

18 January 2019

Dear Members

Meeting of the Sentencing Council – 25 January 2019

The next Council meeting will be held in the **Queens Building Conference Suite, 2nd Floor Mezzanine at the Royal Courts of Justice**, on Friday 25 January 2019 at 9:45.

A security pass is not needed to gain access to this building and members can head straight to the meeting room. Once at the Queen's building, go to the lifts and the floor is 2M. Alternatively, call the office on 020 7071 5793 and a member of staff will come and escort you to the meeting room.

The agenda items for the Council meeting are:

- | | |
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| ▪ Agenda | SC(19)JAN00 |
| ▪ Minutes of meeting held on 16 December | SC(18)DEC01 |
| ▪ Action Log | SC(19)JAN02 |
| ▪ Firearms | SC(19)JAN03 |
| ▪ Arson/Criminal Damage | SC(19)JAN04 |
| ▪ Public Order | SC(19)JAN05 |
| ▪ Offence specific guideline | SC(19)JAN06 |
| ▪ Drugs | SC(19)JAN07 |
| ▪ Robbery Evaluation | SC(19)JAN08 |

Members can access papers via the members' area of the website. If you are unable to attend the meeting, we would welcome your comments in advance.

Best wishes



Steve Wade

Head of the Office of the Sentencing Council

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COUNCIL MEETING AGENDA

25 January 2019
Royal Courts of Justice
Queen's Building

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| 09:45 – 10:00 | Minutes of the last meeting and matters arising (papers 1 & 2) |
| 10:00 – 11:00 | Firearms - presented by Sophie Klinger (paper 3) |
| 11:00 – 12:00 | Arson/criminal damage presented by Mandy Banks (paper 4) |
| 12:00 – 13:00 | Public Order - presented by Lisa Frost (paper 5) |
| 13:00 – 13:30 | Lunch |
| 13:30 – 14:30 | Offence specific guidelines – presented by Ruth Pope (paper 6) |
| 14:30 – 15:30 | Drugs - presented by Eleanor Nicholls (paper 7) |
| 15:30 – 16:00 | Robbery evaluation - presented by Sarah Poppleton (paper 8) |

Sentencing Council

COUNCIL MEETING AGENDA

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MEETING OF THE SENTENCING COUNCIL

14 DECEMBER 2018

MINUTES

Members present:

Tim Holroyde (Chairman)
Rob Butler
Mark Castle
Rosina Cottage
Rebecca Crane
Rosa Dean
Heather Hallett
Max Hill
Maura McGowan
Alpa Parmar
Beverley Thompson

Apologies:

Julian Goose
Sarah Munro

Representatives:

Chief Constable Nick Ephgrave for the police,
Phil Douglas for the Lord Chancellor (Director,
Offender and Youth Justice Policy)

Members of Office in
Attendance:

Steve Wade (Head of Office)
Mandy Banks
Lisa Frost
Phil Hodgson
Amber Isaac
Sophie Klinger
Ruth Pope

1. MINUTES OF LAST MEETING

- 1.1. The minutes from the meeting of 16 November 2018 were agreed.

2. MATTERS ARISING

- 2.1 The Chairman welcomed Kathryn Montague to her first Council meeting following her recent recruitment to the office as the Senior Press and Communications Officer.

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

- 3.1 The Council considered and agreed a final draft of the guideline ahead of a public consultation on the proposals in spring next year.
- 3.2 The Council considered the changes made to the guideline since the last meeting, and the findings of the recently published final report of the Independent Review into the Mental Health Act.
- 3.3 The Council also considered the proposed plan for the draft resource assessment to accompany the consultation, noting the data limitations in this area.

4. DISCUSSION ON ADDITIONAL RESEARCH TO SUPPORT DRUGS GUIDELINE – PRESENTED BY AMBER ISAAC, OFFICE OF THE SENTENCING COUNCIL

- 4.1 The Council considered a proposal for a piece of analysis to investigate the factors that influence sentences imposed at the Crown Court for drug offences. It was proposed that this analysis includes culpability, harm, aggravating and mitigating factors, information on guilty plea reductions and demographic factors.
- 4.2 The Council approved the proposal and will consider findings from the analysis in time to inform the consultation on the revised Drug Offences guideline.

5. DISCUSSION ON ASSAULT – PRESENTED BY LISA FROST, OFFICE OF THE SENTENCING COUNCIL

- 5.1 The Council considered culpability factors and sentence levels for s18 GBH with intent. Discussion took place as to whether an additional very high culpability category should be included for cases involving multiple or extreme high culpability factors.
- 5.2 The Council thought that such a category could potentially capture a high proportion of cases, so instead agreed to include additional wording in the guideline similar to that included in the Sexual Offences Rape guideline to provide for sentencers to move outside of the category range in appropriate cases. Extensive discussion took place

as to whether the guideline should include a factor to provide for cases akin to loss of control manslaughter cases.

- 5.3 The Council considered the potential for a relevant offence not involving a death but causing GBH otherwise attracting a higher sentence. It was agreed that a model of the guideline including a relevant loss of control type factor be tested and the findings considered before a final version of the guideline is agreed. Sentence levels were also agreed for testing based on the factors discussed at the meeting.

6. DISCUSSION ON GENERAL GUIDELINE – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

- 6.1 The Council reviewed and approved amended wording for the expanded guidance on harm and mitigating factors in the General guideline. Consideration was then given to how the explanations for aggravating and mitigating factors in the General guideline would apply to offence specific guidelines. The Council agreed to minor adaptations to ensure relevance to particular guidelines.
- 6.2 The Council reviewed how the expanded explanations in offence specific guidelines would work in practice on a test version of the website and agreed to consult on this model in early 2019.

7. UPDATE ON SENTENCING COUNCIL WEBSITE – PRESENTED BY PHIL HODGSON, OFFICE OF THE SENTENCING COUNCIL

- 7.1 The Council were updated on the plans for redeveloping the Sentencing Council website. Members suggested some amendments and a number of recommendations for additional content.

8. DISCUSSION ON FIREARMS – PRESENTED BY SOPHIE KLINGER, OFFICE OF THE SENTENCING COUNCIL

- 8.1 The Council agreed revisions to the assessment of culpability, harm, and aggravating and mitigating factors in the guideline on Possession of a Prohibited Weapon. They also discussed sentence levels for this offence. The Council agreed to include two separate tables at step two, covering offences subject to the minimum term and those where no minimum term applies.
- 8.2 The Council considered guidance on the minimum term and on 'exceptional circumstances'. The Council also considered what the aim of this guidance should be following analysis of minimum term cases where the sentence imposed fell below 5 years. Some amendments were made to the draft wording, which will be reviewed further at a future meeting.

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ACTION AND ACTIVITY LOG – as at 18 January 2019

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 13 April 2018					
1	Robbery	Full report for the robbery evaluation to be circulated to Council, once the time series analysis has been updated. Council will then decide whether or not to put robbery back on the workplan.	Sarah Poppleton		ACTION CLOSED – To be presented at January meeting.
SENTENCING COUNCIL MEETING 22 June 2018					
2	Expanded factors in offence specific guidelines	Council members to assist with reviewing factors in digital guidelines over the summer	Ruth Pope/ Council members		ACTION CLOSED – Factors to be discussed at January meeting.
SENTENCING COUNCIL MEETING 27 July 2018					
3	Mental Health	Claire agreed to check the data held in relation to probation reports, specifically, what percentage of reports (oral and written) suggested that psychiatric reports were ordered.	Pamela Jooman	ACTION ONGOING- It has been determined that any information available in the reports is likely to be limited (in terms of both coverage and detail), and would require a large amount of resource to extract. SC A&R are instead investigating other sources of data and working with MoJ colleagues to determine what information may be available.	

SENTENCING COUNCIL MEETING 28 September 2018					
4	Media Coverage	It was agreed that the suggested actions arising from Nick Mann's presentation on changing trends in media coverage be remitted to the Communications and Confidence Subgroup	Phil Hodgson	ACTION ONGOING - to be discussed at next C&C subgroup meeting in the new year	
SENTENCING COUNCIL MEETING 16 November 2018					
5	Drug Offences (revision)	Eleanor to circulate revised aggravating factors relating to "more than usual harm" to Council members for comment prior to January meeting.	Eleanor Nicholls/Council members	ACTION ONGOING – Eleanor to circulate revised wording after December papers.	ACTION CLOSED – To be discussed at January meeting.
SENTENCING COUNCIL MEETING 14 December 2018					
6	Mental Health	Mandy, Tim and Rosa to reflect on the discussion at the meeting on the agreed objectives for the guideline, and produce wording.	Mandy, Tim and Rosa		ACTION CLOSED- wording circulated to members on the 16/1/19

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

25 January 2019
SC(19)JAN03 – Firearms paper
Maura McGowan
Sophie Klinger
07976 300962

1 ISSUE

1.1 This is the fifth meeting to consider the firearms guideline. This paper asks the Council to consider culpability and harm in two further guidelines covering possession with intent offences. Step two factors and the rest of the guidelines will be considered at a subsequent meeting.

