

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

**5 April 2019**  
**SC(19)APR04 – Public Order**  
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## **1 ISSUE**

1.1 This meeting requires consideration of consultation responses to the draft guidelines for S4, S4A and S5 Public Order Act offences.

## **2 RECOMMENDATION**

2.1 The Council is asked to;

- consider points raised in consultation and in road testing for the draft guidelines for s4, s4A and s5 offences;
- agree revisions to the definitive versions of the guidelines.

## **3 CONSIDERATION**

3.1 These are summary offences providing for a range of disorderly behaviour. There is existing guidance within the MCSG for sentencing these offences. There is significant overlap between the offences in relation to the type of conduct required to constitute an offence. The s4 offence of threatening behaviour is similar to the offence of affray in that it requires the threat or provocation of unlawful violence towards another person. The s4A and s5 offences relate to disorderly behaviour with intent to cause harassment alarm or distress (s4A), and disorderly behaviour likely to cause harassment alarm or distress (S5).

3.2 **Annex A** includes the draft guidelines which were subject to consultation. A summary of decisions made in the development of each guideline is included in this paper, and to further assist members not present during the development stage a copy of the consultation document which provided the rationale for the content of the guideline is provided at **Annex B**. Road testing of the guideline was undertaken during the consultation period. Road testing findings are included at **Annex C** and have informed or supported some of the changes proposed in this paper. **Annex D** includes the existing MCSG guidelines for these offences.

3.3 The legislative provisions for the offences to be discussed are as follows;

#### Section 4 – Threatening Behaviour – causing fear or provocation of violence

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

(a) uses towards another person threatening, abusive or insulting words or behaviour, or  
(b) 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.

#### Section 4A – Disorderly behaviour with intent to cause harassment, alarm or distress

Section 4A(1) of the Public Order Act provides that 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.

#### Section 5 – Disorderly behaviour causing or likely to cause harassment, alarm or distress

(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.

#### Culpability factors

##### Rationale for factors agreed

3.4 To provide for the overlap between offences, the culpability factors are broadly similar across the three guidelines, save for one or two additional factors in more serious offences; these are ‘missiles thrown’ in s4 and ‘production of a weapon’ in s4 and s4A.

3.5 Given that a s4 offence can involve an intention to cause a person to believe that immediate unlawful violence will be used, and the potential for a s4 plea to be offered as an alternative plea to affray, it was also agreed that an additional culpability factor ‘intention to cause fear of serious violence’ be included as in the affray guideline.

3.6 All offences include ‘use of force’ as a culpability factor, although for the s4 and s4A offences this is qualified as ‘use of substantial force’. It was agreed that while use of any force would make a s5 offence more serious, a higher threshold would be required for the

more serious offences to avoid potentially inflating sentences in s4 and s4A offences where force may be a more common feature of the offence.

### Responses: culpability factors

3.7 The CPS, HM Circuit Judges, DJ Legal Committee and CBA all approved of the proposed factors and suggested no changes.

*Incidents of offences under section 4 of the POA (threatening behaviour offences) can vary greatly as the offence is capable of being committed in many ways. It is therefore helpful that the many ways that culpability can be raised is reflected in the categorisation suggested for high culpability. The proposed factors capable of placing a case within the category of high culpability have been recognised and included in the proposed guideline. The committee concurs with this approach.- DJ legal Cttee*

3.8 At the road testing events held with magistrates, participants agreed that the factors included were appropriate and that the high culpability factors included would make an offence more serious.

3.9 The MA made the following points regarding factors which are included across the three guidelines;

*Culpability A factors include 'targeting of individual(s) by a group'. We presume this means targeting of a 'specific' individual or group, ie not an individual chosen at random but a specifically targeted individual, so it might be clearer if 'specific' was added. We would also propose that this factor is divided into two separate culpability A factors, firstly, offender acting as part of a group, and secondly, targeting of specific individual(s).*

This point was made by the MA in relation to other guidelines which include the factor, and the Council preferred to retain the factor as worded.

3.10 A further point noted by the MA was as follows;

*A high culpability factor is 'sustained incident'. The consultation document states that this phrase is intended to encapsulate both 'substantial disturbance caused' and 'lengthy incident'. Although it does cover a lengthy incident, it does not necessarily cover a 'substantial disturbance' and therefore we would propose that the phrase 'sustained and/or substantial incident' is used.*

The consultation specifically mentioned substantial disturbance in respect of s5 offences only, as the existing MCSG guideline for this offence includes 'substantial disturbance' as a high culpability factor. It is not proposed it be included for a s4 offence as the offence relates to the causing of fear or provocation of violence and sustained incident would capture a more serious incident of this type, while a substantial disturbance would not necessarily be a feature of the offence. For the disorderly behaviour offences of s4A and s5 it may be thought to be relevant and could be included. However, it is likely that a sustained incident in either

of those offences would amount to a substantial disturbance. The Council are asked to consider if rephrasing or expanding the factor is necessary.

**Question 1: Does the Council wish to add 'substantial disturbance' as a high culpability factor in the S4A and S5 guidelines?**

Harm

3.11 The harm factors reflect the statutory definitions of the offences. The s4A and s5 offences are made out if the offences cause or are likely to cause harassment, alarm or distress. The s4 offence involves causing fear or provocation of violence. The high harm factors for s4A and s5 capture serious distress or alarm, or distress or alarm to multiple persons. The s4 high harm factors agreed relate to the fear of violence caused and incidents which escalate into violence. Category 2 captures all other cases.

