

Road testing of the public order guidelines with magistrates

Background and method

At a series of events with magistrates, scenario-based exercises were used to test out how the guidelines for threatening behaviour (section 4) and disorderly behaviour (section 4A) might work 'in the field', particularly for racially or religiously aggravated cases. Magistrates were asked to review a scenario in pairs or groups of three, and then sentence it using the new draft guideline, filling out a detailed questionnaire as they went along. The events were:

- The MA AGM in November 2017, attended by approximately 80 magistrates, of which around half reviewed this guideline.
- A further regional magistrates' AGM in April 2018, attended by approximately 60 magistrates.
- Two further, smaller consultation events held in different parts of the country in May 2018, the first of which was attended by 11 magistrates and the second of which was attended by three magistrates (in this latter event, the magistrates worked on their own rather than in pairs/groups).

Two different scenarios were used, one at the MA AGM and two at the three further events. The guidelines used at the MA AGM also differed slightly to the one used at the later events, with the latter giving more detailed guidance on how to judge the level of racial aggravation. At the two smaller events, participants were also asked to sentence a racially aggravated criminal damage scenario, which presented an opportunity to compare the approaches across the two guidelines.¹

As with all our qualitative work, the sample size was small and self-selecting, which means that the findings cannot be taken as representative of all magistrates. They provide an insight into how magistrates may use and respond to the guideline, but we cannot be sure that these findings are typical of the wider group.

Key findings

- Both the scenarios were initially categorised consistently across magistrates i.e. almost all participants arrived at the same categories for culpability and harm before taking into account the racial element of the offence and adding the uplift. These categorisations were as expected by policy.
- Across both scenarios, the categorisation of the level of racial aggravation was much more variable than the categorisation of the basic offence. For example, for the threatening behaviour scenario, opinion was divided as to whether the level of racial aggravation was high, medium or low, with the categorisation as 'high' arising primarily from participants' assessment that the behaviour caused 'Severe distress to victim and family'.

¹ The draft public order guidelines contained a separate sentencing table for racially aggravated offences, whereas the draft criminal damage guideline contained guidance on adjustment of the sentence levels in the table for the basic offence. In the draft public order guideline, aggravating and mitigating factors were placed after the racial aggravation step, whereas in the draft criminal damage guideline they came before.

- It seemed that when magistrates focused on the distress caused, they tended to overlook the need to separate out the distress caused *by the racial aggravation* from the overall distress. Consequently, despite the wording in the guideline, they made the decision about the level of racial aggravation on the basis of a global sense of the distress caused, and hence there was an element of double counting.
- Opinion was divided as to whether it was better to have a separate sentencing table for the racially aggravated cases, or not. Magistrates favoured a consistent approach to the positioning of mitigating and aggravating factors across guidelines.

Findings by scenario and notes on the discussions

Threatening behaviour (s4) scenario (reviewed at all events, n = 24 pairs/groups)

In an offence lasting ten minutes, defendant threatened and racially abused a shop keeper, leaving the shop keeper and other customers extremely frightened. There were strong mitigating circumstances.

This scenario was categorised very consistently across participants: at the first event, all 15 pairs/groups categorised the basic offence as A1, and of the 24 pairs/groups at the subsequent three events, 22 gave a categorisation of A1, and two B1. Participants unanimously categorised this offence as harm 1 on the basis of two factors: 'Victim feared serious violence' and 'Fear of immediate violence caused to multiple persons present'. Similarly, most frequently participants saw the behaviour as culpability A on the basis of, 'Intention to cause fear of serious violence' and 'Sustained incident'.

However, opinion as to the level of racial aggravation was more variable. Table 1 details the level of racial aggravation chosen and the reason(s) for that choice from the three most recent consultation events (n = 24 pairs/groups). This suggests that those who chose to focus on **the distress caused to the victim** in the scenario tended to see the level of racial aggravation as **high** (see yellow shading), whereas those who focused on the **proportion of the offence which was felt to be racially aggravated**, saw the level of aggravation as **medium or low** (see green shading). Or, putting it another way, all seven participants who categorised the level of racial aggravation as high did so on the basis of severe distress and 5/7 did so *solely* on the basis of severe distress. Because of the variability in categorising the level of racial aggravation, final sentences were therefore quite wide-ranging: between a medium level community order and 36 weeks' custody, before guilty plea.

It may be that sentencers find it difficult to mentally apportion the distress caused *because of the racial aggravation*, so, despite the wording in the guideline, they make the decision based on a global sense of distress. There was a little bit of qualitative evidence to this effect, arising from the 'disorderly' scenario. At the smallest event, where the magistrates worked on their own, two out of three categorised the level of racial aggravation as medium on the basis of 'aggravated nature caused some distress'. However, one magistrate seemed to consider the level of distress in more detail, saying that she rejected this factor because of the wording 'over and above the distress considered at step one'. Rather she saw the level of *additional* distress caused by the racially aggravated nature of the offence as minimal, and categorised the level of racial aggravation as low, based on this and the proportion of the offence that contained specific racial slurs (see below).