1.2 Currently, there are three further meetings scheduled to discuss the firearms guideline. The aim is to sign off the consultation version at the May 2019 meeting, if possible, with consultation planned for June to October 2019. These timelines will continue to be monitored and amended as required.

2 RECOMMENDATION

2.1 It is recommended that the Council:

- agrees to group the offences under S16, 17(1), 17(2) and 18 together in one guideline, with S16A in a separate guideline, due to the differing maximum penalty and sentence levels (see table at paragraph 3.2);
- considers the culpability model for each guideline (paragraph 3.6);
- considers the harm model for each guideline (paragraph 3.17).

3 CONSIDERATION

Offences to be covered

3.1 This paper focuses on possession with intent offences. It is proposed to cover the following five offences over two guidelines, grouped as follows:

1. **Guideline 5a (Annex A):** S16 (possession with intent to endanger life), S17(1) (use of firearm to resist arrest), S17(2) (possession while committing a Schedule 1 offence¹), S18 (carrying firearm with criminal intent)
2. **Guideline 5b (Annex B):** S16A (possession with intent to cause fear of violence)

¹ Schedule 1 includes certain offences against the person, arson and criminal damage, sexual offences, theft, robbery, burglary, blackmail and others (see **Annex C** for full schedule).

3.2 The Firearms Act provisions and Schedule 1 are included in full at **Annex C**. Details of the individual offences are set out below:

Offence	Description	Maximum penalty	Volumes (2017)
S16 Possession with intent to endanger life	Possession of any firearm or ammunition with intent to endanger life, or to enable another person to endanger life, whether injury caused or not.	Life	77
S16A Possession with intent to cause fear of violence	Possession of any firearm or imitation firearm with intent to cause, or to enable another person to cause, any person to believe that unlawful violence will be used against him or another person.	10 years	261
S17(1) Use of firearm to resist arrest	Making or attempting to make use of a firearm or imitation firearm with intent to resist or prevent the lawful arrest or detention of himself or another person.	Life	1
S17(2) Possession while committing a Schedule 1 offence	At the time of committing or being arrested for an offence in Schedule 1, having in possession a firearm or imitation firearm, unless possessed for a lawful object.	Life	16
S18(1) Carry firearm with criminal intent	Having a firearm or imitation firearm with intent to commit an indictable offence, or to resist arrest or prevent the arrest of another, while having the firearm or imitation firearm with him.	Life	16

3.3 All the offences are indictable only. The minimum term provisions will apply in any case where the firearm concerned is a specified firearm prohibited under S5.² There is no data available on the proportions of these offences where the minimum term applies. However, from the sentence levels and transcript analysis, it appears that the majority of offences under S16 involve firearms subject to the minimum term, while offences under S16A, S17 and S18 involve a mixture of genuine and imitation firearms, with smaller numbers of firearms attracting the minimum term.

3.4 It is worth noting that the S16 offence covers firearms and ammunition only, while S16A, S17 and S18 expressly cover both firearms and imitation firearms, but not ammunition. The majority of S16A cases (around 70% in 2017) involve imitation firearms (see data at **Annex D**). A set of short case summaries from transcripts is included at **Annex E**, to illustrate the various offences.

² The minimum term applies in respect of a firearm specified in section 5(1)(a), (ab), (aba), (ac), (ad), (ae) or (af) or section 5(1A)(a) of the Firearms Act 1968.

3.5 The S16A offence of possession with intent to cause fear of violence, which is the highest volume offence, has been placed in a separate guideline. All the offences have life imprisonment as the maximum penalty, except the S16A offence, which has a maximum of 10 years. The sentence levels for the S16A offence are also lower than the offences with the life maximum. The median ACSL for S16A is 2 years 6 months' custody, compared with 12 years for the S16 offence and ranging from 4 years 3 months to 7 years for the other offences (see **Annex D**). The different statutory maximum and sentence levels mean that it is necessary to have a separate guideline for the S16A offence.

Question 1: Does the Council agree with the groupings for these guidelines?

Culpability model

3.6 It is proposed to use the same overall culpability model for these guidelines as used in the other possession guidelines. This model involves a two-pronged approach, first considering the type of weapon at Culpability step A, then other culpability factors at Culpability step B. It is not proposed to change the number of levels in culpability for either guideline.

Question 2: Does the Council agree with the proposed culpability model?

Culpability step A – Type of weapon

3.7 These offences cover a range of types of weapon. They may include prohibited firearms under S5, firearms or shotguns requiring a licence, air weapons that do not require a certificate, ammunition and imitation firearms, depending on the offence.³ It is appropriate therefore for the type of weapon table to cover the full range of weapons.

3.8 It is proposed to use a type of weapon table similar to the table the Council previously agreed for the S19 offence (carrying a firearm in a public place). The two guidelines can be the same except with ammunition omitted from the table in the guideline for S16A. Imitation firearms need to be included for both guidelines as although the S16 offence does not extend to imitations, the offences under S17 or S18 may include them.

3.9 There are also two new additions to the table concerning imitation firearms. Certain imitation firearms are more sophisticated and realistic, with some convertible to live firing weapons, while others are more crude. In 2017 imitation firearms accounted for around 70% of the highest-volume possession with intent offence (S16A, possession with intent to cause fear of violence). Given this, it could be useful to draw a distinction between different types of

³ Per the table at paragraph 3.2 the section 16 offence covers ammunition but not imitation firearms; the offences under 16A, 17 and 18 cover firearms and imitation firearms but not ammunition.

imitation firearm. It is proposed the type of weapon table expressly incorporates two categories of more serious imitation firearm which already exist in legislation: realistic imitation firearms⁴ (which are prohibited, subject to certain exceptions⁵) and readily convertible imitation firearms⁶ (which require a certificate to possess), placing these in type 2 rather than type 3, with a drop-down box in the guideline to explain these terms further. Imitation firearms not falling in these categories would remain at type 3.

3.10 The proposed type of weapon table is below, with additions relating to imitation firearms underlined:

Type 1	<ul style="list-style-type: none"> • Firearm or shotgun prohibited under section 5 (whether or not the mandatory minimum sentence applies) (where not at Type 2)
Type 2	<ul style="list-style-type: none"> • Weapon prohibited under section 5(1)(b) • Firearm, shotgun or air weapon for which a certificate is required • <u>Realistic imitation firearm or readily convertible imitation firearm</u>⁷ • Ammunition (where not at Type 3)⁸
Type 3	<ul style="list-style-type: none"> • Air weapon that is not prohibited and for which no certificate is required • Imitation firearm (<u>where not at Type 2</u>) • Very small quantity of ammunition⁹

Question 3: Does the Council agree with the type of weapon table, including changes relating to imitation firearms?

⁴ The Violent Crime Reduction Act 2008 made it an offence to manufacture, import or sell realistic imitation firearms (section 36). A realistic imitation firearm is defined as an imitation firearm which has an appearance that is so realistic as to make it indistinguishable, for all practical purposes, from a real firearm (section 38).

⁵ It is a defence if the realistic imitation firearm was available for a museum or gallery, theatrical performances, film/tv production, historical re-enactments, or for exercising a function of a crown servant; additionally, a person in trade may import realistic imitations for the purpose of modifying them to make them non-realistic (section 37 Violent Crime Reduction Act 2006). There are two further defences: permitted activities, which are generally airsoft skirmishing, and permitted events, which are for the purpose of display at arms fairs (Violent Crime Reduction Act 2006 (Realistic Imitation Firearms) Regulations 2007).

⁶ Section 1 Firearms Act 1968 applies to an imitation firearm (i.e. requiring a firearms certificate) if: (a) it has the appearance of being a firearm to which section 1 of the 1968 Act applies; and (b) it is so constructed or adapted as to be readily convertible into a firearm to which that section applies (section 1(1) of the Firearms Act 1982). The firearm is readily convertible if: (a) it can be so converted without any special skill on the part of the person converting it in the construction or adaptation of firearms of any description; and (b) the work involved in converting it does not require equipment or tools other than such as are in common use by persons carrying out works of construction and maintenance in their own homes (section 1(6) of 1982 Act).

⁷ Drop-down box in guideline to link to the relevant legislative definitions.

⁸ Guideline 5a only, as the section 16A offence in guideline 5b does not cover ammunition.

⁹ Guideline 5a only.

Guideline 5a (Possession with intent) – Culpability step B – Other culpability factors

3.11 This paper first addresses culpability step B in Guideline 5a at **Annex A** (Possession with intent). The factors under culpability step B are similar to those in the possession guidelines already considered. There have been some additions and amendments to address features relating to intent and use. In most of these cases the firearm will have been produced.