3.12 The following points were raised in respect of s4 factors only.

3.13 The Law Society thought that the s4 offence factor 'incident escalated into violence' should be subject to a qualification:

*In relation to the offence of threatening behaviour, the category 1 harm factors include 'incident escalated into violence'. In such a case it is likely that additional charges will be included on the indictment reflecting the violence, so that the factor should contain the qualification '(if not subject to separate charge)', so as to remove the risk of double-counting. If the facts warrant an additional charge the CPS are likely to advise that it be added. However, there are instances where there is no 'victim' of the offence, because the victim will not wish to cooperate with the prosecution or cannot be found, but the CCTV of the incident clearly shows an assault taking place. These instances are cases where the additional offending can properly be reflected in the sentence for the disorder offence(s). – Law Society*

The LCCSA thought the factor should not even be included;

*The committee could not see why "incident escalated into violence" was a factor at all, given that if the incident escalated into actual physical violence a different offence to a s 4 POA would have been committed.*

3.14 It is not proposed that this factor be removed. It was included as it was considered that where violence is provoked and eventuates, this would make the harm caused in the offence more serious and the guideline should provide for it. It is possible a s4 offence would still be charged where the offence results in actual violence whether or not assault charges arise, and as the Law Society note there may not be a victim willing to support an assault prosecution and a court may be sentencing a sole s4 charge in such situations. In the event that other offences were charged the fact that an incident escalated into violence would be highly relevant to the seriousness of the s4 offence, and provocation of violence would be a

separate element to any resulting assault. The overall sentence would be adjusted for totality.

**Question 2: Does the Council agree to retain the high culpability factor ‘incident escalated into violence’ in the s4 guideline?**

3.15 The LCCSA went on to raise a further point;

*The committee took the view that the only factor that needed to be included in Category 1 harm was “victim feared serious violence”. The committee did not see why a defendant who causes fear of serious violence to one person should be treated the same as a defendant who causes fear of violence to multiple people. The committee took the view that fear of serious violence should be the primary determinant of which cases fell into the highest category, and the number of people who were caused that fear should have no bearing upon which category the offence falls in to.– LCCSA*

The MA also questioned the factors relating to fear being caused to one or multiple persons, although specifically questioned why fear caused to a single victim does not need to be immediate to attract a high culpability categorisation;

*Category 1 includes: ‘Victim feared serious violence or fear of immediate violence caused to multiple persons present’. It is not clear why fear of violence has to be immediate for multiple people and not for a single victim? We would suggest that ‘immediate’ should be removed, particularly as ‘immediate’ is already included in the offence definition. – MA*

The MA point regarding the offence requirement that the threat of violence be immediate is a valid one, and as worded the factors may appear to imply that a threat towards a single victim does not need to be immediate, which is not the case. The distinction between the factors is in the level of fear caused, and in development it was considered that a threat to an individual victim causing fear of serious violence would be equal to a high level of harm where multiple victims fear any violence. The Council is asked to consider if this principle should be maintained, or if they agree with the LCCSA point and only one factor of ‘victim(s) feared serious violence’ should be included in the highest category of harm. If the Council does wish to maintain a distinction and have a higher threshold for fear caused to a single victim than for multiple victims, it is suggested that the word ‘immediate’ should be removed from the multiple victims factor. The point regarding level of fear required for single or multiple victims is also relevant to s4A and s5 offences, as the harm factors include two factors of ‘serious distress or alarm caused’ and ‘distress or alarm to multiple persons present’.

**Question 3: Does the Council wish to reword the first harm factor as ‘victim(s) feared serious violence’ and remove the multiple victims factor, or if both factors are**

**retained does it agree to remove the word 'immediate' from the multiple victims factor?**

3.16 The MA also suggested 'serious distress' should be included as a harm or aggravating factor;

*We also query whether causing serious distress should be a category 1 level of harm, or referenced as an aggravating factor. - MA*

3.17 Serious distress is included as harm factors for s4A and s5 offences, but these offences specifically relate to the causing of harassment, alarm or distress. As the s4 offence relates to the causing of fear or provoking violence, it may not be appropriate to include a 'distress' related factor for this offence, particularly as the factor may be present in a high number of cases and have an inflationary effect on categorisation.

**Question 4: Does the Council wish to include an additional harm or aggravating factor of 'serious distress' in the s4 guideline?**

#### Aggravating and mitigating factors

3.18 Almost all respondents approved of the aggravating and mitigating factors. The MA suggested the same changes to the mental health or learning disability factor as made for the affray guideline and the removal of the qualifying 'where related to the commission of the offence' which the Council agreed at the last meeting. This change will be effected to this factor across the guidelines. The MA also suggested an additional aggravating factor be included:

*An aggravating factor for violent disorder and affray is 'incident occurred in victim's home' and we would propose that this should also be an aggravating factor in relation to this offence.- MA*

While all offences can be committed in a private or public place, they cannot be committed where the offender and the victim are in a dwelling so it is not proposed this factor be included.

3.19 A further issue raised was the treatment of alcohol within the guideline as an aggravating factor. This matter was subject to considerable discussion in the guideline development, as it was noted that often offenders behave out of character under the influence of drink and analysis of cases identified that for that reason the factor is often used applied as mitigation. The Council agreed that it should not be.