The other notable finding for this scenario was that in most instances, magistrates saw their end sentence (based on the sentencing table) as too tough for this defendant in this scenario. For example, one group who gave a sentence of 26 weeks pre-guilty plea, 18 weeks post, wrote 'Disproportionately harsh penalty resulted (we checked twice)'. In total, **two thirds of the sample of 24 pairs/groups wrote comments like this (too harsh)**, with only a couple rating the sentence as

about right, and others leaving the question blank. This may suggest that the sentences in the table were pitched too high, or that the guideline caused magistrates to over-estimate the level of aggravation, or a combination of both. It should also be noted that the offender in this case was very sympathetic (he was drunk after attending the wake of a close bereavement, he was very remorseful) so magistrates may have simply felt sorry for him.

Disorderly behaviour (s4a) scenario (reviewed at the last three events, n =15 pairs/groups)

Offender became very angry when issued with a parking ticket and abused traffic warden, including racial slurs alongside other slurs. She also pushed past the victim to get to her car. Victim was upset at the name calling but also said that because of her job she was used to it.

For this scenario, almost all of the pairs/groups classified the offence as B2 (using the factors 'All other ..' (culpability) and 'All other cases..' (harm)). This categorisation was as expected. One group categorised the offence as A1 (seeing it as 'sustained' (culpability) and leading to 'serious distress' (harm)), two further said A2 (seeing culpability A because the offence was 'sustained') and one B1 (seeing the harm caused as 'serious distress').

The level of racial aggravation was seen as **low** by 8/15 pairs/groups, medium by 6/15 (with one response unclear). Most pairs/groups/individuals judged the racial aggravation on the basis that it formed **a minimal proportion** of the offence, with 8/8 who said '**low**' quoting this factor (in 7/8 cases in isolation, but in one case – the participant who did this exercise very carefully, described above - quoting 'minimal or no distress' as well).

Meanwhile, those who viewed it as **medium** did so either on the basis that the racial aggravation was **a significant proportion of the offence** and/or that it caused '**some**' distress (so consideration of the level of distress appeared once again to be pulling the categorisation upwards). Participants were generally happy with their end sentences (medium or low community order to Band B fine, post-guilty plea).

Note on the discussions at the two consultation events

The two consultation events presented a good opportunity to compare the way racially aggravated offences were dealt with in the two guidelines, the key differences being the use of a table for racially/religiously aggravated threat/disorderly behaviour, and the positioning of the aggravating and mitigating factors.

In one of the groups, the inclusion of the table was preferred by the majority of magistrates (three out of four pairs) because it was felt that it was clear and would lead to consistency (although earlier they were concerned about the severity of the penalties in this guideline). However, one group of three felt strongly that the *Criminal Damage* approach (no table) was better, because it gave them flexibility to decide on the level of uplift. At the smaller event, the facilitator noted that having the two tables for the public order offences seemed to take up more time, and cause a significant amount of to-ing and fro-ing (participants too felt it took up more time, and suggested you could have a separate guideline for racially aggravated offences that dispensed with the first table, until pointed out that sentence for un-aggravated offence needs to be stated in open court). There was a sense that the *Criminal Damage* approach was preferred, but that the inclusion of a table might lead to more consistent sentencing. The different positioning of the aggravating and mitigating factors was also noted at the second group: whilst they could see pros and cons to having aggravating and mitigating factors earlier (the base sentence includes aggravation and mitigation) and later (aggravating and mitigating factors stand out more), they felt they would like to see consistency across guidelines.

Table 1: Level of racial aggravation and reason for threatening behaviour scenario

	Level of racial aggravation	Factor ticked	Factor ticked
1	Medium	Aggravated nature causes severe distress to victim and family	RA was significant proportion
2	Low	Aggravated element formed minimal part	
3	Medium	RA was significant proportion	
4	Low	Aggravated element formed minimal part	
5	Low	Aggravated element formed minimal part	
6	Medium	Aggravated nature causes some distress to victim and family	
7	High	Aggravated nature causes severe distress to victim and family	
8	Medium	RA was significant proportion	
9	Not clear, remainder of form is not completed	Aggravated nature causes severe distress to victim and family	Aggravated nature causes some distress to victim and family
10	Low	Aggravated element formed minimal part	
11	Medium	Aggravated nature causes some distress to victim and family	
12	Medium	Aggravated nature causes severe distress to victim and family	RA was significant proportion
13	Medium	RA was significant proportion	
14	Low	Aggravated element formed minimal part	
15	High	Aggravated nature causes severe distress to victim and family	RA was significant proportion
16	High	Aggravated nature causes severe distress to victim and family	Aggravated nature causes serious distress to community
17	Low	Aggravated element formed minimal part	
18	High	Aggravated nature causes severe distress to victim and family	
19	Medium	RA was significant proportion	Aggravated nature causes severe distress to victim and family
20	High	Aggravated nature causes severe distress to victim and family	
21	Medium	RA was significant proportion	Aggravated nature causes some distress to victim and family
22	High	Aggravated nature causes severe distress to victim and family	
23	High	Aggravated nature causes severe distress to victim and family	
24	Low	Aggravated nature causes some distress to victim and family	Aggravated element formed minimal part