3.12 The following factors are retained from the earlier possession guidelines:

- High culpability: ‘Firearm discharged’ – this continues to make a case more serious although it is more common in these cases than in simple possession. In some cases there is injury or damage that results from the discharge (see discussion below under harm).
- Medium culpability: ‘Other cases falling between high and lower culpability’
- Lower culpability: ‘No use or intention to use’ – this is for the rare case under section 17(2) where the person is arrested for or commits a schedule 1 offence while in possession of a firearm which they do not use or intend to use, e.g. has it out of sight in their backpack while committing a street robbery.

3.13 Various factors have been added or changed. In high culpability:

- ‘Intent to endanger life or enable another to do so’ – this new factor recognises that this intention is more serious compared with the intention for the S17 and S18 offences. Although this factor will be present in all S16 offences, the court will need to balance it with other factors in different levels to select the appropriate category. This is necessary to guard against too many S16 cases falling into high culpability. Road-testing can explore whether this works well in practice.
- ‘Sophisticated nature of the offence/significant planning’ – transcripts indicated that cases where there is a great deal of planning, organisation or forethought were more serious. Some possession with intent to endanger life cases also involve large-scale use, often in the context of organised criminal offending and drug supply. The wording for this factor is used in the fraud and theft guidelines. There are corresponding factors of ‘some degree of planning’ and ‘little or no planning or unsophisticated offending’ in medium and lower culpability.

- 'Leading role where offending is part of a group activity' – where offending was in a group, transcripts differentiated between offenders based on their role. The wording of this factor is based on the robbery guideline. There are corresponding factors of 'significant role' and 'lesser role' in medium and lower culpability.
- 'Prolonged incident' – transcripts tended to differentiate between offending where the offender's conduct involving the firearm was sustained over a longer period, compared with a less serious incident that was over very quickly (although a short incident could still be very serious). There is a corresponding factor of 'conduct limited in scope and duration' in lower culpability.

3.14 Medium culpability:

- 'Firearm/ammunition produced with threats of violence (where not at high culpability)' – this factor is intended to differentiate those cases where the firearm is produced accompanied by threats as opposed to being produced without threats or not produced at all. There is a corresponding factor in lower culpability of 'other cases where firearm produced or visible'.
- 'Firearm loaded or held with compatible ammunition but not discharged' – the firearm being loaded has been shifted to medium culpability, alongside being held with ammunition, to avoid too many cases falling into high culpability.

3.15 Lower culpability:

- 'No intention to cause injury to persons' – this factor would mainly be relevant in the S17 and S18 offences (since it is not compatible with an intention to endanger life).

Question 4: Does the Council agree with the proposed culpability B factors in guideline 5a?

Guideline 5b (Possession with intent to cause fear of violence) – Culpability step B – Other culpability factors

3.16 The factors in this guideline (at **Annex B**) are similar to guideline 5a but with some specific factors relating to intent:

- 'Intention falling just short of intent to endanger life' (higher culpability) – there is some overlap between the possession with intent to endanger life offence (S16) and possession with intent to cause fear of violence (S16A), where the case is similar but the more serious intention cannot be made out or falls just short. This factor recognises those cases as more serious than other causing fear of violence cases.

- ‘Conduct intended to maximise fear or distress’ (higher culpability) – transcripts have indicated that in certain cases the offender will take actions to exacerbate the fear caused by use of a firearm, for example by pointing it at a person’s face for a prolonged period of time.
- ‘No use’ (lower culpability) – compared with guideline 5a (**Annex A**), ‘or intention to use’ has been omitted from this factor since all cases in guideline 5b will involve the intention to cause fear of violence.

Question 5: Does the Council agree with the proposed culpability B factors in guideline 5b?

Harm model

3.17 It is proposed to use a model for harm that is similar to that for the possession guidelines. The proposed harm model is the same for both possession with intent guidelines. In the text above the harm factors, harm is described as being assessed by reference to the **risk of injury/death** or **disorder** occurring (as in simple possession) and/or **actual harm** caused.

3.18 There are some additional factors and amendments to reflect the actual harm present in some of these cases, in addition to the risk of harm which was the main focus of the simple possession guidelines. The weapon is often produced in front of other persons and discharge of the firearm is more frequent, particularly in the intent to endanger life offence. Consequently, alarm and distress is much more common and there are some instances of psychological harm. Where the firearm is discharged, in assessing seriousness the court should consider the location, who and how many persons were exposed to danger and the seriousness of any injury or damage to property (per *R v Sheen*¹⁰).

Question 6: Does the Council agree with the proposed harm model for both guidelines 5a and 5b?

3.19 The main changes to harm factors compared with the possession guidelines are set out below.

¹⁰ *R v Sheen* [2011] EWCA Crim 2461. This was a possession with intent to endanger life case (S16), where the firearm was discharged. It held that where the firearm is discharged, in addition to the four questions in *Avis* (on type of weapon, use, intended use, previous convictions) there should also be consideration of two further questions: (1) Where was the firearm (or were the firearms) discharged, and who and how many were exposed to danger by its or their use? (2) Was any injury or damage caused by the discharge of the firearm or firearms, and if so how serious was it?

- Category 1: ‘Serious physical and/or psychological harm caused’ – this new factor is aimed at the most serious type of harm that may result. Category 1 also includes the two risk-related factors from the possession guidelines.
- Category 2: This category includes two new factors, ‘Less serious physical harm and/or serious alarm/distress caused’ and ‘Serious property damage caused’. These are aimed at capturing actual harm that is less serious than that falling in category 1. Category 2 also includes the catch-all factor from the possession guidelines.
- Category 3: Two new factors are included, ‘Limited alarm/distress caused’ and ‘Limited property damage caused’, to reflect the lower end of possible actual harm. This category also continues to include the lower-end two risk-related factors from the possession guidelines.

3.20 After the harm table, there is wording to ensure the court considers totality where there are separate charges:

Where separate charges apply, for example in relation to any injury caused, the court should have regard to totality (see step seven).

Question 7: Does the Council agree with the proposed harm factors?

4 IMPACT

4.1 A draft resource assessment will be considered in due course. The resource assessment will be developed in line with the Council’s decision at the September 2018 meeting that the guideline should aim to replicate current sentencing practice (subject to consideration of the sentencing tables and any future decisions around the objective of the exceptional circumstances guidance). The impact on resources within the system is likely to be negligible if the guideline continues to be developed in line with the aim of replicating current practice.

5 RISK

5.1 The Offensive Weapons Bill had its second reading in the House of Lords on 7 January 2019. The Lords Committee stage has yet to be scheduled. As noted previously, the Bill will prohibit two further items: rapid firing rifles¹¹ and bump stock devices.¹² Both items will be subject to the minimum term.

¹¹ Certain chambered weapons from which cartridge cases are extracted by propellant gas. According to the Home Office, these fire at a rate that is significantly greater than a conventional bolt-action rifle, making them closer to self-loading rifles, which are already prohibited.

¹² A bump stock device is an attachment that increases the rate of fire, so that a semi-automatic weapon can fire almost as quickly as an automatic weapon.

5.2 I will come back to the Council for confirmation once the legislation is passed, but in light of the nature of the items and the minimum term applying, it is provisionally intended to include them both under type 1. It is understood that bump stocks are not currently in circulation in the United Kingdom and the rapid firing rifles are infrequently used, if at all, in criminal activity. Therefore it is anticipated adding these two items to type 1 will not have a significant impact on overall volumes.

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Firearms – Possession with intent

Possession with intent to endanger life

Firearms Act 1968 (section 16)

Use of firearm to resist arrest

Firearms Act 1968 (section 17(1))

Possession while committing a Schedule 1 offence

Firearms Act 1968 (section 17(2))

Carrying firearm with criminal intent

Firearms Act 1968 (section 18)

Indictable only

Maximum: Life imprisonment

Offence range: [To come]

These are serious specified offences for the purposes of sections 224 and 225(2) (life sentences for serious offences) of the Criminal Justice Act 2003.

These are offences listed in Part 1 of Schedule 15B for the purposes of section 224A (life sentence for a second listed offence).

These are specified offences for the purposes of section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.

This offence is subject to statutory minimum sentencing provisions. See STEPS TWO and THREE for further details.

**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**.

Culpability A – Type of weapon

Use the table below to identify an initial culpability category based on the **type of weapon** only. This assessment focuses on the nature of the weapon itself only, not whether the weapon was loaded or in working order.

The categorisations below are indicative only and should not be applied mechanistically. Courts should take care to ensure the categorisation is appropriate for the specific weapon by moving up or down a category where necessary. Where the weapon or ammunition does not fall squarely in one category, the court may need to adjust the starting point in STEP TWO.