3.20 The Law Society agreed with the Council's position that the influence of alcohol on the offender should be an aggravating factor;

*The factors for the various s4, s4A and s5 offences include the clear statement that acting under the influence of alcohol or drugs is an aggravating, and not mitigating, factor. We acknowledge that there is some inconsistency in the courts' approach to intoxication, and indeed that of defence lawyers, but think it would be correct to say that, nowadays, most sentencers regard intoxication as aggravation not mitigation. In any event, a clear statement in the guideline will at least encourage consistency on this point. – Law Society*

## Sentences

3.21 Sentence levels were intended to provide for relativity between offences and with aggravated offence sentences. While ranges provide for custody in a number of categories for more serious offences, it was agreed that only the most serious s4 offences should attract a custodial starting point. The sentences included in the existing MCSG guidelines are included at Annex D

3.22 Road testing findings at events with magistrates found no issues with sentences for the basic offences. However, one or two consultation respondents raised concerns.

3.23 The Howard League response criticised nearly all custodial sentences in the guideline and included a lengthy discussion of the current political consideration of short term custodial sentences:

*In May 2018, the justice secretary David Gauke stated that short prison sentences of less than 12 months do not rehabilitate prisoners and should be a last resort. He noted that prisoners held for less than a year have a recidivism rate of about 66%, higher than the reoffending rate of those handed non-custodial sentences.*

*In the same month, the prisons minister, Rory Stewart called for a "massive reduction" in the number of people sent to prison for a short sentence, saying incarceration of under 12 months makes offenders more likely to commit crime. Research published by the Ministry of Justice showed that short prison sentences have significantly worse outcomes than community sentences.*

*The Sentencing Council guidelines will have an impact on sentencing practice. The guidelines should be encouraging the use of effective community programmes, rather than expensive and ineffective short term prison sentences. The Sentencing Council appears to be out of step with government thinking, research and evidence. – Howard League*

3.24 Other responses expressed concern that sentences were too low in some cases; *Again the committee is concerned to see the range for the lowest type of offending (for a s4) to start at a discharge. Less serious offending could and should be captured by a charge under Section 5 POA 86 and not S4 POA 86. - DJ Legal Committee*

3.25 The MA noted the starting point of the most serious category of s4A offence was lower than in the existing guideline;

*We note that the starting point at the highest level is now a high level community order whereas previously it was 12 weeks' custody - MA*

3.26 In developing the guideline it was initially agreed that the existing starting point for a s4A offence should be retained. However, this was later revised to a high level community order to provide for relativity with s4 sentences to reflect the s4 is a more serious offence, and it was agreed a 12 week starting point should be maintained for a serious s4 offence. Updated statistics illustrate that while there are a fairly high proportion of custodial sentences (18% immediate and suspended in 2017) imposed for a s4A offence, the highest proportion of sentences imposed are fines:

#### S4A – sentence distribution

Year	Absolute & Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with	Total
<b>2013</b>	18%	38%	26%	6%	9%	4%	<b>100%</b>
<b>2014</b>	19%	40%	23%	6%	8%	4%	<b>100%</b>
<b>2015</b>	18%	38%	25%	7%	9%	3%	<b>100%</b>
<b>2016</b>	15%	39%	25%	7%	10%	3%	<b>100%</b>
<b>2017</b>	15%	40%	24%	7%	11%	3%	<b>100%</b>

The table below illustrates the lengths of custodial sentences imposed for S4A (estimated, pre guilty plea);

Sentence length band	Number of offenders sentenced to immediate custody					Proportion of offenders sentenced to immediate custody				
	2013	2014	2015	2016	2017	2013	2014	2015	2016	2017
Up to and including 1 month	22	22	41	44	42	9%	9%	13%	13%	12%
1 to 2	51	67	68	91	104	21%	27%	21%	27%	29%
2 to 3	71	73	81	82	72	29%	29%	25%	24%	20%
3 to 4	31	22	34	26	37	13%	9%	10%	8%	10%
4 to 5	37	32	54	55	60	15%	13%	17%	16%	17%
5 to 6	36	36	48	38	41	15%	14%	15%	11%	12%
<b>Total</b>	<b>248</b>	<b>252</b>	<b>326</b>	<b>336</b>	<b>356</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>



3.27 It is not proposed that the starting point be revised back to 12 weeks for a s4A, as to retain relativity with s4 sentences this would require an increase in the most serious s4 category starting point of 12 weeks custody, which will also be discussed in this paper. A custodial sentence is available within the range of three categories to reflect the statutory maximum and provide for custodial sentences in appropriate cases.

**Question 5: Does the Council agree to retain the s4A starting point of a high level community order in category A1?**

3.28 There are issues with the s4 starting point which did not arise from consultation responses but require consideration in respect of other decisions the Council have recently made. Since developing the Public Order guideline work has commenced on revising the Assault guideline. The existing common assault offence guideline includes a high level community order as the starting point for the most serious category 1 offences, with a range of a low level community order – 26 weeks’ custody. In the revision of the guideline the starting point and range has been maintained, to provide for relativity with ABH offences and to avoid including a 12 week starting point, as the Council has previously questioned the value of a custodial sentence of such short duration and have preferred not to include 12 week starting points. The agreed revised draft common assault guideline is included at **Annex E**.

3.29 In developing s4 sentences, it was noted that relativity to common assault offences should be considered at the point the assault guideline was revised, as common assault is considered more serious as it will often involve use of violence rather than the threat or provocation of violence. It is important to note that the existing guideline’s highest categories do not reflect such relativity and include a high level community order for a common assault and a 12 week custodial starting point for a s4.

