

Annex B

Criminal Damage/Arson with Intent to Endanger Life or Reckless as to Whether Life Endangered: Road testing with Crown Court judges

Introduction

Twelve interviews were conducted with Crown Court judges to test the *Criminal Damage/Arson with Intent to Endanger Life or Reckless as to Whether Life Endangered* draft guideline. These interviews were conducted either by telephone or face to face with judges across England and Wales. Each judge considered two scenarios (as summarised below)¹, sentencing the scenarios as if they were in court today (without the draft guideline) and then sentencing using the draft guideline. The research has provided valuable information on how the guideline might work in practice to support development of the Arson and Criminal Damage Guideline. However, there are limitations to the work², and as a result the research findings presented below should be regarded as **indicative** only and not conclusive.

Scenario	Summary of scenario
1 – arson with intent	P took off her jumper, set light to it, and pushed it through the letter box. She and the friend, who had left the scene and then returned, both then walked away. Children were in the house, P was aware of this.
1A – arson with intent	P was caught on CCTV setting alight rubbish he had piled against the fire exit of a crowded pub, using matches. This was the second time he had set fire to the same pub, he had previously done so in 2004. The fire was spotted in its early stages by a member of pub staff who put the fire out using a fire extinguisher.
2 - reckless	W, aged 30 had been drinking all day. On his way home in the afternoon he passed by a house in which a number of students lived. He took out a bag of rubbish from a wheelie bin, placed it outside the door of the property, and set it alight with matches he had in his pocket. He then left. The fire did not really take hold partly as the material in the bag was not particularly flammable, and partly as one of the students came and put the fire out.
2A – reckless	H, aged 28 shared a caravan with another man, they both lived and worked on a poultry farm. The pair had been drinking in a group earlier in the day, and had a disagreement about some beer that had gone missing. The victim was asleep in bed in the caravan in the early hours when H set fire to his empty bed, using an aerosol and a lighter. The victim awoke to thick black smoke and flames, and had to escape the caravan through a small window, dressed only in his boxer shorts, dropping to gravel below. A neighbour saw the flames and called the emergency services, but the fire had spread to two other caravans.

¹ The scenarios consisted of shortened versions of two reckless cases and two intent cases at varying levels of seriousness. Each scenario was sentenced by six judges.

² Limitations include: this is a small sample which is not necessarily representative; the guidelines were out for consultation at the time of the research which means judges may have seen the guideline before this exercise (biasing the 'pre-guideline' sentence); and the scenarios only include limited detail of the actual case, which makes comparison with the sentence given by the judge in the actual case difficult.

Key Points

- Most judges see arson with intent to endanger life/reckless as to whether life is endangered cases a few times a year, and reported that these frequently involve an offender with mental health difficulties. 'Reckless' offences are reported as more common than 'with intent'. Criminal damage with intent or reckless as to whether life is endangered is rarely seen in the Crown Court.
- The guideline road tested well and judges found it clear and easy to use. For the most part, scenarios were sentenced consistently across judges, and the hypothetical sentences judges gave under the new draft guideline were largely consistent with the sentence they gave 'as if it came before them today'. There was no indication that the guideline would raise sentencing levels.
- Three small issues were raised, which the Council may wish to consider:
 - When sentencing one of the 'reckless' scenarios, several judges observed that the starting point under culpability B felt a little low, insufficiently reflecting the dangerousness of an offence where a life has been endangered by something as unpredictable as a fire. Moreover, in another 'reckless' scenario, a few judges gave a lower sentence under the new draft guideline than their current sentence. This may suggest an appetite for slightly increasing the starting point sentences for culpability B ('reckless' offences).
 - Although judges were generally happy with the aggravating and mitigating section, several felt that a number of aggravating factors (e.g. multiple people endangered) would be considered when determining the harm category and a flag to remind judges not to double count would be beneficial. Council may wish to add a line on double counting into the aggravating and mitigating factors section of the guideline.
 - Currently there is no aggravating factor that increases the seriousness of an offence in which victims are not able to get away from the fire easily, for example because the main exits are blocked. Several judges felt that if fire exits or main exits are blocked, this is an important aggravating factor.

