

Section six: Section 4, Section 4A and Section 5 Public Order offences

These are summary offences providing for a range of disorderly behaviour. There is existing guidance within the MCSG for sentencing these offences. These include examples of activity and require an assessment of conduct to assess the seriousness of the offence, rather than assessing harm and culpability separately. The draft guidelines developed adopt the standard Sentencing Council guideline approach, assessing individual culpability and harm factors. There is significant overlap between the offences in relation to the type of conduct required to constitute an offence.

Due to the similarity between offences the factors included are very similar. Each draft guideline is discussed in detail below, and factors, sentence levels and the approach to sentencing in each guideline discussed and outlined.

Racially and religiously aggravated offences

Each offence has a racially or religiously aggravated counterpart, provided for by section 31 Crime and Disorder Act 1998. Section 31 provides:

- (1) A person is guilty of an offence under this section if he commits—
 - (a) an offence under section 4 of the Public Order Act 1986 (fear or provocation of violence);
 - (b) an offence under section 4A of that Act (intentional harassment, alarm or distress); or
 - (c) an offence under section 5 of that Act (harassment, alarm or distress),

which is racially or religiously aggravated for the purposes of this section.
- (4) A person guilty of an offence falling within subsection (1)(a) or (b) above shall be liable —
 - (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.
- (5) A person guilty of an offence falling within subsection (1)(c) above shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale.

The proposed guidelines include additional guidance at step two for assessing the seriousness of and sentencing racially aggravated offences. The approach requires the sentencer to first identify the category of the basic offence, and then tailor the sentence depending on the level of aggravation present. Due to differing statutory maximum sentences for basic and aggravated offences, the guidelines for these offences include separate sentence tables or guidance on applying an uplift to reflect the level of aggravation. Further detail is provided in the summary of each guideline.

SECTION 4

Threatening Behaviour – fear or provocation of violence

Section 4(1) of the Public Order Act provides that a person is guilty of this offence if he —

- uses towards another person threatening, abusive or insulting words or behaviour, or
- distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,

with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

A person found guilty of the basic offence under this section is liable on summary conviction in the magistrates' court to a term not exceeding 26 weeks. In 2016, 6,500 offenders were sentenced for this offence. A person guilty of a racially or religiously aggravated offence is liable to a maximum of two years' imprisonment in the Crown Court and 26 weeks' in the magistrates' court. In 2016, 580 offenders were sentenced for the aggravated offence.

There is existing guidance in the MCSG for this offence. These include examples of the type of activity and require an assessment of conduct to assess the seriousness of the offence, rather than assessing harm and culpability separately. The draft guidelines developed adopt the standard Sentencing Council guideline approach, assessing individual culpability and harm factors.

STEP ONE

The first step of the guideline is to consider the culpability level of the offender and the harm caused by the offence by the assessment of a series of factors.

It is proposed that culpability be limited to two levels: one listing factors that indicate higher levels of culpability and a lower culpability category that would capture all other cases. Analysis of a limited number of cases did not identify a range of behaviour providing for three categories of culpability.

Culpability demonstrated by one or more of the following

A – High culpability

- Targeting of individual(s) by a group
- Intention to cause fear of serious violence
- Sustained incident
- Use of substantial force
- Production of weapon
- Missile thrown

B – Lesser culpability

- All other cases

High culpability factors

The Council considers that the presence of the factors listed indicate higher culpability of an offender. For a section 4 offence to be committed it is necessary for the offender to intend to cause a person to believe that immediate unlawful violence will be used, therefore the factor '*intention to cause fear of serious violence*' is proposed. Presence of this factor would be established by considering the nature and level of the threat. Where individuals are targeted by a group, this will always make the offence more serious, so this factor is included at culpability A. The other factors listed are factors which were present in cases analysed and are all considered to imply a higher level of intention to threaten or provoke violence. The existing MCSG guidance for this offence includes a

factor for the most serious activity which includes ‘*use of weapon*’ and ‘*missile thrown*’. The Council also considers that a sustained incident or an incident involving the use of substantial force would increase the culpability of an offender.