3.30 The tables below illustrate current sentencing distribution and lengths of custodial sentences imposed for each offence;

S4 – sentence distribution

Year	Absolute & Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with <sup>1</sup>	Total
2013	13%	24%	37%	11%	12%	2%	100%
2014	12%	25%	36%	11%	12%	4%	100%
2015	13%	25%	35%	13%	12%	2%	100%
2016	12%	23%	35%	14%	14%	2%	100%
2017	11%	23%	34%	15%	15%	2%	100%

S4 – immediate custodial sentence volumes of offenders and sentence lengths (estimated, pre guilty plea)

Sentence length band	Number of offenders sentenced to immediate custody					Proportion of offenders sentenced to immediate custody				
	2013	2014	2015	2016	2017	2013	2014	2015	2016	2017
Up to and including 1 month	39	50	55	62	58	5%	6%	6%	7%	7%
1 to 2	133	145	160	167	155	16%	16%	18%	18%	18%
2 to 3	230	250	236	266	232	28%	28%	26%	29%	27%
3 to 4	99	114	96	122	93	12%	13%	11%	13%	11%
4 to 5	146	156	192	137	158	18%	18%	21%	15%	19%
5 to 6	176	171	163	154	157	21%	19%	18%	17%	18%
<b>Total</b>	<b>823</b>	<b>886</b>	<b>902</b>	<b>908</b>	<b>853</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Common Assault – sentence distribution

Year	Absolute & conditional discharge	Fine	Community sentence	Suspended sentence	Immediate custody	Otherwise dealt with	Total
<b>2013</b>	15%	14%	39%	12%	14%	5%	<b>100%</b>
<b>2014</b>	16%	15%	37%	12%	14%	5%	<b>100%</b>
<b>2015</b>	15%	16%	39%	13%	14%	3%	<b>100%</b>
<b>2016</b>	15%	16%	38%	14%	14%	3%	<b>100%</b>
<b>2017</b>	14%	16%	39%	14%	14%	3%	<b>100%</b>

Common Assault - immediate custodial sentence volumes of offenders and sentence lengths (pre guilty plea)

Sentence length band	Number of offenders sentenced to immediate custody					Proportion of offenders sentenced to immediate custody				
	2013	2014	2015	2016	2017	2013	2014	2015	2016	2017
Up to and including 1 month	272	352	379	421	400	4%	5%	5%	6%	7%
1 to 2	770	915	990	984	876	12%	14%	14%	15%	14%
2 to 3	1,124	1,260	1,323	1,283	1,173	18%	19%	19%	20%	19%
3 to 4	739	754	823	747	647	12%	11%	12%	11%	11%
4 to 5	1,196	1,315	1,266	1,227	1,118	19%	20%	18%	19%	18%
5 to 6	2,127	2,145	2,249	1,917	1,852	34%	32%	32%	29%	31%
<b>Total</b>	<b>6,228</b>	<b>6,741</b>	<b>7,030</b>	<b>6,579</b>	<b>6,066</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

3.31 It will be noted that common assault sentence distribution is very similar to that for s4, but while both attract similar proportions of sentences of up to one month, proportions of higher sentences towards the top of the statutory maximum are significantly higher for common assault with almost half of pre-guilty plea sentences falling between 4-6 months. This could be attributable to more serious ABH offences being charged as common assault prior to revised CPS guidance being issued, however.

3.32 As the draft common assault guideline has now been agreed, the Council is asked to consider if further consideration should be given to the s4 starting point in the most serious category. The level of emotional or psychological type harm may be of a similar level in each offence and while common assault requires only the apprehension of violence by a victim, it does include the potential for physical harm to also be caused. The Council therefore needs to consider if the s4 starting point should be revised down to a high level community order or lower to provide for relativity with common assault starting points. It would also be necessary to revise the A2 and B1 categories to a medium level community order. This could result in considerable deflation from existing sentencing practice given that currently almost a third of sentences are custodial (with an equal split between immediate and suspended sentences), and would mean that the most serious s4 starting point is the same as for a serious s4A offence (unless the s4A starting point is further decreased to a medium level community order. However this would be a more notable decrease for a s4A than the current starting point of 12 weeks.) An alternative option is to revise serious common assault sentences upwards from a high level community order to a custodial starting point, which may appear unjustifiably inflationary. A further option is for the current position where the different starting points for each offence is maintained.

3.33 There are risks associated with all options. Maintaining the different starting points for common assault and s4 may appear to not reflect the relativity between offences, while revising the s4 sentences down may look unjustifiably deflationary and invite criticism, from magistrates in particular as the sentencers of these offences. On the other hand increasing the starting point for a common assault offence while the effectiveness of short term custodial sentences is topical and a political issue may invite further criticism such as that from the Howard League that the Council has not considered the effectiveness of sentences in developing the guideline. A clear rationale for the approach taken will be required and included in the consultation document to mitigate the risk associated with the Council's decision.

**Question 6: Does the Council wish to revise the starting point in A1 of a s4 sentence?**

## Racially aggravated approach

3.34 The racially aggravated approach in the draft guidelines which included a separate sentencing table specifying a starting point and range for aggravated offences attracted the greatest variation of views. On the one hand many respondents agreed with the principle of a separate sentencing table, and approved of the approach;

*We concur with the Council's conclusion that it is impossible for each element of an aggravated offence to be adequately provided, for the reasons as set out in the draft guideline on page 33. We agree that assessing seriousness of the basic offence at step one and assessing related elements as a second step is a pragmatic and sensible solution to the difficulty highlighted at page 33. We also agree that whilst the level of aggravation is identified, sentencers should use a separate sentencing table to identify the appropriate starting point and sentence range.- DJ Legal Cttee*

*The MA welcomes the addition of a separate sentencing table. – MA*

*We consider that all the guidance in the draft guidelines on racial and religious aggravation is in line with an appropriate and consistent approach to sentencing. – Law Society*

