

3.2 The current SGC guideline for this offence has four categories of seriousness, and some of the factors which we have in Culpability A are likely to occur in cases in the second category in the current guideline which has the following factors:

- |   |
|---|
| <ul style="list-style-type: none"><li>(i) Series of assaults (the more serious the individual assaults and the longer the period over which they are perpetrated, the more serious the offence).</li><li>(ii) Protracted neglect or ill-treatment (the longer the period of ill-treatment or neglect and the longer the period of which it takes place, the more serious the offence).</li><li>(iii) Failure to protect a child from either of the above.</li></ul> |
|---|

3.3 However, this second category has a starting point and ranges more similar to our B1 and A2 categories. The levels in the current guideline’s most serious category equates with our A1 category (starting point 6 years, range 4 to 8 years), and distribution of sentences (see chart below) shows that most current cases are sentenced below this, with the current guideline’s most serious category being used as a sort of “exceptional circumstances” category. This also fits with the transcripts we are seeing – there are very few cases where the culpability and harm are as high as indicated by an A1 sentence; this is likely to be because the most serious instances of culpability and harm are charged as assault offences, or as the Causing or Allowing offence. We should also remember that around 40% of these offences are sentenced in the magistrates’ courts, so the transcripts themselves will give us only a partial picture of the nature of these offences.

3.4 The distribution of post-guilty plea sentence types and lengths in 2017 is illustrated by this chart:



3.5 The sentence levels as currently drafted allow, in theory, for disposal types and sentence lengths within these sorts of ranges, by, for example, including Community Orders within 6 of the 9 ranges. However, the combination of sentence levels and culpability and harm factors do not push sentencers to keeping sentences at the current levels.

3.6 If we retain this starting point for A1, and do not change the culpability and harm factors, there is a significant risk that cases with a small number of the A1 factors present, which would now be placed in the second category of the current guideline and receive a sentence within the range of B1 or A2, will be placed in the new category A1 and thus receive considerably higher sentences.

3.7 As an example, in one transcript a child was subjected to multiple incidents of ill-treatment over a period of two years. These included hitting (involving significant force), name calling, and harsh and threatening treatment which might amount to gratuitous degradation. As well as some physical harm, the victim exhibited some initial symptoms of post-traumatic stress and depression, which improved after contact with the abuser ceased. The sentence given in this case was two years' custody (pre-guilty plea).

3.8 This level of ill treatment is at the higher end of that seen in the Cruelty to a Child transcripts, and the sentence is very comparable with others.

3.9 At the Council meeting in March when we discussed sentence levels, members were keen to retain the six-year starting point in category A1, in order to ensure that the most serious cases were covered, and to lower the range only slightly. Rather than proposing changes to sentence levels again, I am therefore proposing making changes to the culpability and harm factors to align more closely with current sentencing practice and mitigate the risk of sentence inflation. The proposed revisions are given at Annex D. The main change is to make culpability A the category which is more explicitly reserved for the exceptionally serious offences, using wording which you have agreed for the manslaughter guidelines. Culpability B now contains some of the previous culpability A factors, with wording changed slightly in some cases to make it clear that these are the less serious versions of the factors. Culpability C remains unchanged.

***Question One: Does the Council agree to the proposed changes to Culpability A and B set out at Annex D, pD2?***

3.10 I am also proposing to change the harm factors slightly, to make it more clear that Category 1 harm is likely to occur in only a small number of the most serious cases, and to bring the wording into line with that used in the Causing or Allowing serious injury offence. The Child Cruelty offence covers a very wide range of types of harm, including cases where there is no harm caused at all, and the very small number of cases in which the physical or psychological harm is as serious as in Causing or Allowing cases. In the majority of cases, the harm is at the lower end of the scale, as is clearly shown by the distribution of disposal types and sentence lengths. The risk with the previous drafting was that sentencers (who might see perhaps two of these cases per year, if that) would not consider what is serious in the context of this offence and would place, for example, low level injuries consistent with ABH, into Category 1 even though this is only in the third category of the current guideline with a starting point of 36 weeks. I am therefore proposing to bring into Category 1 harm some of the wording in the Causing or Allowing offence, to give further guidance as to just how serious the harm needs to be to justify such a sentence. I do not propose to include the Causing or Allowing

factors “Significantly reduced life expectancy” or “A progressive, permanent or irreversible condition” since these are very unlikely to be found in this offence and, if they were, would be grounds for going outside the guideline.