The Council is consulting on these factors and seek views on whether there are any other factors which indicate a higher level of culpability in an offence.

Lesser culpability

This category will capture offences where the factors proposed in category 1 are not present. The Council considers this will enable a straightforward and proportionate assessment of culpability, but seek views on whether the factors and approach are suitable.

Q17

Do you agree with the proposed approach to the assessment of culpability? Please give reasons where you do not agree.

Harm factors

Once the court has determined the level of culpability the next step is to consider the harm caused or intended to be caused by the offence.

As for culpability, two levels of harm are proposed:

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.

Category 1

- Victim feared serious violence
- Fear of immediate violence caused to multiple persons present
- Incident escalated into violence

Category 2

- All other cases

Harm category 1 factors

These factors are considered to represent the highest level of harm which would be present in an offence of threatening or provoking violence. The factor ‘*victim feared serious violence*’ would be inferred from the conduct of the offender. For example an offender in very close proximity to another wielding an object in a threatening manner would be captured by this category. Fear of immediate violence to multiple persons captures the increased harm caused when multiple persons are present during an offence, for example, serious threats made to a number of people in a busy street. Incidents that escalate into violence from a threat would also result in a greater degree of harm. The Council is consulting on these factors and seek views on whether there are any other factors which indicate a higher level of harm in an offence.

Harm category 2 factors

This captures offences where factors specified in category 1 are not present.

Q18

Do you agree with the proposed approach to the assessment of harm? Please give reasons where you do not agree.

STEP TWO

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point of the sentence.

Sentence levels

The starting points and ranges have been based on statistical data from the Court Proceedings Database and a limited analysis of first-instance transcripts as few were available due to this being a summary only offence. Reference to the ranges within the common assault guideline (which is a comparable offence) and section 4A offences has also been observed, to ensure relativity of sentences, subject to differences in the substance of the offences.

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.

| Harm | Culpability | |
|------------|--|---|
| | A | B |
| Category 1 | Starting point 12 weeks' custody | Starting point High level community order |
| | Category range Medium level community order – 26 weeks' custody | Category range Band C fine – 12 weeks' custody |
| Category 2 | Starting point High level community order | Starting point Low level community order |
| | Category range Band C fine – 12 weeks' custody | Category range Discharge – Medium level community order |

Q19

Do you have any comments on the sentence ranges and starting points?

Racially aggravated section 4 offences

The guideline then goes on to address racially aggravated offences. The Council did consider developing separate guidelines for aggravated offences, but it was not possible to develop a model that enabled each element of the offence to be adequately provided for. For example, an offence may involve low level threats of violence that do not cause a victim a high degree of fear, but a high level of racial aggravation may be present which is deeply upsetting for the victim.

The seriousness of the basic offence and the appropriate basic offence category is therefore assessed at step one, with the aggravated elements assessed at step two. Once the level of aggravation is identified, a separate sentence table is included to identify the appropriate starting point and sentence range;

RACIALLY OR RELIGIOUSLY AGGRAVATED OFFENCES ONLY

Maximum sentence for the aggravated offence on indictment is 2 years' custody (maximum when tried summarily is a level 5 fine and/or 6 months)

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

HIGH LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION

- Racial or religious aggravation was the predominant motivation for the offence
- Offender was a member of, or was associated with, a group promoting hostility based on race or religion (where linked to the commission of the offence)
- Aggravated nature of the offence caused severe distress to the victim or the victim's family (over and above the distress already considered at step one)
- Aggravated nature of the offence caused serious fear and distress throughout local community or more widely

MEDIUM LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION

- Racial or religious aggravation formed a significant proportion of the offence as a whole
- Aggravated nature of the offence caused some distress to the victim or the victim's family (over and above the distress already considered at step one)
- Aggravated nature of the offence caused some fear and distress throughout local community or more widely

LOW LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION

- Aggravated element formed a minimal part of the offence as a whole
- Aggravated nature of the offence caused minimal or no distress to the victim or the victim's family (over and above the distress already considered at step one)

Q20

Do you agree with the approach to assessing the level of aggravation present in an offence?