Type 1	<ul style="list-style-type: none"> • Firearm or shotgun prohibited under section 5 (whether or not the mandatory minimum sentence applies) (where not at Type 2)
Type 2	<ul style="list-style-type: none"> • Weapon prohibited under section 5(1)(b) • Firearm, shotgun or air weapon for which a certificate is required • Realistic imitation firearm¹ or readily convertible imitation firearm² • Ammunition (where not at Type 3)
Type 3	<ul style="list-style-type: none"> • Air weapon that is not prohibited and for which no certificate is required • Imitation firearm (where not at Type 2) • Very small quantity of ammunition

¹ Drop-down box to link to relevant legislative definitions.

² Drop-down box to link to relevant legislative definitions.

Culpability B – Other culpability factors

The court should weigh all the factors set out below in determining the offender’s culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender’s culpability.

Culpability demonstrated by one or more of the following:	
High culpability:	
<ul style="list-style-type: none"> • Intent to endanger life or enable another to do so • Sophisticated nature of offence/significant planning • Leading role where offending is part of a group activity • Firearm discharged • Prolonged incident 	
Medium culpability:	
<ul style="list-style-type: none"> • Firearm/ammunition produced with threats of violence (where not at high culpability) • Firearm loaded or held with compatible ammunition but not discharged • Significant role where offending is part of a group activity • Some degree of planning • Other cases falling between high and lower culpability 	
Lower culpability:	
<ul style="list-style-type: none"> • No use or intention to use • No intention to cause injury to persons • Other cases where firearm produced or visible • Lesser role where offending is part of group activity • Little or no planning or unsophisticated offending • Conduct limited in scope and duration 	

Culpability category

Identify the final culpability category in the table below, considering both **A – Type of weapon** and **B – Other culpability factors**.

		A – Type of weapon		
		1	2	3
B – Other culpability factors	High	Culpability category A	Culpability category A	Culpability category B
	Medium	Culpability category A	Culpability category B	Culpability category C
	Lower	Culpability category B	Culpability category C	Culpability category C

<p>Harm</p> <p>The court should consider the steps set out below to determine the level of harm that has been caused or was risked.</p>	
<p>This step is assessed by reference to the risk of injury/death or disorder occurring and/or actual harm caused.</p> <p>When considering the risk of harm, relevant considerations may include the number and vulnerability of people exposed, especially children, accessibility and visibility of the weapon, and the location of the offence.</p>	
<p>Category 1</p>	<ul style="list-style-type: none"> • Serious physical and/or psychological harm caused • Offence committed in circumstances where person(s) put at high risk of serious physical injury or death • Offence committed in circumstances where there is a high risk of serious disorder
<p>Category 2</p>	<ul style="list-style-type: none"> • Less serious physical harm and/or serious alarm/distress caused • Serious property damage caused • All other cases falling between category 1 and category 3 because: <ul style="list-style-type: none"> ○ Factors in both 1 and 3 are present which balance each other out; and/or ○ The harm falls between the factors as described in 1 and 3
<p>Category 3</p>	<ul style="list-style-type: none"> • Limited alarm/distress caused • Limited property damage caused • Offence committed in circumstances where person(s) put at no/minimal risk of serious physical injury or death • Offence committed in circumstances where there is no/minimal risk of serious disorder

Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm.

Where separate charges apply, for example in relation to any injury caused, the court should have regard to totality (see step seven).

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	C
Category 1	Starting point	Starting point	Starting point
	Category range	Category range	Category range
Category 2	Starting point	Starting point	Starting point
	Category range	Category range	Category range
Category 3	Starting point	Starting point	Starting point
	Category range	Category range	Category range

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness

Statutory aggravating factors:

- A1. 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
- A2. Offence committed whilst on bail

Other aggravating factors:

Factors reducing seriousness or reflecting personal mitigation

STEP THREE

Minimum Terms

[To come once finalised]

STEP FOUR

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 FIVE

Dangerousness

The court should consider whether having regard to the criteria contained in Chapter 15 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 244A or section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions the notional determinate sentence should be used as the basis for the setting of a minimum term.

STEP SIX

Reduction for guilty pleas

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

Where a **mandatory minimum sentence** has been imposed under section 51A of the Firearms Act 1968, the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than the mandatory minimum.

STEP SEVEN

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 EIGHT

Ancillary orders

In all cases the court should consider whether to make ancillary orders.

Forfeiture and destruction of firearms and cancellation of certificate

The court should consider ordering forfeiture or disposal of any firearm or ammunition and the cancellation of any firearms certificate. Section 52 Firearms Act 1968 provides for the forfeiture and disposal of firearms and the cancellation of firearms and shotgun certificates where a person is convicted of one or more offence under the Firearms Act 1968 (other than an offence relating to an air weapon) and is given a custodial sentence or a community order containing a requirement not to possess, use or carry a firearm. The court may order the forfeiture or disposal of air weapons under paragraphs 7 and 8 Part II to Schedule Six Firearms Act 1968.

Serious Crime Prevention Order

The court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

STEP NINE

Reasons

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

STEP TEN

Consideration for time spent on bail

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

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Firearms – Possession with intent to cause fear of violence

Possession with intent to cause fear of violence

Firearms Act 1968 (section 16A)

Indictable only

Maximum: 10 years' custody

Offence range: [To come]

This is a specified offence for the purposes of section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.

This offence is subject to statutory minimum sentencing provisions. See STEPS TWO and THREE for further details.

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**.

Culpability A – Type of weapon

Use the table below to identify an initial culpability category based on the **type of weapon** only. This assessment focuses on the nature of the weapon itself only, not whether the weapon was loaded or in working order.

The categorisations below are indicative only and should not be applied mechanistically. Courts should take care to ensure the categorisation is appropriate for the specific weapon by moving up or down a category where necessary. Where the weapon or ammunition does not fall squarely in one category, the court may need to adjust the starting point in STEP TWO.

Type 1	<ul style="list-style-type: none"> • Firearm or shotgun prohibited under section 5 (whether or not the mandatory minimum sentence applies) (where not at Type 2)
Type 2	<ul style="list-style-type: none"> • Weapon prohibited under section 5(1)(b) • Firearm, shotgun or air weapon for which a certificate is required • Realistic imitation firearm¹ or readily convertible imitation firearm²
Type 3	<ul style="list-style-type: none"> • Air weapon that is not prohibited and for which no certificate is required • Imitation firearm (where not at Type 2)

¹ Drop-down box to link to relevant legislative definitions.

² Drop-down box to link to relevant legislative definitions.

Culpability B – Other culpability factors

The court should weigh all the factors set out below in determining the offender’s culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender’s culpability.

Culpability demonstrated by one or more of the following:	
High culpability:	<ul style="list-style-type: none"> • Intention falling just short of intent to endanger life • Conduct intended to maximise fear or distress • Sophisticated nature of offence/significant planning • Leading role where offending is part of a group activity • Firearm discharged • Prolonged incident
Medium culpability:	<ul style="list-style-type: none"> • Firearm produced with threats of violence (where not at high culpability) • Firearm loaded or held with compatible ammunition but not discharged • Significant role where offending is part of a group activity • Some degree of planning • Other cases falling between high and lower culpability
Lower culpability:	<ul style="list-style-type: none"> • No use • No intention to cause injury to persons • Other cases where firearm produced or visible • Lesser role where offending is part of group activity • Little or no planning or unsophisticated offending • Conduct limited in scope and duration

Culpability category

Identify the final culpability category in the table below, considering both **A – Type of weapon** and **B – Other culpability factors**.

		A – Type of weapon		
		1	2	3
B – Other culpability factors	High	Culpability category A	Culpability category A	Culpability category B
	Medium	Culpability category A	Culpability category B	Culpability category C
	Lower	Culpability category B	Culpability category C	Culpability category C

<p>Harm</p> <p>The court should consider the steps set out below to determine the level of harm that has been caused or was risked.</p>	
<p>This step is assessed by reference to the risk of injury/death or disorder occurring and/or actual harm caused.</p> <p>When considering the risk of harm, relevant considerations may include the number and vulnerability of people exposed, especially children, accessibility and visibility of the weapon, and the location of the offence.</p>	
<p>Category 1</p>	<ul style="list-style-type: none"> • Serious physical and/or psychological harm caused • Offence committed in circumstances where person(s) put at high risk of serious physical injury or death • Offence committed in circumstances where there is a high risk of serious disorder
<p>Category 2</p>	<ul style="list-style-type: none"> • Less serious physical harm and/or serious alarm/distress caused • Serious property damage caused • All other cases falling between category 1 and category 3 because: <ul style="list-style-type: none"> ○ Factors in both 1 and 3 are present which balance each other out; and/or ○ The harm falls between the factors as described in 1 and 3
<p>Category 3</p>	<ul style="list-style-type: none"> • Limited alarm/distress caused • Limited property damage caused • Offence committed in circumstances where person(s) put at no/minimal risk of serious physical injury or death • Offence committed in circumstances where there is no/minimal risk of serious disorder

Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm.