***Question Two: Does the Council agree to the proposed changes to wording for Category One harm as set out in Annex D, pD3***

3.11 Finally, to mitigate this risk of sentence inflation further I am proposing to include above the sentence levels the text which is currently used in the manslaughter guidelines to indicate that movement in either direction from the starting point can be considered before turning to aggravating and mitigating factors. The additional text would replace the current wording on moving upwards for cases of particular gravity and would read as follows:

Where a case does not fall squarely within a category, adjustment from the starting point may be required before adjustment for aggravating or mitigating features.  
~~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.~~

***Question Three: Does the Council agree to the proposed changes to wording in the text above the sentence levels, as set out in Annex D pD3?***

*Use of factors across guidelines*

3.12 Separate from the revisions proposed above, I have reviewed the culpability, harm, aggravating and mitigating factors in all three guidelines for consistency and a comparison table is given in Annex E. I have corrected minor inconsistencies in drafting (shown as struck through/underlined in the table) but do not propose to go through these individually. I am, however, also proposing some more substantial changes on which I seek Council’s views but I do not in general reconsider below areas where we have already agreed to the presence of a factor in one guideline but, for good reason, not in another.

*Use of a weapon – Cruelty to a Child offence*

3.13 “Use of a weapon” currently appears in the Cruelty to a Child offence as a Culpability A factor. Whilst this is consistent with the Causing or Allowing offence, transcripts show that where weapons are used in Cruelty to a Child cases, there are rarely (only in one in over 100 transcripts) considered as factor increasing culpability in this way. Unlike in Causing or Allowing cases, which sometimes involve sadistic and repeated use of a weapon, in Cruelty to a Child cases the weapon is usually a belt or shoe, used once or in a small number of instances, in cases of overchastisement by otherwise caring parents. Use of a weapon, unlike some other factors, is easy to identify and I am concerned that it may be seized upon and



used to place too many cases into Category A. I therefore propose to remove it from step one and instead include it as an aggravating factor at step two.

**Question Four: Is the Council content to move “Use of a weapon” from step one to step two in the Cruelty to a Child guideline?**

*High culpability – FGM Offence*

3.14 The factor at line 9 in the culpability table (Annex E pE1) is only used at step one in the FGM offence, as it is particularly relevant to this offence. However, the factor is used at step two (aggravating factor table, pE4, line 11) for the other offences as it is in many guidelines. There are some differences in the wording as follows:

**FGM guideline (at step one) -**

Failure to respond to interventions or warnings e.g. from medical professionals/social services etc

**Cruelty to a Child/Causing or Allowing guidelines (at step two) –**

Failure to respond to interventions or warnings about behaviour

3.15 When we discussed aggravating factors for the Cruelty to a Child/Causing or Allowing offences in March, we considered suggestions made by consultation respondents that we should give more examples of types of interventions, such as those made by medical professionals. We agreed not to include these examples, since it would narrow the applicability of the factor. I therefore propose to remove the examples from the FGM factor at step one, so it would now read:

Failure to respond to interventions or warnings

I do not propose to include the words “about behaviour” used in the Cruelty to a Child and Causing or Allowing guidelines, since the relevant warnings in this offence would relate specifically to the carrying out of FGM, rather than the more general “behaviour”.

**Question Five: Does the Council agree to removing the examples from this culpability factor as proposed?**

*Mitigating factors*

3.16 The mitigating factor at line 8 in the table on pE5 is only present for the FGM offence because it is included at step one for the other two offences. However, the wording here at step two includes the link to responsibility/culpability which is normally only given when this is used as a step one culpability factor. I therefore propose to remove this wording, so the factor would now read:

Age and/or lack of maturity

**Question Six: Is the Council content to remove the wording linking this factor to responsibility?**

3.17 The mitigating factor at line 9 in the table on pE5 covers mental disorder and learning disability (where not taken into account at step one). For the Cruelty to a Child and Causing or Allowing guidelines, I propose to include lack of maturity in this factor, since in these guidelines this is a factor at step one. The factor would therefore now read:

Mental disorder, ~~or~~ learning disability, or lack of maturity (where not taken into account at step one)

**Question Seven: Does the Council agree to add in reference to lack of maturity to this mitigating factor?**

3.18 At the last meeting you agreed the revised wording on good character set out at line 12 in the table on pE6. The related wording used in the draft overarching seriousness guideline is slightly different, as it includes reference to the good character being used to conceal the offence. Although the wording in the seriousness guideline may change post-consultation, I propose to add in this reference to be consistent as far as we can be at the moment.