Once the court has considered these factors and any other such factors it considers relevant, the court should sentence according to the relevant category in the table below:

| Basic Offence Category | Level of Racial/Religious Aggravation | | |
|------------------------|---|---|---|
| | High | Medium | Low |
| A1 | Starting point 36 weeks' custody | Starting point 26 weeks' custody | Starting point 16 weeks' custody |
| | Category range 16 weeks' – 1 year 6 months' custody | Category range 6 weeks' – 1 year's custody | Category range High level community order – 36 weeks' custody |
| A2 or B1 | Starting point 12 weeks' custody | Starting point 6 weeks' custody | Starting point High level community order |
| | Category range 6 weeks' – 1 year's custody | Category range Medium level community order – 26 weeks' custody | Category range Low level community order – 16 weeks' custody |
| B2 | Starting point 6 weeks' custody | Starting point High level community order | Starting point Medium level community order |
| | Category range High level community order – 26 weeks' custody | Category range Low level community order – 12 weeks' custody | Category range Band C fine – High level community order |

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

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

The starting points and ranges have been based on statistical data from the Court Proceedings Database and a limited analysis of first-instance transcripts. The sentences are intended to be proportionate and relative to substantive offence sentences.

Q21

Do you agree with the sentence levels and ranges for the aggravated offence, and the inclusion of a separate sentencing table?

The court should then consider any additional factors, not identified at step one or the first stage of step two, which may aggravate or mitigate the offence.

These factors are included to give the court the opportunity to consider the wider context of the offence and any relevant circumstances relating to the offender. It is at the court's discretion whether to remain at the starting point or to move up or down from it. The presence of any of the factors included within the list does not mean it must be taken into account if the sentencer does not consider it to be significant in the particular case. The court will need to attribute appropriate weight to the factors.

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

Factors increasing seriousness

Statutory aggravating factors:

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

Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or transgender identity

Offence committed whilst on bail

'Previous convictions', 'Offence motivated by or demonstrating hostility based on characteristics' and 'offence committed whilst on bail' are factors which the court is required by statute to consider when assessing the seriousness of an offence and their inclusion is therefore not subject to consultation. As with previous guidelines issued by the Council, these factors are considered at step two after the starting point has been established.

The following factors are standard aggravating factors that have been included in other definitive guidelines and which are self explanatory. They are not subject to consultation:

Offence committed whilst on licence or subject to post sentence supervision

History of failure to comply with court orders

Commission of offence whilst under the influence of alcohol or drugs

Other aggravating factors:

Planning

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

Leading role where offending is part of group activity

Vulnerable persons or children present

Victim is targeted due to a vulnerability (or a perceived vulnerability) where not already taken into account in considering racial or religious aggravation

History of antagonising the victim

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

Other factors included are considered to be factors which increase the seriousness of a section 4 offence. Particular consideration was given to the factor *'commission of offence whilst under the influence of drink or drugs'*, which is a standard factor included in guidelines. Analysis of cases found that this factor often mitigated the sentence as an offender may have behaved out of character whilst intoxicated. However, the Council takes the firm view that it would not be acceptable for the seriousness of behaviour in relation to this offence to be seen to be reduced due to intoxication. The public have a right to be protected from such behaviour. It would be more appropriate for the court to consider whether the mitigating factor of good character and/or exemplary conduct apply where it is demonstrated an offender behaved out of character.