Where separate charges apply, for example in relation to any injury caused, the court should have regard to totality (see step seven).

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		
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Category 1	Starting point	Starting point	Starting point
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The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness

Statutory aggravating factors:

- A1. 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
- A2. Offence committed whilst on bail

Other aggravating factors:

Factors reducing seriousness or reflecting personal mitigation

STEP THREE

Minimum Terms

[To come once finalised]

STEP FOUR

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 FIVE

Dangerousness

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

Reduction for guilty pleas

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

Where a **mandatory minimum sentence** has been imposed under section 51A of the Firearms Act 1968, the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than the mandatory minimum.

STEP SEVEN

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.

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In all cases the court should consider whether to make ancillary orders.

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Serious Crime Prevention Order

The court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

STEP NINE

Reasons

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

STEP TEN

Consideration for time spent on bail

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

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FIREARMS ACT 1968 – SECTIONS 16-18 AND SCHEDULE 1**16. Possession of firearm with intent to injure.**

It is an offence for a person to have in his possession any firearm or ammunition with intent by means thereof to endanger life, or to enable another person by means thereof to endanger life, whether any injury has been caused or not.

16A. Possession of firearm with intent to cause fear of violence.

It is an offence for a person to have in his possession any firearm or imitation firearm with intent—

(a) by means thereof to cause, or

(b) to enable another person by means thereof to cause,

any person to believe that unlawful violence will be used against him or another person.

17.— Use of firearm to resist arrest.

(1) It is an offence for a person to make or attempt to make any use whatsoever of a firearm or imitation firearm with intent to resist or prevent the lawful arrest or detention of himself or another person.

(2) If a person, at the time of his committing or being arrested for an offence specified in Schedule 1 to this Act, has in his possession a firearm or imitation firearm, he shall be guilty of an offence under this subsection unless he shows that he had it in his possession for a lawful object.

[(3) repealed]

(4) For purposes of this section, the definition of “firearm” in section 57(1) of this Act shall apply without paragraphs (b) and (c) of that subsection, and “*imitation firearm*” shall be construed accordingly.

(5) In the application of this section to Scotland, a reference to Schedule 2 to this Act shall be substituted for the reference in subsection (2) to Schedule 1.

18.— Carrying firearm with criminal intent.

(1) It is an offence for a person to have with him a firearm or imitation firearm with intent to commit an indictable offence, or to resist arrest or prevent the arrest of another, in either case while he has the firearm or imitation firearm with him.

(2) In proceedings for an offence under this section proof that the accused had a firearm or imitation firearm with him and intended to commit an offence, or to resist or prevent arrest, is evidence that he intended to have it with him while doing so.

(3) In the application of this section to Scotland, for the reference to an indictable offence there shall be substituted a reference to any offence specified in paragraphs 1 to 18 of Schedule 2 to this Act.

SCHEDULE 1 – OFFENCES TO WHICH SECTION 17(2) APPLIES

- 1.** Offences under section 1 of the Criminal Damage Act 1971
- 2.** Offences under any of the following provisions of the Offences Against the Person Act 1861:—
 - sections 20 to 22 (inflicting bodily injury; garrotting; criminal use of stupefying drugs);
 - section 30 (laying explosive to building etc.);
 - section 32 (endangering railway passengers by tampering with track);
 - section 38 (assault with intent to commit felony or resist arrest);
 - section 47 (criminal assaults);
- 2A.** Offences under Part I of the Child Abduction Act 1984 (abduction of children).
[paragraph 3 repealed]
- 4.** Theft, robbery, burglary, blackmail and any offence under section 12(1) (taking of motor vehicle or other conveyance without owner's consent) of the Theft Act 1968
- 5.** Offences under section 89(1) of the Police Act 1996 or section 90 of the Police and Fire Reform (Scotland) Act 2012 (assaulting or impeding police).
- 5A.** An offence under section 90(1) of the Criminal Justice Act 1991 (assaulting prisoner custody officer).
- 5B.** An offence under section 13(1) of the Criminal Justice and Public Order Act 1994 (assaulting secure training centre custody officer).
- 6.** Offences under any of the following provisions of the Sexual Offences Act 2003—
 - (a) section 1 (rape);
 - (b) section 2 (assault by penetration);
 - (c) section 4 (causing a person to engage in sexual activity without consent), where the activity caused involved penetration within subsection (4)(a) to (d) of that section;
 - (d) section 5 (rape of a child under 13);
 - (e) section 6 (assault of a child under 13 by penetration);
 - (f) section 8 (causing or inciting a child under 13 to engage in sexual activity), where an activity involving penetration within subsection (3)(a) to (d) of that section was caused;
 - (g) section 30 (sexual activity with a person with a mental disorder impeding choice), where the touching involved penetration within subsection (3)(a) to (d) of that section;
 - (h) section 31 (causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity), where an activity involving penetration within subsection (3)(a) to (d) of that section was caused.
- 6A.** An offence under paragraph 14 or 24 of Schedule 10 to the Criminal Justice and Courts Act 2015 (assaulting secure college custody officer).
[paragraph 7 repealed]
- 8.** Aiding or abetting the commission of any offence specified in [paragraphs 1 to 6A]¹ of this Schedule.
- 9.** Attempting to commit any offence so specified.

Table 1: Number of adult offenders sentenced for offences under the Firearms Act 1968, by type of weapon, 2007-2017

Guideline group	Legislation	Section	Offence	Number of adult offenders sentenced												
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017		
Group 5a (Maximum: 10 years)	Firearms Act 1968	16	Possess a firearm with intent to endanger life / enable another to do so ¹	-	-	-	-	52	49	42	31	45	50	73		
			Possess ammunition with intent to endanger life / enable another to do so ¹	-	-	-	-	2	1	0	1	1	1	0		
			Possess a shotgun with intent to endanger life / enable another to do so	1	3	1	5	0	1	2	0	2	1	1		
			Possess an air weapon with intent to endanger life / enable another to do so	1	2	0	0	2	1	0	0	0	0	0		
			TOTAL SECTION 16 OFFENCES	47	63	53	48	69	64	70	44	54	53	77		
		17(1)	Make use / attempt to make use of a firearm/ imitation firearm with intent to resist arrest	1	0	5	2	5	3	3	3	1	4	1		
		17(2)	Possess firearm/ imitation firearm/ shotgun/ air weapon while committing Schedule 1 offence	52	55	34	24	24	20	13	24	13	13	16		
		18(1)	Have a firearm/ imitation firearm with intent to commit an indictable offence/ resist arrest/ prevent the arrest of another	43	26	34	24	23	11	17	11	10	14	16		
		Group 5b (Maximum: 10 years)	Firearms Act 1968	16A	Possess a firearm with intent to cause fear of violence ¹	-	-	-	-	101	76	81	71	74	91	68
					Possess an imitation firearm with intent to cause fear of violence ¹	-	-	-	-	134	130	124	132	153	166	183
Possess a shotgun with intent to cause fear of violence	4				5	1	6	0	5	1	3	3	7	6		
Possess an air weapon with intent to cause fear of violence	9				7	10	4	12	9	14	13	9	14	4		
TOTAL SECTION 16A OFFENCES	299				327	257	274	250	230	221	221	241	280	261		

Source: Court Proceedings Database, Ministry of Justice

Note

1) Data for these specific offences not available prior to 2011.

Table 2: Sentence outcomes for adult offenders sentenced for offences under the Firearms Act 1968, 2017

Guideline group	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Group 5a (Maximum: Life)	16	Possess a firearm/ ammunition/shotgun/air weapon with intent to endanger life / enable another to do so	0	0	0	0	0	72	5	77
	17(1)	Use of firearms to resist arrest	0	0	0	0	0	0	1	1
	17(2)	Possess firearm while committing a Schedule 1 offence	0	0	0	1	1	14	0	16
	18(1)	Carry firearm or imitation firearm with intent to commit indictable offence	0	0	0	0	1	15	0	16
Group 5b (Maximum: 10 years)	16A	Possess a firearm/ imitation firearm/ shotgun/ air weapon with intent to cause fear of violence	0	1	0	9	61	184	6	261

Source: Court Proceedings Database, Ministry of Justice

Guideline group	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Group 5a (Maximum: Life)	16	Possess a firearm/ ammunition/shotgun/air weapon with intent to endanger life / enable another to do so	0%	0%	0%	0%	0%	94%	6%	100%
	17(1)	Use of firearms to resist arrest	0%	0%	0%	0%	0%	0%	100%	100%
	17(2)	Possess firearm while committing a Schedule 1 offence	0%	0%	0%	6%	6%	88%	0%	100%
	18(1)	Carry firearm or imitation firearm with intent to commit indictable offence	0%	0%	0%	0%	6%	94%	0%	100%
Group 5b (Maximum: 10 years)	16A	Possess a firearm/ imitation firearm/ shotgun/ air weapon with intent to cause fear of violence	0%	<0.5%	0%	3%	23%	70%	2%	100%

Source: Court Proceedings Database, Ministry of Justice

Note

1) Includes a number of orders, for example hospital orders, confiscation orders and compensation orders.