**Question Eight: Is the Council content to add in this wording on concealing the offending, bearing in mind the potential for changes to the seriousness guideline post-consultation?**

*Step five – parental responsibilities*

3.19 After discussion at the last meeting, I circulated revised text for step five on parental responsibilities. Thank you to everyone for responding to my email. No further changes were suggested so I have included that text in the draft guidelines in Annexes A to D.

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

4.1 As discussed above, we believe that, in the Cruelty to a Child offence, the current culpability and harm factors present a significant risk of sentence inflation. An initial analysis suggests that the impact of this would, at the upper end of the estimated impact, be equivalent to 60 prison places. This is based on initial analysis which would feed into the resource assessment and, subject to normal quality assurance, this figure would be published in the resource assessment if the Council decides not to make any changes to these factors. Further to decisions taken today, we will produce the final resource assessment which will be circulated to Council members before publication in September.

**Annex A: revised draft guideline**

**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~~ 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 significant force
- Prolonged and/or multiple incidents of cruelty, including neglect
- 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
- Offender is vVictim 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.
- Use of some force or failure to protect the victim from an incident involving some 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.

Harm	Culpability		
	A	B	C
<b>Category 1</b>	<p><b>Starting point</b> 6 years' custody</p> <p><b>Category range</b> 4 – 8 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> High level community order</p> <p><b>Category range</b> Medium level community order – 1 year's custody</p>
<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> High level community order</p> <p><b>Category range</b> Medium 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 – 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:**

1. 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
2. Offence committed whilst on bail

**Other aggravating factors:**

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

**Factors reducing seriousness or reflecting personal mitigation**

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. 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
4. Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
5. Good character and/or exemplary conduct (where previous good character/exemplary conduct has been used to facilitate or conceal the offence, this should not normally constitute mitigation and such conduct may constitute aggravation)
6. Serious medical condition requiring urgent, intensive or long-term treatment
7. Mental disorder, ~~or~~ learning disability or lack of maturity (where not taken into account at step one)
8. 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 Child Cruelty cases the offender will have parental responsibility for the victim.

- When considering whether to impose 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 in the offender's care). 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.

- Where custody is unavoidable consideration of the impact on the offender's children may be relevant to the length of the sentence imposed. For more serious offences where a substantial period of custody is appropriate, this consideration will carry less weight.

**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.



## **Annex B: Revised draft guideline**

# **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 ~~to~~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 significant 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
- Offender is 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
- Use of some force or failure to protect the victim from an incident involving some 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>• Serious 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>• Serious physical harm that does not fall into Category 2</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>	<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> 3 years' custody  <b>Category range</b> 1 year 6 months' – 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> 3 years' custody  <b>Category range</b> 1 year 6 months' – 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:**

1. 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
2. Offence committed whilst on bail

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

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

### Factors reducing seriousness or reflecting personal mitigation

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. 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
4. Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
5. Good character and/or exemplary conduct (where previous good character/exemplary conduct has been used to facilitate or conceal the offence, this should not normally constitute mitigation and such conduct may constitute aggravation).
6. Serious medical condition requiring urgent, intensive or long-term treatment
7. Mental disorder, ~~or~~ learning disability or lack of maturity (where not taken into account at step one)
8. 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 Child Cruelty cases the offender will have parental responsibility for the victim.

- When considering whether to impose 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 in the offender's care). 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.

- Where custody is unavoidable consideration of the impact on the offender's children may be relevant to the length of the sentence imposed. For more serious offences where a substantial period of custody is appropriate, this consideration will carry less weight.

**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 the risk of 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: 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:

- Child was subject to an FGM Protection Order
- Failure to respond to interventions or warnings including, but not limited to, those from medical professionals/social services
- Involving others through coercion, intimidation or exploitation
- Failure to take any steps to protect the victim from the FGM offence

#### B - Medium culpability:

- Limited steps taken to protect victim from the FGM offence
- 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 victim ~~child~~ but fell just short of what could reasonably be expected
- Offender is 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.

#### Psychological harm

A finding that the psychological, 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 harm exists. It is important to be clear that the absence of such a finding does **not** imply that the harm suffered by the victim is minor or trivial.