The Council also considers that it is important that the offence is aggravated where offending is directed towards vulnerable persons and those providing a service to the public.

| Factors reducing seriousness or reflecting personal mitigation |
|---|
| Minimal/peripheral role where offending is part of group activity |
| No previous convictions or no relevant/recent convictions |
| Remorse |
| Good character and/or exemplary conduct |
| Age and/or lack of maturity where it affects the responsibility of the offender |
| Mental disorder or learning disability where linked to commission of offence |
| Sole or primary carer for dependent relatives |

Many of the mitigating factors are standard factors included within guidelines. The only non-standard factor identified as relevant is '*minor/peripheral role in group activity*'.

Q22

Do you agree with the aggravating and mitigating factors? Please state which, if any, should be removed or added.

Q23

Do you have any other comments on the structure and content of the draft guideline?

SECTION 4A

Disorderly behaviour with intent to cause harassment, alarm or distress

A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he —

- (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
- (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress.

A person guilty of an offence under this section is liable on summary conviction in the magistrates' court to imprisonment for a term not exceeding 26 weeks. In 2016, 3,200 offenders were sentenced for the basic offence. A person guilty of a racially or religiously aggravated offence is liable to a maximum of two years' imprisonment in the Crown Court and 6 months' in the magistrates' court. In 2016, 2,400 offenders were sentenced for the aggravated offence.

There is existing guidance in the MCSG for this offence. These include examples of the type of activity and require an assessment of conduct to assess the seriousness of the offence, rather than assessing harm and culpability separately. The draft guidelines developed adopt the standard Sentencing Council guideline approach, assessing individual culpability and harm factors.

STEP ONE

The first step of the guideline is to consider the culpability level of the offender and the harm caused by the offence by the assessment of a series of factors.

As for the more serious section 4 offence, it is proposed that culpability be limited to two levels: one listing factors that indicate higher levels of culpability and a lower culpability category that would capture all other cases.

Culpability demonstrated by one or more of the following:

A – High culpability

- Targeting of individual(s) by a group
- Sustained incident
- Use of substantial force
- Production of weapon
- Missile thrown

B – Lesser culpability

- All other cases

High culpability factors

With the exception of the factor *'intention to cause fear of serious violence'* the high culpability factors proposed are as for the section 4 offence of threatening or provoking violence.

The Council considers that parity of these factors is appropriate due to the similarity in the conduct required to make out a section 4 or a section 4A offence, with the same conduct required but a distinction in whether the intention is to cause fear or provocation of violence or to cause harassment, alarm or distress.

Existing MCSG guidance provides for a weapon being brandished or used for a section 4A offence, and a limited review of cases did identify the presence of weapons in a number of more serious offences; in one offence an offender jabbed a steel bar in the direction of the victim, while in another a car jack was wielded at the victim. While the factor *'missile thrown'* is not included in existing section 4A guidance, such behaviour could be as serious as producing a weapon and would likely cause a high level of alarm or distress.

The Council is consulting on the proposed factors and whether any factors should be added or removed.

Lesser culpability

This is a catch all category for offences not involving factors listed in culpability category A.

Q24

Do you agree with the proposed approach to the assessment of culpability? Please give reasons where you do not agree.

Harm factors

Once the court has determined the level of culpability the next step is to consider the harm caused or intended to be caused by the offence.

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.

Category 1

- Serious distress or alarm caused
- Distress or alarm caused to multiple persons present

Category 2

- All other cases

Harm category 1 factors

The proposed factors are self explanatory and are intended to reflect the most serious harm which could be caused or intended by this offence.

Harm category 2 factors

This is a catch all category and provides for cases where a lower level of harm is present in an offence.

Q25

Do you agree with the proposed approach to the assessment of harm? Please give reasons where you do not agree.

STEP TWO

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point of the sentence.

Sentence levels

The starting points and ranges have been based on statistical data from the Court Proceedings Database and a limited analysis of first-instance transcripts as few were available due to this being a summary only offence. Reference to the ranges within the section 4 and section 5 offences has also been observed, to ensure relativity within the limitations of the different statutory maximum sentences and the substance of the offences.