3.35 HM Circuit Judges thought the sentences in some categories were too low;

*The draft guideline proposes three levels of 'racial or religious aggravation'. For a Category 1 harm/high level of racial aggravation case the starting point is suggested at 36 weeks custody with a range of 16 weeks' - 18 months' custody. The starting point may be too low for 'top end' cases where:*

- (i) Racial/ religious aggravation was the predominant motivation for the offence;*
- (ii) The offender was a member of, or was associated with, a group promoting hostility base on race or religion;*
- (iii) The racial/religious aggravation was intended to cause and does cause severe distress to an individual, a local or wider community.*

*The draft guideline for a Category A1/High racially aggravated S4A offence has a starting point of 26 weeks' custody. Again, having regard to the maximum sentence of two years' imprisonment in the Crown Court, the starting point may be too low for a 'top end' offence with one or more of the aggravating features set out at (i), (ii) and (iii) above.- HM Circuit Judges*

3.36 In road testing the opposite view was found, and when used by magistrates who would usually sentence these offences, the sentences they arrived at were almost universally thought to be too high. Some respondents also thought they were too high:

*The committee took the view that the proposed uplifts were too severe. A Category A1 section 4 offence has a starting point of 12 weeks imprisonment, but a Category A1 section 4 has a starting point of 36 weeks' imprisonment, a 200% uplift. The difference was deemed to be especially severe given that the practical difference between a section 4 offence and a*

*racially aggravated section 4 offence can often be a single racially abusive word uttered at the time of commissioning the offence - LCCSA*

3.37 The LCCSA also thought the approach was overly complex;

*The committee took the view that the proposed approach to assessing the level of aggravation was unnecessarily complex, unduly prescriptive and would pose a problem for benches sentencing offences of this nature. The committee took the view that there should simply be a further step in the sentencing process that obliged the sentencer to apply an uplift to the basis that there was racial or religious aggravation. - LCCSA*

This was also a finding of road testing, where it was noted that the additional table approach might cause sentencing to take longer. It was felt that the sentencing table may result in more consistent sentencing, however.

3.38 Responses were varied and the overall findings of road testing were that while the sentencing table would produce consistency of sentence, sentences were significantly higher. Revising sentences will not be an option as, as was discussed in developing sentences, if sentences do not properly reflect the two year statutory maximum set by Parliament this may attract criticism that the Council has not properly reflected the gravity of any racial or religious aggravation in sentences.

3.39 The Council has already agreed in considering the different approaches to assessing aggravation in Arson and Criminal Damage offences earlier in the year that the less prescriptive uplift approach would be preferable, and that consistency of approach across guidelines is important. It is therefore proposed that this approach is adopted for the aggravated s4 and s4A public order offences. Annex F includes the uplift table and wording agreed for racially and religiously aggravated arson and criminal damage offences. However, members present in the development of the guideline will recall this approach will not work for a s5 offence, given the statutory maximum sentence is limited to a level 4 fine. The approach consulted upon for s5 offences included a percentage uplift approach to calculating the aggravated sentence. Page 94 of Annex A illustrates the approach for s5, which it is proposed should be retained in the definitive guideline.

3.40 It should be noted that as the uplift approach was not tested for Public Order, findings from testing this approach in other guidelines will inform the final resource assessment. In testing with other guidelines it was found that the uplift approach may still cause an inflationary impact, but any potential impact will be outlined in the final resource assessment and is not likely to be as marked as the increase in using a separate sentencing table.

3.41 It will be important to have a clear rationale for not including the consultation approach in the definitive guideline, which does not solely relate to concerns regarding sentence inflation. As well as highlighting that consistency of approach across guidelines is important, it will be clarified that some sentencers in road testing found the additional table

approach time consuming and complex, and had concerns regarding disproportionate sentences which were shared by a number of respondents.

**Question 7: Does the Council agree to include the uplift approach for sentencing aggravated s4 and s4A offences?**

#### **4 ISSUES**

4.1 There is currently existing guidance in MCSG for sentencing all offences discussed in this paper. It will be important that responses are fully considered and post consultation changes are clearly explained.

#### **5 RISKS**

The draft resource assessment did not anticipate any inflationary or deflationary impacts of the guideline. Any revisions to the draft guidelines will be considered as part of the final resource assessment to assess whether an impact on current sentence practice is anticipated.

# Threatening behaviour – fear or provocation of violence Public Order Act 1986 (section 4)

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Triable summarily  
Maximum: 6 months' custody

Offence range: Discharge – 26 weeks' custody

# Racially or religiously aggravated threatening behaviour – fear or provocation of violence Crime and Disorder Act 1998 (section 31(1)(a))

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Triable either way  
Maximum: 2 years' custody

Offence range: Fine – 1 year 6 months' custody

The racially or religiously aggravated offence is a violent specified offence for the purposes of section 226A of the Criminal Justice Act 2003

**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**.

**For racially and religiously aggravated offences, identify the basic offence category then move to consider the racially and religiously aggravated guidance to identify the appropriate sentence category.**

**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
- Missiles thrown

**B – Lesser culpability**

- All other cases

**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



**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	<b>Starting point</b> 12 weeks' custody	<b>Starting point</b> High level community order
	<b>Category range</b> Medium level community order – 26 weeks' custody	<b>Category range</b> Band C fine – 12 weeks' custody
Category 2	<b>Starting point</b> High level community order	<b>Starting point</b> Low level community order
	<b>Category range</b> Band C fine – 12 weeks' custody	<b>Category range</b> Discharge – Medium level community order