## Annex C: Draft Guideline

<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Serious physical or psychological harm which has a substantial or long-term effect</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Harm which does not fall into Category 1</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>	<b>Starting point</b> 5 years' custody  <b>Category range</b> 3 – 6 years' custody	<b>Starting point</b> 3 years' custody  <b>Category range</b> 2– 4 years' custody	<b>Starting point</b> 1 year's custody  <b>Category range</b> High level community order – 3 years' custody
<b>Category 2</b>	<b>Starting point</b> 3 years' custody  <b>Category range</b> 2– 4 years' custody	<b>Starting point</b> 1 year's custody  <b>Category range</b> High level community order – 3 years' custody	<b>Starting point</b> High level community order  <b>Category range</b> Low level community order – 1 year's 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:*

## Annex C: Draft Guideline

1. 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
2. Offence committed whilst on bail

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

1. Failure to seek medical help when necessary
2. Deliberate concealment and/or covering up of the offence
3. Blame wrongly placed on others
4. Threats to prevent reporting of the offence
5. Failure to comply with current court orders (where not taken into account at step one)
6. Offence committed on licence or post sentence supervision
7. Offences taken into consideration

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

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. Offender particularly isolated with limited access to support
4. Appropriate medical care sought for victim
5. Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
6. Good character and/or exemplary conduct
7. Serious medical condition requiring urgent, intensive or long-term treatment
8. Age and/or lack of maturity ~~where it affects the responsibility of the offender~~
9. Mental disorder or learning disability (where not taken into account at step one)
10. 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 Child Cruelty cases the offender will have parental responsibility for the victim.

- When considering whether to impose 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 in the offender's care). 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.

- Where custody is unavoidable consideration of the impact on the offender's children may be relevant to the length of the sentence imposed. For more serious offences where a substantial period of custody is appropriate, this consideration will carry less weight.

### **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.

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## **Annex D: revised draft guideline**

# **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 – 8 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:**

High culpability may be indicated by:

- The extreme character of one or more culpability B factors and/or
- A combination of culpability factors
- ~~Prolonged and/or multiple incidents of serious cruelty, including serious neglect~~
- ~~Gratuitous degradation of victim and/or sadistic behaviour~~
- ~~Use of very significant force~~
- ~~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 significant force
- Prolonged and/or multiple incidents of cruelty, including neglect
- Deliberate disregard for the welfare of the victim
- Gratuitous degradation of victim and/or sadistic behaviour
- Offender with professional responsibility for the victim (where linked to the commission of the offence)
- No/Limited steps taken to protect victim in cases with one or more of the above 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
- Offender is vVictim of domestic abuse, including coercion and/or intimidation (when linked to the commission of the offence)
- Some sSteps 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.
- Use of some force or failure to protect the victim from an incident involving some 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 physical harm <u>which has a substantial and/or long term effect</u> (including illnesses contracted due to neglect)</li> <li>• Serious psychological, developmental <u>and/or</u> emotional harm <u>which has a substantial and/or long term effect</u></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.

Where a case does not fall squarely within a category, adjustment from the starting point may be required before adjustment for aggravating or mitigating features.

~~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>	<b>Starting point</b> 6 years' custody  <b>Category range</b> 4 – 8 years' custody	<b>Starting point</b> 3 years' custody  <b>Category range</b> 2 – 6 years' custody	<b>Starting point</b> 1 year's custody  <b>Category range</b> High level community order – 2 years 6 months' custody
<b>Category 2</b>	<b>Starting point</b> 3 years' custody  <b>Category range</b> 2 – 6 years' custody	<b>Starting point</b> 1 year's custody  <b>Category range</b> High level community order – 2 years 6 months' custody	<b>Starting point</b> High level community order  <b>Category range</b> Medium level community order – 1 year's custody
<b>Category 3</b>	<b>Starting point</b> 1 year's custody  <b>Category range</b> High level community order – 2 years 6 months' custody	<b>Starting point</b> High level community order  <b>Category range</b> Medium level community order – 1 year's custody	<b>Starting point</b> Medium level community order  <b>Category range</b> Low level community order – 6 months' 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:**

1. 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
2. Offence committed whilst on bail

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

1. Failure to seek medical help (where not taken into account at step one)
2. Commission of offence whilst under the influence of alcohol or drugs
3. Deliberate concealment and/or covering up of the offence
4. Use of a weapon
5. Blame wrongly placed on others
6. Failure to respond to interventions or warnings about behaviour