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 |
| Category 1 | Starting point High level community order | Starting point Low level community order |
| | Category range Medium level community order – 26 weeks' custody | Category range Band C fine – 12 weeks' custody |
| Category 2 | Starting point Low level community order | Starting point Band C fine |
| | Category range Band C fine – 12 weeks' custody | Category range Discharge – Low level community order |

Q26

Do you have any comments on the sentence ranges and starting points?

Racially aggravated section 4A offences

The guideline then goes on to address racially aggravated offences, using the same approach as for the section 4 offence explained at page 33.

The seriousness of the basic offence and the appropriate basic offence category is therefore assessed at step one, with the aggravated elements assessed at step two. Once the level of aggravation is identified, a separate sentence table is included to identify the appropriate starting point and sentence range.

RACIALLY OR RELIGIOUSLY AGGRAVATED OFFENCES ONLY

Maximum sentence for the aggravated offence on indictment is 2 years' custody (maximum when tried summarily is a level 5 fine and/or 6 months)

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

HIGH LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION

- Racial or religious aggravation was the predominant motivation for the offence
- Offender was a member of, or was associated with, a group promoting hostility based on race or religion (where linked to the commission of the offence)
- Aggravated nature of the offence caused severe distress to the victim or the victim's family (over and above the distress already considered at step one)
- Aggravated nature of the offence caused serious fear and distress throughout local community or more widely

MEDIUM LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION

- Racial or religious aggravation formed a significant proportion of the offence as a whole
- Aggravated nature of the offence caused some distress to the victim or the victim's family (over and above the distress already considered at step one)
- Aggravated nature of the offence caused some fear and distress throughout local community or more widely

LOW LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION

- Aggravated element formed a minimal part of the offence as a whole
- Aggravated nature of the offence caused minimal or no distress to the victim or the victim's family (over and above the distress already considered at step one)

Q27

Do you agree with the approach to assessing the level of aggravation present in an offence?

Once the court has considered these factors and any other such factors it considers relevant, the court should sentence according to the relevant category in the table below:

| Basic Offence Category | Level of Racial/Religious Aggravation | | |
|------------------------|---|---|---|
| | High | Medium | Low |
| A1 | Starting point 26 weeks' custody | Starting point 12 weeks' custody | Starting point 6 weeks' custody |
| | Category range 6 weeks' – 1 year 3 months' custody | Category range High level community order – 36 weeks' custody | Category range Medium level community order – 26 weeks' custody |
| A2 or B1 | Starting point 6 weeks' custody | Starting point High level community order | Starting point Medium level community order |
| | Category range High level community order – 36 weeks' custody | Category range Medium level community order – 26 weeks' custody | Category range Band C fine – 16 weeks' custody |
| B2 | Starting point High level community order | Starting point Medium level community order | Starting point Low level community order |
| | Category range Medium level community order – 12 weeks' custody | Category range Band C fine – 6 weeks' custody | Category range Band B fine – High level community order |

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

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

Q28

Do you agree with the sentence levels and ranges for the aggravated offence, and the inclusion of a separate sentencing table?

The court should then consider any additional factors, not identified at step one or the first stage of step two, which may aggravate or mitigate the offence.

These factors are included to give the court the opportunity to consider the wider context of the offence and any relevant circumstances relating to the offender. It is at the court's discretion whether to remain at the starting point or to move up or down from it. The presence of any of the factors included within the list does not mean it must be taken into account if the sentencer does not consider it to be significant in the particular case. The court will need to attribute appropriate weight to the factors.