**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)

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	<b>Starting point</b> 36 weeks' custody	<b>Starting point</b> 26 weeks' custody	<b>Starting point</b> 16 weeks' custody
	<b>Category range</b> 16 weeks' – 1 year 6 months' custody	<b>Category range</b> 6 weeks' – 1 year's custody	<b>Category range</b> High level community order – 36 weeks' custody
A2 or B1	<b>Starting point</b> 12 weeks' custody	<b>Starting point</b> 6 weeks' custody	<b>Starting point</b> High level community order
	<b>Category range</b> 6 weeks' – 1 year's custody	<b>Category range</b> Medium level community order – 26 weeks' custody	<b>Category range</b> Low level community order – 16 weeks' custody
B2	<b>Starting point</b> 6 weeks' custody	<b>Starting point</b> High level community order	<b>Starting point</b> Medium level community order
	<b>Category range</b> High level community order – 26 weeks' custody	<b>Category range</b> Low level community order – 12 weeks' custody	<b>Category range</b> 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 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 or presumed characteristics of the victim: disability, sexual orientation or transgender identity

Offence committed whilst on bail

##### *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)

Commission of offence whilst under the influence of alcohol or 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

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

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

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

**STEP FOUR****Reduction for guilty pleas**

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

**STEP FIVE****Dangerousness**

For **racially or religiously aggravated offences only** the court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose an extended sentence (section 226A).

**STEP SIX****Totality principle**

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

**STEP SEVEN****Compensation and ancillary orders**

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

# Disorderly behaviour with intent to cause harassment, alarm or distress Public Order Act 1986 (section 4A)

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Triable summarily  
Maximum: 26 weeks' custody

Offence range: Discharge – 26 weeks' custody

# Racially or religiously aggravated disorderly behaviour with intent to cause harassment, alarm or distress Crime and Disorder Act 1998 (section 31(1)(b))

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Triable either way  
Maximum: 2 years' custody

Offence range: Fine – 1 year 3 months' custody

The racially or religiously aggravated offence is a violent specified offence for the purposes of section 226A of the Criminal Justice Act 2003

**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**.

**For racially and religiously aggravated offences, identify the basic offence category then move to consider the racially and religiously aggravated guidance to identify the appropriate sentence category.**

**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
- Missiles thrown

**B – Lesser culpability**

- All other cases

**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

**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	<b>Starting point</b> High level community order	<b>Starting point</b> Low level community order
	<b>Category range</b> Medium level community order – 26 weeks' custody	<b>Category range</b> Band C fine – 12 weeks' custody
Category 2	<b>Starting point</b> Low level community order	<b>Starting point</b> Band C fine
	<b>Category range</b> Band C Fine – 12 weeks' custody	<b>Category range</b> Discharge – Low level community order

**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)

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	<b>Starting point</b> 26 weeks' custody	<b>Starting point</b> 12 weeks' custody	<b>Starting point</b> 6 weeks' custody
	<b>Category range</b> 6 weeks' – 1 year 3 months' custody	<b>Category range</b> High level community order – 36 weeks' custody	<b>Category range</b> Medium level community order – 26 weeks' custody
A2 or B1	<b>Starting point</b> 6 weeks' custody	<b>Starting point</b> High level community order	<b>Starting point</b> Medium level community order
	<b>Category range</b> High level community order – 36 weeks' custody	<b>Category range</b> Medium level community order – 26 weeks' custody	<b>Category range</b> Band C fine – 16 weeks' custody
B2	<b>Starting point</b> High level community order	<b>Starting point</b> Medium level community order	<b>Starting point</b> Low level community order
	<b>Category range</b> Medium level community order – 12 weeks' custody	<b>Category range</b> Band C fine – 6 weeks' custody	<b>Category range</b> 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.



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 or presumed characteristics of the victim: disability, sexual orientation or transgender identity

Offence committed whilst on bail

##### *Other aggravating factors:*

Planning

Leading role where offending is part of group activity

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

Vulnerable persons or children present

Victim is targeted due to a vulnerability (or a perceived vulnerability)

History of antagonising the victim

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

Commission of offence whilst under the influence of alcohol or drugs

Offence committed whilst on licence or post sentence supervision

History of failure to comply with court orders

#### Factors reducing seriousness or reflecting personal mitigation

Minor/peripheral role in group activity

No previous convictions or no relevant/recent convictions

Remorse

Previous good character

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

Mental disorder or learning disability where related to the commission of the offence

Sole or primary carer for dependent relatives

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

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

**STEP FOUR****Reduction for guilty pleas**

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

**STEP FIVE****Dangerousness**

For **racially or religiously aggravated offences only** the court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose an extended sentence (section 226A).