7. Threats to prevent reporting of the offence
8. Failure to comply with current court orders
9. Offence committed on licence or post sentence supervision
10. Offences taken into consideration
11. Offence committed in the presence of another child

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

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. 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
4. Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
5. Good character and/or exemplary conduct (where previous good character/exemplary conduct has been used to facilitate or conceal the offence, this should not normally constitute mitigation and such conduct may constitute aggravation)
6. Serious medical condition requiring urgent, intensive or long-term treatment
7. Mental disorder, ~~or~~ learning disability or lack of maturity (where not taken into account at step one)
8. 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 Child Cruelty cases the offender will have parental responsibility for the victim.

- When considering whether to impose 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 in the offender's care). 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.

- Where custody is unavoidable consideration of the impact on the offender's children may be relevant to the length of the sentence imposed. For more serious offences where a substantial period of custody is appropriate, this consideration will carry less weight.

#### **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.

## Annex E - Child Cruelty Comparison of Factors

### Culpability

	<b>Cruelty to a Child</b>	<b>Causing or Allowing</b>	<b>FGM Offence</b>
<b>1</b>	Prolonged and/or multiple incidents of serious cruelty, including serious neglect	Prolonged and/or multiple incidents of serious cruelty, including serious neglect	
<b>2</b>	Gratuitous degradation of victim and/or sadistic behaviour	Gratuitous degradation of victim and/or sadistic behaviour	
<b>3</b>	Use of very significant force	Use of very significant force	
<b>4</b>	<del>Use of a weapon</del>	Use of a weapon	
<b>5</b>	<del>Blatant and</del> Deliberate disregard to the welfare of the victim	Deliberate disregard to the welfare of the victim	
<b>6</b>	Failure to take any steps to protect the victim from offences in which the above factors are present	Failure to take any steps to protect the victim from offences in which the above factors are present	Failure to take any steps to protect the victim from the FGM offence
<b>7</b>	Offender with professional responsibility for the victim (where linked to the commission of the offence)	Offender with professional responsibility for the victim (where linked to the commission of the offence)	
<b>8</b>			Child was subject to an FGM Protection Order
<b>9</b>			Failure to respond to interventions or warnings e.g. from medical professionals/social services etc
<b>10</b>			Involving others through coercion, intimidation or exploitation
<b>11</b>	Use of significant force	Use of significant force	
<b>12</b>	Limited steps taken to protect victim in cases with Category A factors present	Limited steps taken to protect victim in cases with Category A factors present	Limited steps taken to protect victim from the FGM offence

<b>13</b>	Other cases falling between A and C because: <ul style="list-style-type: none"> <li>• Factors in both high and lesser categories are present which balance each other out; and/or</li> <li>• The offender's culpability falls between the factors as described in high and lesser culpability</li> </ul>	Other cases falling between A and C because: <ul style="list-style-type: none"> <li>• Factors in both high and lesser categories are present which balance each other out; and/or</li> <li>• The offender's culpability falls between the factors as described in high and lesser culpability</li> </ul>	Other cases falling between A and C because: <ul style="list-style-type: none"> <li>• Factors in both high and lesser categories are present which balance each other out and/or</li> <li>• The offender's culpability falls between the factors as described in high and lesser culpability</li> </ul>
<b>14</b>	Steps taken to protect victim but fell just short of what could reasonably be expected	Steps taken to protect victim but fell just short of what could reasonably be expected	Steps taken to protect <del>child</del> <u>victim</u> but fell just short of what could reasonably be expected
<b>15</b>	Momentary or brief lapse in judgement including in cases of neglect.	Momentary or brief lapse in judgement	
<b>16</b>	Use of some force or failure to protect the victim from an incident involving some force.	Use of some force or failure to protect the victim from an incident involving some force	
<b>17</b>	Low level of neglect	Low level of neglect	
<b>18</b>	<u>Offender is <del>v</del>ictim</u> of domestic abuse, including coercion and/or intimidation (when linked to the commission of the offence)	<u>Offender is <del>v</del>ictim</u> of domestic abuse, including coercion and/or intimidation (when linked to the commission of the offence)	Offender is <u>victim</u> of domestic abuse (where linked to commission of the offence)
<b>19</b>			Subjected to coercion, intimidation or exploitation ( <u>where linked to the commission of the offence</u> )
<b>20</b>	Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity	Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity	Offender's responsibility substantially reduced by mental disorder or learning disability