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

Factors increasing seriousness

Statutory aggravating factors:

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

Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or transgender identity

Offence committed whilst on bail

'Previous convictions', 'Offence motivated by or demonstrating hostility based on characteristics' and 'offence committed whilst on bail' are factors which the court is required by statute to consider when assessing the seriousness of an offence and their inclusion is therefore not subject to consultation. As with previous guidelines issued by the Council, these factors are considered at step two after the starting point has been established

The following factors are standard aggravating factors that have been included in other definitive guidelines and which are self explanatory. They are not subject to consultation:

Offence committed whilst on licence or subject to post sentence supervision

History of failure to comply with court orders

Commission of offence whilst under the influence of alcohol or drugs

Other aggravating factors:

Planning

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

Leading role where offending is part of group activity

Vulnerable persons or children present

Victim is targeted due to a vulnerability (or a perceived vulnerability) where not already taken into account in considering racial or religious aggravation

History of antagonising the victim

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

Other factors included are considered to be factors which increase the seriousness of a section 4A offence. As for the section 4 offence, particular consideration was given to the factor *'commission of offence whilst under the influence of drink or drugs'* which is a standard factor included in guidelines. Analysis of cases found that this factor often mitigated the sentence as an offender may have behaved out of character whilst intoxicated. However, the Council takes the firm view that it would not be acceptable for the seriousness of behaviour in relation to this offence to be seen to be reduced due to intoxication. The public have a right to be protected from such behaviour by the courts. It would be more appropriate for the court to consider whether the mitigating factor of good character and/or exemplary conduct apply where it is demonstrated an offender behaved out of character.

The Council also considers that it is important that the offence is aggravated where offending is directed towards vulnerable persons and those providing a service to the public.

| Factors reducing seriousness or reflecting personal mitigation |
|---|
| Minor/peripheral role where offending is part of group activity |
| No previous convictions or no relevant/recent convictions |
| Remorse |
| Good character and/or exemplary conduct |
| Age and/or lack of maturity where it affects the responsibility of the offender |
| Mental disorder or learning disability where linked to commission of offence |
| Sole or primary carer for dependent relatives |

Many of the mitigating factors are standard factors included within guidelines. The only non-standard factor identified as relevant is '*minor/peripheral role in group activity*'.

Q29

Do you agree with the aggravating and mitigating factors? Please state which, if any, should be removed or added.

Q30

Do you have any other comments on the structure and content of the draft guideline?

SECTION 5

Disorderly behaviour causing or likely to cause harassment, alarm or distress

A person is guilty of this offence if he —

- (a) uses threatening or abusive words or behaviour, or disorderly behaviour, or
- (b) displays any writing, sign or other visible representation which is threatening or abusive, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale. In 2016, 5,100 offenders were sentenced for the basic offence. A person guilty of a racially or religiously aggravated offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale. In 2016, 1,400 offenders were sentenced for the aggravated offence.

There is existing guidance in the MCSG for this offence. These include examples of the type of activity and require an assessment of conduct to assess the seriousness of the offence, rather than assessing harm and culpability separately. The draft guidelines developed adopt the standard Sentencing Council guideline approach, assessing individual culpability and harm factors.

STEP ONE

The first step of the guideline is to consider the culpability level of the offender and the harm caused by the offence by the assessment of a series of factors.

As for the more serious section 4 and section 4A offences, it is proposed that culpability be limited to two levels: one listing factors that indicate higher levels of culpability and a lower culpability category that would capture all other cases.

Culpability demonstrated by one or more of the following:

| | |
|-------------------------------|---|
| A – High culpability | <ul style="list-style-type: none"> • Targeting of individual(s) by a group • Sustained incident • Use of force |
| B – Lesser culpability | <ul style="list-style-type: none"> • All other cases |

High culpability factors

The high culpability factors included for the section 5 offence are reflective of factors included for the section 4 and section 4A offence. ‘*Sustained incident*’ is included as for the other offences, to recognise higher culpability on the part of an offender where the duration of the incident is long lasting. Such incidents are provided for in the existing MCSG guidance by the activity ‘*substantial disturbance caused*’ and an aggravating factor of ‘*lengthy incident*’; ‘*sustained incident*’ is intended to encapsulate both these factors.