Table 3: Estimated average custodial sentence lengths (pre guilty plea) for adult offenders sentenced to immediate custody, and sentence ranges for offences under the Firearms Act 1968, 2017

Guideline group	Section	Offence	Mean sentence length ^{1,3}	Median sentence length ^{2,3}	Sentence range (using estimated pre GP sentence lengths)	
Group 5a (Maximum: Life)	16	Possess a firearm with intent to endanger life / enable another to do so	12 years 5 months	12 years	1 year 8 months - 27 years' custody (and indeterminate)	
		Possess ammunition with intent to endanger life / enable another to do so ^{4,5}	11 years 6 months	12 years	5 years 6 months - 16 years 2 months' custody (and indeterminate)	
		Possess a shotgun with intent to endanger life / enable another to do so ^{4,5}	11 years 2 months	10 years	9 years - 16 years' custody	
		Possess an air weapon with intent to endanger life / enable another to do so ⁴	*	*	4 years 2 months - 7 years 6 months' custody	
	TOTAL SECTION 16 OFFENCES			12 years 5 months	12 years	1 year 8 months - 27 years' custody (and indeterminate)
	17(1)	Use of firearms to resist arrest ⁴	4 years 5 months	4 years 3 months	6 months - 10 years 8 months' custody (and indeterminate)	
17(2)	Possess firearm while committing a Schedule 1 offence	5 years 10 months	5 years 8 months	CO - 12 years' custody		
18(1)	Carry firearm or imitation firearm with intent to commit indictable offence	8 years 8 months	7 years	SSO - 24 years' custody		
Group 5b (Maximum: 10 years)	16A	Possess a firearm with intent to cause fear of violence	4 years 9 months	4 years 6 months	CO - 10 years' custody	
		Possess an imitation firearm with intent to cause fear of violence	2 years 8 months	2 years 3 months	Discharge - 9 years 9 months' custody	
		Possess a shotgun with intent to cause fear of violence ⁴	5 years 4 months	6 years	SSO - 10 years' custody	
		Possess an air weapon with intent to cause fear of violence ⁴	3 years	3 years	SSO - 6 years 9 months' custody	
TOTAL SECTION 16A OFFENCES			3 years 4 months	2 years 6 months	Discharge - 10 years' custody	

Source: Court Proceedings Database, Ministry of Justice

Notes

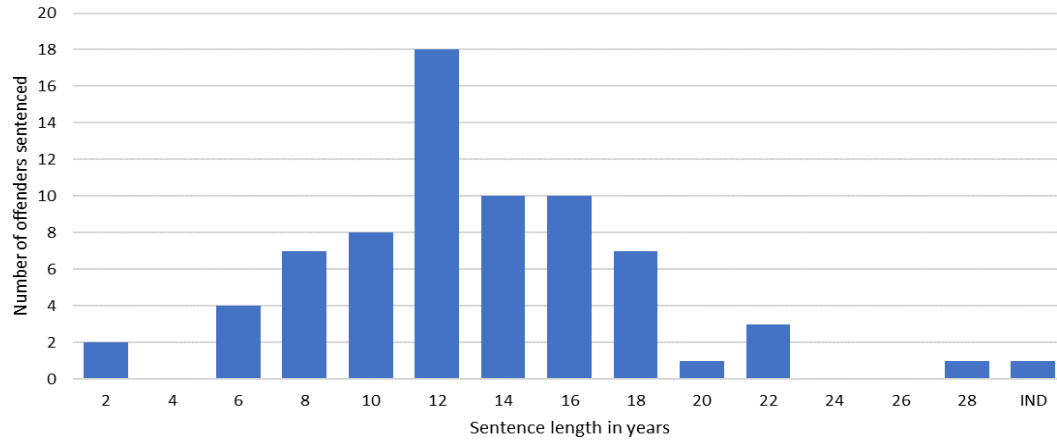
- 1) The mean is calculated by taking the sum of all values and then dividing by the number of values.
- 2) The median is the value which lies in the middle of a set of numbers when those numbers are placed in ascending or descending order.
- 3) Excludes life and indeterminate sentences.
- 4) The ACSLs and ranges shown for these offences cover the period 2011-2017, due to the very low number of offenders sentenced for these offences.
- 5) These figures should be treated with caution, due to the low number of offenders sentenced to immediate custody for this offence.

* Figures not shown due to the very low number of offenders sentenced to immediate custody for this offence.

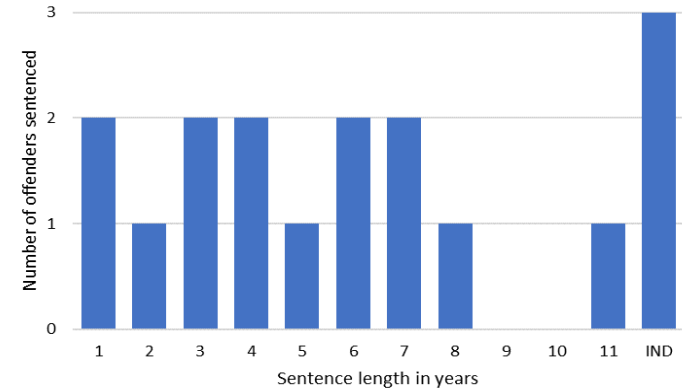
Figure 1: Estimated distribution of custodial sentence lengths for adult offenders sentenced to immediate custody for offences under the Firearms Act 1968, before any reduction for guilty plea

Group 5a (Maximum: Life)

Section 16 offences (total) - Possess a firearm/ ammunition/shotgun/air weapon with intent to endanger life / enable another to do so, 2017



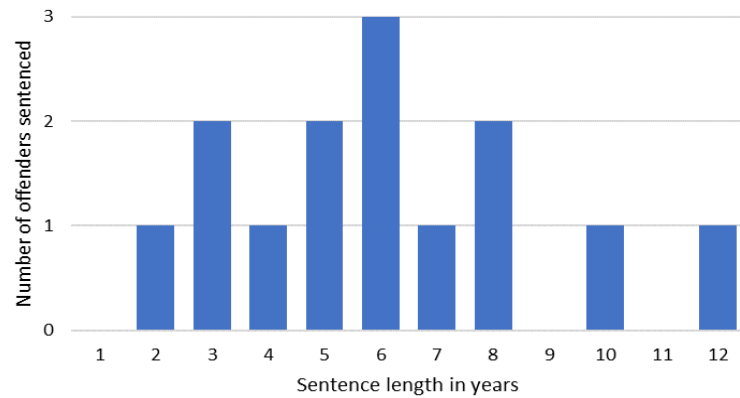
17(1) - Use of firearms to resist arrest, 2011-2017¹



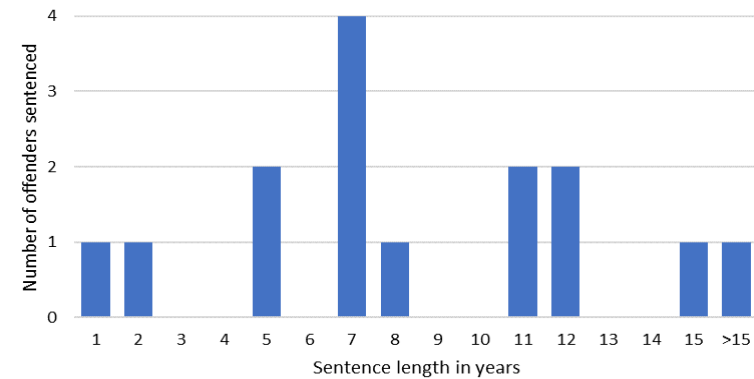
Note:

1) The data shown for section 17(1) covers the period 2011-2017, due to the low number of offenders sentenced.