## Harm

	<b>Cruelty to a Child</b>	<b>Causing or Allowing</b>	<b>FGM Offence</b>
<b>1</b>		Death	
<b>2</b>	Serious psychological, developmental, and/or emotional harm	Serious physical harm which has a substantial and/or long term effect	Serious physical or psychological harm which has a substantial and/or long term effect
<b>3</b>	Serious physical harm (including illnesses contracted due to neglect)	Serious psychological, developmental or emotional harm	
<b>4</b>		Significantly reduced life expectancy	
<b>5</b>		A progressive, permanent or irreversible condition	
<b>6</b>	Cases falling between category 1 and 3		
<b>7</b>	A high likelihood of category 1 harm being caused		
<b>8</b>	Little or no psychological, developmental, and/or emotional harm		
<b>9</b>	Little or no physical harm		
<b>10</b>		Serious physical harm that does not fall into Category 2	Harm which does not fall into Category 1

## Aggravating Factors

	<b>Cruelty to a Child</b>	<b>Causing or Allowing</b>	<b>FGM Offence</b>
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 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 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
2	Offence committed whilst on bail	Offence committed whilst on bail	Offence committed whilst on bail
3	Failure to seek medical help (where not taken into account at step one)	Failure to seek medical help (where not taken into account at step one)	Failure to seek medical help when necessary
4	Deliberate concealment and/or covering up of the offence	Deliberate concealment and/or covering up of the offence	Deliberate concealment and/or covering up of the offence
5	Blame wrongly placed on others	Blame wrongly placed on others	Blame wrongly placed on others
6	Threats to prevent reporting of the offence	Threats to prevent reporting of the offence	Threats to prevent reporting of the offence
7	Failure to comply with current court orders	Failure to comply with current court orders	Failure to comply with current court orders (where not taken into account at step one)
8	Offence committed on licence or post sentence supervision	Offence committed on licence or post sentence supervision	Offence committed on licence or post sentence supervision
9	Offences taken into consideration	Offences taken into consideration	Offences taken into consideration
10	Commission of offence whilst under the influence of alcohol or drugs	Commission of offence whilst under the influence of alcohol or drugs	
11	Failure to respond to interventions or warnings about behaviour	Failure to respond to interventions or warnings about behaviour	
12	Offence committed in the presence of another child	Offence committed in the presence of another child	
13		Prolonged suffering prior to death	
14	Use of a weapon		

**Mitigating Factors**

	<b>Cruelty to a Child</b>	<b>Causing or Allowing</b>	<b>FGM Offence</b>
1	No previous convictions <b>or</b> no relevant/recent convictions	No previous convictions <b>or</b> no relevant/recent convictions	No previous convictions <b>or</b> no relevant/recent convictions
2	Remorse	Remorse	Remorse
3			Offender particularly isolated with limited access to support
4			Appropriate medical care sought for victim
5	Sole or primary carer for dependent relatives ( <b>see step five for further guidance on parental responsibilities</b> )	Sole or primary carer for dependent relatives ( <b>see step five for further guidance on parental responsibilities</b> )	Sole or primary carer for dependent relatives ( <b>see step five for further guidance on parental responsibilities</b> )
6			Commission of the offence was a lapse in the offender's otherwise satisfactory/good standard of care.
7	Serious medical condition requiring urgent, intensive or long-term treatment	Serious medical condition requiring urgent, intensive or long-term treatment	Serious medical condition requiring urgent, intensive or long-term treatment
8			Age and/or lack of maturity <del>where it affects the responsibility of the offender</del>
9	Mental disorder, <del>or</del> learning disability, <u>or lack of maturity</u> (where not taken into account at step one)	Mental disorder, <del>or</del> learning disability, <u>or lack of maturity</u> (where not taken into account at step one)	Mental disorder or learning disability (where not taken into account at step one)
10	Co-operation with the investigation	Co-operation with the investigation	Co-operation with the investigation
11	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	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	

12	Good character and/or exemplary conduct (where previous good character/exemplary conduct has been used to facilitate <u>or conceal</u> the offence, this should not normally constitute mitigation and such conduct may constitute aggravation)	Good character and/or exemplary conduct (where previous good character/exemplary conduct has been used to facilitate <u>or conceal</u> the offence, this should not normally constitute mitigation and such conduct may constitute aggravation)	
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