Sentence Levels, Consistency, Starting Points and Ranges

- In all four scenarios, the vast majority of judges categorised the culpability consistently and as expected by policy. This shows that judges understand that the culpability section is determined by the charging of the offence. Categorisation of harm was fairly consistent across judges and concurred with the expectations of policy, with one exception: in one scenario (the most serious 'intent' case – 1A), there was some tendency to categorise risk of harm at a lower level than expected.
- The road testing suggests that the draft guideline is unlikely to increase sentencing for criminal damage/arson with intent to endanger life or reckless as to whether life endangered offence. Across multiple scenarios and multiple judges, there were only two instances where judges gave a higher sentence (by one year) using the draft guideline than the sentence they would give under current practice.
- For criminal damage/arson with intent (those offences going into culpability A) most sentences stayed the same when judges sentenced as they would 'as if it came before them today' and then using the new guideline.
- For reckless criminal damage/arson offences (those offences going into culpability B) whilst most sentences stayed the same, some sentences were lower using the draft guideline (between 1.5 to 5 years' decrease). Some of the judges who gave lower sentences using the draft guideline for scenario 2 (culpability B, category 3 – students' house) felt that these sentences were too low. The road testing identified two main reasons why these sentences were perceived as low:
 - Firstly, these judges felt that regardless of whether it had been reckless, a life had been endangered and the sentence needed to reflect this. All of these judges gave a sentence of below two years on this scenario with the draft guideline and some judges did not deem this appropriate: *"This is too low for a case that recklessly puts lives in danger, this does not feel right"*.
 - Secondly, some judges felt that due to the unpredictable nature of fire there is always a high risk of harm as the offender does not know the extent of the damage that the fire will cause. Again, they felt this needed to be reflected in the sentence: *"Fire is unpredictable. So, if you set any fire however minor in circumstances where you are guilty of recklessness as to whether life is*

endangered, if you come into contact with it, then there's a significant risk of serious harm”.

- At the higher harm level in culpability B (scenario 2A, caravan) the guideline took some judges to an appreciably lighter sentence than they had reached without the guideline, inferring that sentence levels at the higher harm levels may be a little light as well.

Views on Culpability

- Most judges were happy with the culpability step, words such as *clear*, *simple* and *sensible* were used to describe the structure. Judges were particularly keen on the simplicity of the culpability section and some judges suggested that there would not be another way of structuring it appropriately.
- For a couple of judges at first, they felt that the culpability section did not allow for a determination of seriousness (further than just distinguishing between reckless and intent offences). They felt that the factors included in the aggravating factors section which were used to potentially increase the seriousness of the offence were too important to be just aggravating factors and should be included in the culpability section of the guideline. This was no longer an issue when they realised that the seriousness of the case would largely be decided in the harm section.

Views on Harm

- There was a general recognition of difficulty when assessing risk due to the unpredictable nature of fire, and the offender not knowing the level of harm they could end up causing. That being said, the scenarios found that judges were generally comfortable with placing the offender in harm categories and were able to use the facts in the scenario to justify this placement.
- Several judges suggested that the ‘serious consequential economic or social impact of offence caused’ and ‘value of damage caused’ factors need more context to clarify their meaning and to ensure that ‘value of damage caused’ is known by judges to be relative to the individual/company.
- A few other observations were made:
 - One judge queried why the word ‘very’ is included in category 1 (very serious physical and psychological harm caused and very high value of damage caused) when it is not referred to in category 2.
 - One judge felt that ‘some’ risk was not covered in the three categories (very serious, significant, no or minimal)

- One judge felt that category 3 was an oxymoron because if there is an endangerment of life then it will not get into category 3 as low risk.

Views on Aggravating and Mitigating Factors

Judges were generally happy with the aggravating and mitigating section. There were the following observations:

- A few judges mentioned that previous convictions for arson were more relevant than other offences, even a historical conviction. One judge suggested making it clearer in the guideline that previous convictions for arson are of particular relevance, regardless of the time passed.
- Some of the judges considered 'victim is particularly vulnerable' to be applicable for a victim sleeping. One judge suggested that referring to a sleeping victim as 'vulnerable' could cause some issues in court but as it is an important factor this could be added to the list separately.
- When judges were asked to consider important factors in each scenario without the draft guideline a few judges referred to the ability of the victim to get away from the fire if the key entry/exit to the premises was obstructed and how this would aggravate the sentence, *"Outside the door so main point of exit or entrance potentially blocked"*.
- Several judges highlighted the risk of double counting with this guideline. Judges felt that a number of aggravating factors (e.g. multiple people endangered) would be considered when determining the harm category and a flag to remind judges not to double count would be beneficial *"I just think that it needs a note of caution, some factors which would determine the risk of serious harm may be factors which are aggravating features, be careful not to use them twice"*. Council may wish to add a line on double counting into the aggravating and mitigating section of the guideline.
- Other suggestions for aggravating and mitigating factors were³: lack of premeditation (mitigating), offender calls emergency services (mitigating), committed in the context of public order (aggravating), children being present (aggravating), danger to firefighters specifically (aggravating) and financial gain (aggravating).

³ These were mentioned by one judge only.

Other points

- Judges were supportive of the 'in exceptional cases within category 1A' text that sits above the starting point table.
- Judges were also supportive of the mental health disposal step, stating that it was very helpful and relevant for the offence. Some judges queried the details in this step (especially around ordering of the different disposals) and this is being looked at again by policy.
- Of the judges that expressed an opinion it was generally felt that there would not be any issues by having arson and criminal damage in the same guideline.