**STEP SIX****Totality principle**

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

**STEP SEVEN****Compensation and ancillary orders**

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

# Disorderly behaviour Public Order Act 1986 (section 5)

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Triable summarily  
Maximum: Level 3 fine

Offence range: Discharge – Fine

# Racially or religiously aggravated disorderly behaviour Crime and Disorder Act 1998 (section 31(1)(c))

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Triable summarily  
Maximum: Level 4 fine

Offence range: Discharge – Fine

**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**.

**For racially and religiously aggravated offences, identify the basic offence category then move to consider the racially and religiously aggravated guidance to identify the appropriate sentence category.**

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

**A – High culpability**

- Targeting of individual(s) by group
- Sustained incident
- Use of force

**B – Lesser culpability**

- All other cases

**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

**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	<b>Starting point</b> Band C fine	<b>Starting point</b> Band B fine
	<b>Category range</b> Band B – Band C fine	<b>Category range</b> Band A – Band C fine
Category 2	<b>Starting point</b> Band B fine	<b>Starting point</b> Band A fine
	<b>Category range</b> Band A – Band C fine	<b>Category range</b> Conditional discharge – Band B fine

**RACIALLY OR RELIGIOUSLY AGGRAVATED OFFENCES ONLY****Summary only offence. Maximum sentence for the aggravated offence is 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><b>HIGH LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION</b></p> <ul style="list-style-type: none"> <li>• Racial or religious aggravation was the predominant motivation for the offence</li> <li>• Offender was a member of, or was associated with, a group promoting hostility based on race or religion (where linked to the commission of the offence)</li> <li>• Aggravated nature of the offence caused severe distress to the victim or the victim's family (over and above the distress already considered at step one)</li> <li>• Aggravated nature of the offence caused serious fear and distress throughout local community or more widely</li> </ul>	<p><b>SENTENCE UPLIFT</b></p> <ul style="list-style-type: none"> <li>• Fine for basic offence: Multiply basic fine by 2.5</li> <li>• 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</li> </ul>
<p><b>MEDIUM LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION</b></p> <ul style="list-style-type: none"> <li>• Racial or religious aggravation formed a significant proportion of the offence as a whole</li> <li>• Aggravated nature of the offence caused some distress to the victim or the victim's family (over and above the distress already considered at step one)</li> <li>• Aggravated nature of the offence caused some fear and distress throughout local community or more widely</li> </ul>	<p><b>SENTENCE UPLIFT</b></p> <ul style="list-style-type: none"> <li>• Fine for basic offence: Multiply basic fine by 2</li> <li>• Discharge for basic offence: impose fine at mid-top of basic offence category range</li> </ul>
<p><b>LOW LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION</b></p> <ul style="list-style-type: none"> <li>• Aggravated element formed a minimal part of the offence as a whole</li> <li>• Aggravated nature of the offence caused minimal or no distress to the victim or the victim's family (over and above the distress already considered at step one)</li> </ul>	<p><b>SENTENCE UPLIFT</b></p> <ul style="list-style-type: none"> <li>• Fine for basic offence: Multiply basic fine by 1.5</li> <li>• Discharge for basic offence: impose fine at low-mid of basic offence category range</li> </ul>

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.

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 or presumed characteristics of the victim: disability, sexual orientation or transgender identity

Offence committed whilst on bail

##### *Other aggravating factors:*

Planning

Leading role where offending is part of group activity

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

Vulnerable persons or children present

Victim is targeted due to a vulnerability (or a perceived vulnerability)

History of antagonising the victim

Commission of offence whilst under the influence of alcohol or drugs

Victim(s) had no opportunity to escape situation (eg: offence occurred on public transport)

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

Minor/peripheral role where offending is part of group activity

Remorse

Previous good character

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

Mental disorder or learning disability where related to the commission of the offence

Sole or primary carer for dependent relatives

**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****Totality principle**

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

**STEP SIX****Compensation and ancillary orders**

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

**STEP SEVEN****Reasons**

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

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

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



## 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	<b>Starting point</b> 12 weeks' custody	<b>Starting point</b> High level community order
	<b>Category range</b> Medium level community order – 26 weeks' custody	<b>Category range</b> Band C fine – 12 weeks' custody
Category 2	<b>Starting point</b> High level community order	<b>Starting point</b> Low level community order
	<b>Category range</b> Band C fine – 12 weeks' custody	<b>Category range</b> 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	<b>Starting point</b> 36 weeks' custody	<b>Starting point</b> 26 weeks' custody	<b>Starting point</b> 16 weeks' custody
	<b>Category range</b> 16 weeks' – 1 year 6 months' custody	<b>Category range</b> 6 weeks' – 1 year's custody	<b>Category range</b> High level community order – 36 weeks' custody
A2 or B1	<b>Starting point</b> 12 weeks' custody	<b>Starting point</b> 6 weeks' custody	<b>Starting point</b> High level community order
	<b>Category range</b> 6 weeks' – 1 year's custody	<b>Category range</b> Medium level community order – 26 weeks' custody	<b>Category range</b> Low level community order – 16 weeks' custody
B2	<b>Starting point</b> 6 weeks' custody	<b>Starting point</b> High level community order	<b>Starting point</b> Medium level community order
	<b>Category range</b> High level community order – 26 weeks' custody	<b>Category range</b> Low level community order – 12 weeks' custody	<b>Category range</b> 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 <b>or</b> 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	<b>Starting point</b> High level community order	<b>Starting point</b> Low level community order
	<b>Category range</b> Medium level community order – 26 weeks' custody	<b>Category range</b> Band C fine – 12 weeks' custody
Category 2	<b>Starting point</b> Low level community order	<b>Starting point</b> Band C fine
	<b>Category range</b> Band C fine – 12 weeks' custody	<b>Category range</b> 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	<b>Starting point</b> 26 weeks' custody	<b>Starting point</b> 12 weeks' custody	<b>Starting point</b> 6 weeks' custody
	<b>Category range</b> 6 weeks' – 1 year 3 months' custody	<b>Category range</b> High level community order – 36 weeks' custody	<b>Category range</b> Medium level community order – 26 weeks' custody
A2 or B1	<b>Starting point</b> 6 weeks' custody	<b>Starting point</b> High level community order	<b>Starting point</b> Medium level community order
	<b>Category range</b> High level community order – 36 weeks' custody	<b>Category range</b> Medium level community order – 26 weeks' custody	<b>Category range</b> Band C fine – 16 weeks' custody
B2	<b>Starting point</b> High level community order	<b>Starting point</b> Medium level community order	<b>Starting point</b> Low level community order
	<b>Category range</b> Medium level community order – 12 weeks' custody	<b>Category range</b> Band C fine – 6 weeks' custody	<b>Category range</b> 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:

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

### 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.

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

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

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

**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
<b>Statutory aggravating factors:</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
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
<b>Other aggravating factors:</b>
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.