17(2) - Possess firearm while committing a Schedule 1 offence, 2017

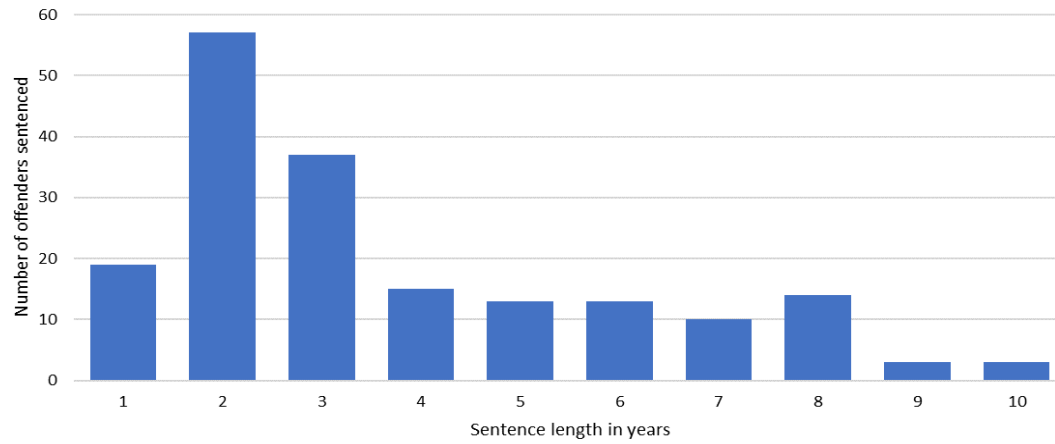


18(1) - Carry firearm or imitation firearm with intent to commit indictable offence, 2017

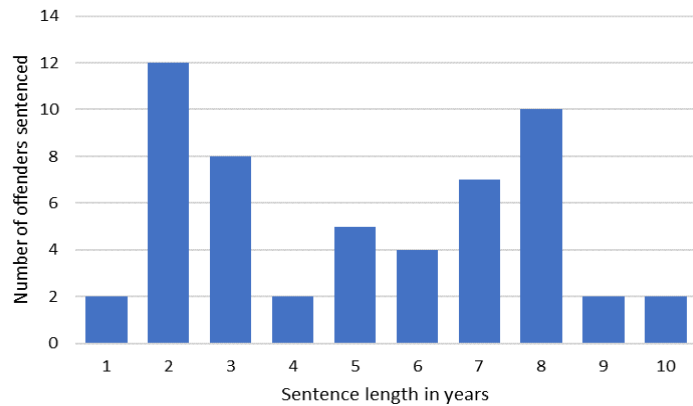


Group 5b (Maximum: 10 years)

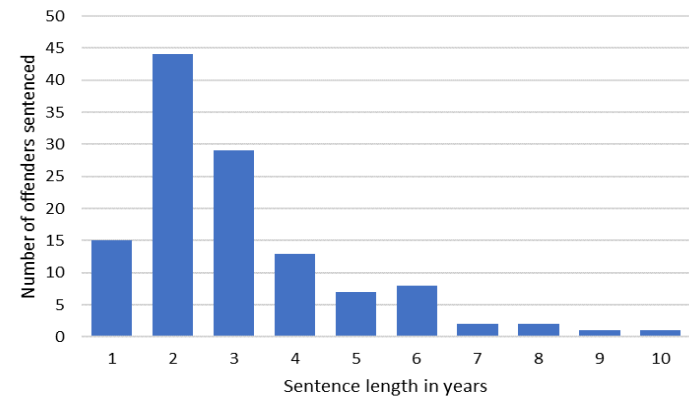
Section 16A (total) - Possess a firearm/ imitation firearm/ shotgun/ air weapon with intent to cause fear of violence, 2017



16A - Possess a firearm with intent to cause fear of violence, 2017



16A - Possess an imitation firearm with intent to cause fear of violence, 2017



Source: Court Proceedings Database, Ministry of Justice

Note:

Separate sentence length breakdowns for section 16A offences involving shotguns and air weapons have not been shown due to low volumes.

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FIREARMS – POSSESSION WITH INTENT EXAMPLES**Possession with intent to endanger life (section 16 – life maximum)**Boyd

Two counts of possession with intent to endanger life, one for ammunition and one for the handgun. There were at least two handguns and ammunition involved. The victim was surrounded by a group of 5 men including B, as he got out of his car at a restaurant. They were near other people in a party-type situation. B shot at the victim at close range. The evidence was inconclusive as to whether an unknown male had also shot at the victim with another handgun. The victim was wounded in the leg – the tibia and fibula fractured and required surgery. The injuries were serious but not life-threatening. (B was acquitted of attempted murder – the judge considered it would have been a level 1 attempted murder case at top end of second category, i.e. starting point of 20 years.)

Final sentence (no guilty plea): 16 years' custody (concurrent on both counts)

Harwozinski

H purchased more than 80 blank firing handguns, at least 19 of which were fully automatic, and over 1800 rounds of blank ammunition from the Czech Republic. G then modified the handguns to enable them to fire live ammunition. The weapons and ammunition were supplied to criminals in various urban centres. The weapons had been discharged in public on a number of occasions in circumstances where the lives of members of the public were or could have been endangered. At least once a gun was used to cause injury, said to amount to something approaching attempted murder. The weapons had been found closely linked to the supply of large quantities of class A drugs. H had imported the guns/ammunition, sourced the lathe and was responsible for the onward transfer of the weapons. H was also charged with importation of firearms and ammunition, conspiracy to convert, and conspiracy to manufacture. A 30 year determinate sentence would have been appropriate after trial.

Sentence after guilty plea: Life with 11 year 8 month minimum term

Smith

Prohibited firearms were loaded and used on a number of occasions in order to enforce the supply of controlled drugs. The offending was in the context of gang activity. In this case, three firearms and related ammunition were recovered, which were lethal weapons ready for use, but there was evidence of two further firearms which were not recovered - one revolver and one machine pistol. There were four shooting incidents. In three, four people were seriously injured and in the fourth, there were life changing injuries to victim. In three cases the shootings were in residential areas, one with shots going into a house, narrowly missing the occupants, and in some cases at a time when people including children were on the street. Innocent members of the public were traumatised. Other charges of drug supply.

Sentences ranging from: 6 years 6 months' custody (no plea) – life with minimum term of 12 years, mainly depending on role in shooting incidents and plea

Possession with intent to cause fear of violence (section 16A – 10 year maximum)Tray

T had been drinking at a party at his house. Fighting broke out amongst the friends. He collected an imitation rifle from his room, which had been left there by somebody else as part of a fancy dress outfit. He walked back into group and started waving the weapon around, with the intent of stopping the fight that was in progress.

Sentence after guilty plea: Community order with 200 hours' UPW

Forrest

At 1.10am F heard a noise outside his house. He believed his neighbour's vehicle was being damaged, and decided to do something. He went out on the street with his air rifle (imitation firearm), with a torch and sights attached to it. The weapon was such that it was not easy to see straightaway that it was an air rifle and not a proper firearm. Anyone seeing it would have been put in fear, which was his intention. It was loaded although it was not fired and was not put to use aside from F taking it into the street.

Sentence after guilty plea: 10 months' SSO (suspended for 2 years) with 20 days' RAR

Wisniewski

W was driving on the motorway with his nephew in passenger seat, running late. The victim's vehicle was driving in the outside/passing lane. W flashed his headlights. The victim was moving into the slow lane, when W also pulled into the inner lane intending to undertake. W then went back into the overtaking lane. W slowed his speed deliberately so the cars were alongside. The lighting was getting towards dark. W was angry and turned on the vehicle's interior light. He reached for the gun (an air pistol in shape of handgun) and held it at right angles to the victim – the gun was not pointed at the victim but it was made clear to the victim that W had a gun. W deliberately wanted to frighten/intimidate the victim. The judge found no provocation in the victim's earlier driving behaviour.

Sentence after guilty plea with dispute as to basis of plea: 6 months' custody

Evans

There was a history of bad blood between J and E. They were arguing on doorstep and began to trade insults and threats. E followed J down the road trying to goad him into a fight. There were aggressive movements and gestures. E attacked J and punched him. J went to his house and got a knife. He stabbed E with a knife - 3 wounds. E demanded his son get E's BB gun from the house. The son tried to calm the situation and E beat/punched him to make him get the gun, which he eventually did. E then searched for J, brandishing the firearm at anyone in his path, including at a heavily pregnant woman. The offence was committed in front of children (his own and neighbours) and other people in the street.

Sentence (no guilty plea): 2 years 6 months' custody (plus 12 months consecutive for affray, to a total of 3 years 6 months)

Neza

A group of defendants were in a vehicle which was observed jumping red lights in pursuit of a van. One defendant was seen to be occupied with an item in his lap. The defendants had armed themselves with a Luger 9mm handgun with a magazine loaded with live ammunition. Their purpose was to follow the occupants of the van with hostile intention for a prolonged period of time and over a substantial distance on motorway. In pursuit they jumped red lights and drove at high speed in a dangerous manner. The driving was part of the intention to cause fear of violence. Police moved to stop the car. The car slowed to enable one person to exit the car and take the weapon. That person was not detained but police recovered the firearm. The firearm had been fired from the car. One defendant additionally charged with dangerous driving

Sentence (no guilty plea): 6 years 9 months' custody (plus 12 months concurrent for one defendant with driving charge)

Belete

In early hours B took himself to hospital with gunshot wound to his upper thigh. A spent cartridge and a live round were found in his trousers. Police found a BMW with blood soaked seats and a firearm (a Baikal, a Russian-made pistol with a silencer) with a number of rounds of ammunition. Three rounds had been fired into the door of MH, who was in some form of relationship with B. The sentencing judge considered this case to be at or near the maximum seriousness for this offence, before discount for the guilty plea. Other charges of

Sentence after guilty plea: 6 years 8 months' custody

Use of firearm to resist arrest (section 17(1) – life maximum)

Hodge

A police officer tried to arrest H at his home. H resisted the arrest, threatening with a taser which is a non-lethal weapon. He was unable to work out how to operate it. Although over a relatively short timeframe, and not calculated or premeditated, this was an incident of persistent and aggressive resistance to the arrest. H used and threatened violence towards the police officer, both when he was standing and when he was on the floor. Bystanders who witnessed the incident would have been upset. Captor spray had to be deployed and others nearby would have been caught by it. A firearms officer was deployed with a Glock pistol, which could have been fired leading to H's injury or death.