The threshold of use of force as a factor in this offence is lower than the ‘substantial’ force required to illustrate high culpability in a section 4 or section 4A offence. This is because as this offence does not require intent but only a likelihood that harassment, alarm or distress would be caused, it is considered that any use of force would increase that likelihood and the culpability of an offender. The Council is consulting on the proposed factors and whether any factors should be added or removed.

Lesser culpability

This is a catch all category for offences not involving factors listed in culpability category A.

Q31

Do you agree with the proposed approach to the assessment of culpability? Please give reasons where you do not agree.

Harm factors

Once the court has determined the level of culpability the next step is to consider the harm caused or intended to be caused by the offence. The factors proposed for the section 5 offence are as for the section 4A offence. Both offences require harassment, alarm or distress to be intended or likely to be caused. The potential harm will therefore be the same in each offence.

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.

| | |
|-------------------|--|
| Category 1 | <ul style="list-style-type: none"> • Serious distress or alarm caused • Distress or alarm caused to multiple persons present |
| Category 2 | <ul style="list-style-type: none"> • All other cases |

Harm category 1 factors

The proposed factors are self explanatory and are intended to reflect the most serious harm which could be caused or intended by this offence.

Harm category 2 factors

This is a catch all category and provides for cases where a lower level of harm is present in an offence.

Q32

Do you agree with the proposed approach to the assessment of harm? Please give reasons where you do not agree.

STEP TWO

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point of the sentence.

Sentence levels

The starting points and ranges have been based on statistical data from the Court Proceedings Database and a limited analysis of first-instance transcripts as few were available due to this being a summary only offence. Reference to the ranges within the section 4A offences have also been observed, to ensure relativity within the limitations of the different statutory maximum sentence for offences. The statutory maximum sentence for this offence is a level 3 fine, which significantly limits the range of sentences.

STEP TWO

Starting point and category range

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

| Harm | Culpability | |
|------------|---|--|
| | A | B |
| Category 1 | Starting point Band C fine | Starting point Band B fine |
| | Category range Band B – Band C fine | Category range Band A – Band C fine |
| Category 2 | Starting point Band B fine | Starting point Band A fine |
| | Category range Band A – Band C fine | Category range Conditional discharge – Band B fine |

Q33

Do you have any comments on the sentence ranges and starting points?

Racially or religiously aggravated section 5 offences

The seriousness of the basic offence is assessed at step one, with the aggravated elements assessed at step two, as for the section 4 and section 4A offences.

The approach to identifying the appropriate sentence differs for this offence, due to the limited statutory maximum sentence. The statutory maximum sentence for the basic offence is a level 3 fine, and for the aggravated offence a level 4 fine. This means it is not possible to include a sentence table that provides adequately for an appropriate uplift in sentence, given that penalties are restricted to fine bands.

The guideline therefore combines the aggravation assessment and uplift guidance. The same factors as for other aggravated offences is considered to identify whether the level of aggravation is high, medium or low, and guidance is included on appropriate increases to the penalty depending on type of sentence and level of aggravation.

RACIALLY OR RELIGIOUSLY AGGRAVATED OFFENCES ONLY

Summary only offence. Maximum sentence for the aggravated offence is a level 4 fine.

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

| | |
|---|--|
| <p>HIGH LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION</p> <ul style="list-style-type: none"> Racial or religious aggravation was the predominant motivation for the offence Offender was a member of, or was associated with, a group promoting hostility based on race or religion (where linked to the commission of the offence) Aggravated nature of the offence caused severe distress to the victim or the victim's family (over and above the distress already considered at step one) Aggravated nature of the offence caused serious fear and distress throughout local community or more widely | <p>SENTENCE UPLIFT</p> <ul style="list-style-type: none"> Fine for basic offence: Multiply basic fine by 2.5 Discharge for basic offence: impose fine at top of basic offence category range or for particularly severe cases move to sentence in next basic offence category |
| <p>MEDIUM LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION</p> <ul style="list-style-type: none"> Racial or religious aggravation formed a significant proportion of the offence as a whole Aggravated nature of the offence caused some distress to the victim or the victim's family (over and above the distress already considered at step one) Aggravated nature of the offence caused some fear and distress throughout local community or more widely | <p>SENTENCE UPLIFT</p> <ul style="list-style-type: none"> Fine for basic offence: Multiply basic fine by 2 Discharge for basic offence: impose fine at mid-top of basic offence category range |