<b>Factors reducing seriousness or reflecting personal mitigation</b>
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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## 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.<sup>1</sup>

*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'.

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<sup>1</sup> 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



**MCSG - S4 Threatening Behaviour****Offence seriousness (culpability and harm)****A. Identify the appropriate starting point**

Starting points based on first time offender pleading not guilty

Examples of nature of activity	Starting point	Range
Fear or threat of low level immediate unlawful violence such as push, shove or spit	Low level community order	Band B fine to medium level community order
Fear or threat of medium level immediate unlawful violence such as punch	High level community order	Low level community order to 12 weeks custody
Fear or threat of high level immediate unlawful violence such as use of weapon; missile thrown; gang involvement	12 weeks custody	6 to 26 weeks custody

**MCSG - S4A Disorderly Behaviour with intent to cause harassment alarm or distress****Offence seriousness (culpability and harm)****A. Identify the appropriate starting point**

Starting points based on first time offender pleading not guilty

Examples of nature of activity	Starting point	Range
Threats, abuse or insults made more than once but on same occasion against the same person e.g. while following down the street	Band C fine	Band B fine to low level community order
Group action or deliberately planned action against targeted victim	Medium level community order	Low level community order to 12 weeks' custody
Weapon brandished or used or threats against vulnerable victim – course of conduct over longer period	12 weeks' custody	High level community order to 26 weeks' custody

**MCSG - S5 Disorderly behaviour likely to cause harassment, alarm or distress****Offence seriousness (culpability and harm)****A. Identify the appropriate starting point**

Starting points based on first time offender pleading not guilty.

Examples of nature of activity	Starting point	Range
Shouting, causing disturbance for some minutes	Band A fine	Conditional discharge to band B fine
Substantial disturbance caused	Band B fine	Band A fine to band C fine

**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.**

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

**A - High culpability:**

- Targeting of vulnerable victim, where victim vulnerable by age, personal characteristics or circumstances
- Prolonged assault
- Use of substantial force
- Threatened or actual use of weapon or weapon equivalent\*
- Leading role in group activity

**B – Lesser culpability**

- Lesser role in group activity
- 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, use of acid, use of animal in commission of 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.

<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 No/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.

**Where the offence is committed in a domestic context, consideration must be given to the definitive guideline 'Overarching Principles: Domestic Abuse' and any aggravating features appropriately reflected in the sentence starting point.**

HARM	CULPABILITY	
	A	B
Harm 1	<p><b>Starting point</b> High level Community Order</p> <p><b>Category Range</b> Low level Community Order - 26 weeks' custody</p>	<p><b>Starting point</b> Medium level Community Order</p> <p><b>Category Range</b> Low level Community Order - 16 weeks' custody</p>
Harm 2	<p><b>Starting point</b> Medium level Community Order</p> <p><b>Category Range</b> Low level Community Order - 16 weeks' custody</p>	<p><b>Starting point</b> Band B fine</p> <p><b>Category Range</b> Band A Fine - low level Community Order</p>
Harm 3	<p><b>Starting point</b> Band B fine</p> <p><b>Category Range</b> Band A Fine - Low level Community Order</p>	<p><b>Starting point</b> Band A Fine</p> <p><b>Category Range</b> Discharge – Band C Fine</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 starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When considering imposing a custodial sentence, the court should also consider the Imposition guideline, and specifically the section on imposition of custodial sentences. In particular the following must be considered;

- 1) **Has the custody threshold been passed?**
- 2) **If so, is it unavoidable that a custodial sentence be imposed?**

### 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 gender identity

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

Spitting

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

Offence committed in prison

Presence of children

Gratuitous degradation of victim

Abuse of power and/or position of trust

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

Commission of offence whilst under the influence of alcohol/drugs

Other offences taken into consideration (TICs)

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

Significant degree of provocation

Age and/or lack of maturity

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

Sole or primary carer for dependent relative(s)

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

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

<b>RACIALLY OR RELIGIOUSLY AGGRAVATED OFFENCES ONLY</b>
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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.

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

<ul style="list-style-type: none"> <li>▪ Aggravated nature of the offence caused some distress to the victim or the victim's family (<b>over and above the distress already considered at step one</b>).</li> <li>▪ Aggravated nature of the offence caused some fear and distress throughout local community or more widely.</li> </ul>	
<b>LOW LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION</b>	<b>SENTENCE UPLIFT</b>
<ul style="list-style-type: none"> <li>▪ Aggravated element formed a minimal part of the offence as a whole.</li> <li>▪ Aggravated nature of the offence caused minimal or no distress to the victim or the victim's family (<b>over and above the distress already considered at step one</b>).</li> </ul>	<p>Consider a more onerous penalty of the same type identified for the basic offence.</p>

Maximum sentence for the aggravated offence is 2 years imprisonment. Magistrates may find that, although the appropriate sentence for the basic offence would be within their powers, the appropriate increase for the aggravated offence would result in a sentence in excess of their powers. If so, they must commit for sentence to the Crown Court.

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