| LOW LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION | SENTENCE UPLIFT |
|--|---|
| <ul style="list-style-type: none"> • Aggravated element formed a minimal part of the offence as a whole • Aggravated nature of the offence caused minimal or no distress to the victim or the victim’s family (over and above the distress already considered at step one) | <ul style="list-style-type: none"> • Fine for basic offence: Multiply basic fine by 1.5 • Discharge for basic offence: impose fine at low-mid of basic offence category range |

Q34 Do you agree with the approach to assessing the seriousness of the aggravated section 5 offence, and to the penalty uplifts proposed?

The court should then consider any additional factors, not identified at step one or the first stage of step two, which may aggravate or mitigate the offence.

These factors are included to give the court the opportunity to consider the wider context of the offence and any relevant circumstances relating to the offender. It is at the court’s discretion whether to remain at the starting point or to move up or down from it. The presence of any of the factors included within the list does not mean it must be taken into account if the sentencer does not consider it to be significant in the particular case. The court will need to attribute appropriate weight to the factors.

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

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

‘Previous convictions’, ‘Offence motivated by or demonstrating hostility based on characteristics’ and ‘offence committed whilst on bail’ are factors which the court is required by statute to consider when assessing the seriousness of an offence and their inclusion is therefore not subject to consultation. As with previous guidelines issued by the Council, these factors are considered at step two after the starting point has been established

The following factors are standard aggravating factors that have been included in other definitive guidelines and which are self explanatory. They are not subject to consultation:

| |
|--|
| Offence committed whilst on licence or subject to post sentence supervision |
| History of failure to comply with court orders |
| Other aggravating factors: |
| Commission of offence whilst under the influence of alcohol or drugs |
| Planning |
| Offence committed against those working in the public sector or providing a service to the public |
| Leading role where offending is part of group activity |
| Vulnerable persons or children present |
| Victim is targeted due to a vulnerability (or a perceived vulnerability) where not already taken into account in considering racial or religious aggravation |
| History of antagonising the victim |
| Victim had no opportunity to escape situation (ie: on public transport) |

Other factors included are considered to be factors which increase the seriousness of a section 5 offence. As for the section 4 offence, particular consideration was given to the factor '*commission of offence whilst under the influence of alcohol or drugs*'. Analysis of cases found that this factor often mitigated the sentence as an offender may have behaved out of character whilst intoxicated. However, the Council takes the firm view that it would not be acceptable for the seriousness of behaviour in relation to this offence as for the section 4 and section 4A offences, to be seen to be reduced due to intoxication. The public have a right to be protected from such behaviour by the courts. It would be more appropriate for the court to consider whether the mitigating factor of good character and/or exemplary conduct apply where it is demonstrated an offender behaved out of character.

The Council also considers that it is important that the offence is aggravated where offending is directed towards vulnerable persons and those providing a service to the public.

| |
|---|
| Factors reducing seriousness or reflecting personal mitigation |
| Minor/peripheral role where offending is part of group activity |
| No previous convictions or no relevant/recent convictions |
| Remorse |
| Good character and/or exemplary conduct |
| Age and/or lack of maturity where it affects the responsibility of the offender |
| Mental disorder or learning disability where linked to commission of offence |
| Sole or primary carer for dependent relatives |

Many of the mitigating factors are standard factors included within guidelines. The only non-standard factor identified as relevant is '*minor/peripheral role in group activity*'.

Q35

Do you agree with the aggravating and mitigating factors? Please state which, if any, should be removed or added.

Q36

Do you have any other comments on the structure and content of the draft guideline?

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