Sentence after guilty plea: 2 years 4 months

Gerrard

G's girlfriend told the police that had left carrying a gun, saying if he was stopped there would be a stand-off. Police pursued G's car and he drove erratically. A police officer went to the driver's door. G got out of car, stood side-on to the officer and stepped on the sill of the car to gain height. He took a silver handgun (imitation) from his waistband and pointed it at the officer's face. The officer thought he was about to be shot in face. G held it at his face to make him believe he would be shot. Another officer arrived. G pointed the gun at that officer, again in the vicinity of his face. That officer heard a clicking sound - he thought an attempt to pull trigger. G was ratcheting the gun at one stage. Other officers arrived and G brandished the gun in a way which would have put them in fear for their lives as well. G then ran off, carrying the gun. He tried to scale a gate and was pulled back. Again he pointed the gun at officers. G was taken to the ground and disarmed. G then called out that it was not a real gun. His intention was to use the gun to frighten the officers.

Sentence after guilty plea: 5 years (plus 16 month consecutive sentence for separate AOABH and driving offence)

Possession while committing a Schedule 1 offence (section 17(2) – life maximum)

Boyd

B was arrested for attempted aggravated burglary with another person. He was never prosecuted for the burglary. He had a rucksack with him containing an imitation firearm which could fire blanks. It is not suggested, in fact, that they were committing a burglary. The firearm was inside the rucksack. There was no suggestion B had removed it from the rucksack to use it and no suggestion he had it with him for any criminal purpose.

Sentence after guilty plea: 12 months' community order with 140 hours UPW

Mohammed

M was armed with a revolver that has not been recovered - taken to be an imitation revolver. M robbed the victim of £10,000 and his phone and took his car and damaged it. M threatened the victim and three other people with violence. The background to the offence was unclear – there was some suggestion of planning but this was not sentenced on basis that it was a significantly planned attack. M said he questioned who was ‘on his area’ in such a car and had a gun with him to deal with people on his area. Other charges of robbery and a driving offence.

Sentence (no guilty plea): 7 years’ custody (concurrent 7 years for robbery, 18 months for driving offence)

Carry firearm with criminal intent (section 18(1) – life maximum)

Brent

B pleaded guilty to possession of an imitation firearm with intent to commit affray. B looked out of his window and saw youths urinating near his garden boundaries. Previously there had been pestering by youths from a nearby traveller's site. B had purchased a BB cylinder powered air pistol that looked exactly like a real firearm, for the purpose of protecting himself by brandishing it if necessary at the youths. He intended to see the youths off. The court considered B had made a mistake under provocation from the youths.

Sentence after guilty plea: 12 months’ community order with 60 hours UPW

Heath

Two defendants went to a shop early in the morning when the victim was at work at a small newsagents. H had an imitation firearm. The victim was approached and was threatened with a gun. The gun was held above her head while she was threatened, shouted at, sworn at, and asked for the keys to the safe. She did not have them or did not hand them over. P had a bottle, which the victim thought she was going to be hit by. H hit her with the gun. She was hit about the face and lower jaw, sustaining injury, and bruising to breast area and a hand injury. She also experienced psychological suffering and anxiety. The defendants left in a nearby car. An imitation firearm was recovered including other items such as balaclavas. Also one charge of attempted robbery.

Sentence after guilty plea: 6 years’ custody (concurrent with extended sentence for attempted robbery of 6 years’ custody, plus 2 years licence)

Hussain

There was a short pursuit of defendants in a vehicle one evening. Two firearms were found in the vehicle, both loaded with ammunition. The sawn off smooth shotgun (automatic) had a cartridge jammed in the mechanism. It was wrapped in bags, in the footwell behind the front seats. The handgun had five bullets in the magazine; it was found under the passenger seat. The jury had concluded the purpose of weapons was to commit an indictable offence e.g. robbery, but the exact offence was uncertain. Two counts of possession with intent to commit an indictable offence. Other charges of possession of prohibited firearm and possession of ammunition without firearms certificate.

Sentence (no guilty plea): 12 years concurrent on each count (8 years concurrent for other possession offences)

Sentencing Council meeting: 25 January 2019
Paper number: SC(19)JAN04 – Arson & Criminal Damage
Lead Council member: Rebecca Crane and Sarah Munro
Lead officials: Mandy Banks
0207 071 5785

1 ISSUE

1.1 This is the second meeting to consider the consultation responses to the guideline, following a first discussion in October on the ‘simple’ arson and criminal damage/arson with intent to endanger or reckless as to life endangered offences. The changes to those guidelines agreed at the meeting have been made and can be seen within **Annexes A and B**.

1.2 This meeting will focus on the criminal damage both under and over £5000 offences, the racially or religiously aggravated criminal damage offence, and the threat to destroy or damage property offence. Sentence levels across all the offences will be discussed at the next meeting, so will not be discussed at this meeting. There are two further meetings scheduled to discuss the guidelines, with the definitive guideline being signed off at the April meeting.

2 RECOMMENDATION

That the Council:

- Confirms it is content with the changes made to ‘simple’ arson and criminal damage/arson intent or reckless offences
- Considers the suggested amendments to the criminal damage offences
- Considers the suggested amendments to the racially or religiously aggravated criminal damage offences
- Considers the suggested amendments to the threats to destroy/damage property offence

3 CONSIDERATION

Structure of the criminal damage guidelines, Annexes C and D

3.1 Two separate guidelines for this offence were consulted on, one for offences under £5000, (which are summary only, with a maximum of 3 months custody), and one for offences over £5000, (triable either way, with a maximum on indictment of 10 years). Consultation respondents strongly supported this approach of having two guidelines, so it is recommended that the two separate guidelines are retained.

3.2 Although the Criminal Bar Association (CBA) agreed with the approach, they commented that there is potential for confusion by virtue of the fact that, where there has been no sending for trial on a charge of criminal damage, and the indictment is amended to add a count of criminal damage, the maximum is 10 years custody even if the amount is less than £5000. This is likely to be a rare occurrence, so it may be unnecessary to add wording on it in the guideline, given the amount of times it would be needed.

3.3 However, if the Council feels the guideline should address it, a way of doing so would be to add a note to the over £5000 guideline stating that if the offence is dealt with on indictment but the value is under £5000, the statutory maximum is 10 years but regard should also be had to the under £5000 guideline.

Question 1: Does the Council agree to retaining the two separate guidelines?

Question 2: Does the Council agree that the issue raised by the CBA will only apply in a small amount of cases so guidance is unnecessary? Or, should wording be added to the over £5000 guideline?

Culpability

3.4 Regarding the culpability factors, all the comments made were very similar to those made in relation to the arson guideline, which the Council has already considered. Namely that the factors within A and B are too similar; that references to 'recklessness' should be removed from high culpability, and that there ought to be more factors within medium culpability. It is therefore suggested that the changes agreed to address these concerns within the arson guideline be copied across to both criminal damage offences (culpability is the same within both criminal damage and arson guidelines, save an accelerant factor in arson). These changes have been reflected on pages two within both **Annexes C and D**. References to recklessness have been moved from culpability A to B, new factors have been added to medium culpability and also one to lesser culpability. At the last meeting the Council agreed to

remove the caveat attached to the mental disorder factor within lesser culpability, so this has also been done within all the offences discussed in the paper.

Question 3: Does the Council agree to the changes to culpability for the criminal damage offences, based on those made to the arson guideline?

Harm

3.5 The proposed harm structure within the two offences can be seen on pages two and three of **Annexes C and D**. The guideline for offences over £5000 has three harm categories, the guideline for offences under £5000 has only two categories. Category one harm is the same for both offences, but category two for the under £5000 offence has no factors, stating '*all other cases*'. Respondents generally agreed with the proposed structure and harm factors, save for a few suggested amendments. The Law Society felt that the factor '*damaged items of great sentimental value*' should be removed from category one harm. They said that although they accepted that damage to sentimental value could be distressing to victims, its inclusion within category one could lead to sentence inflation and more sentences of imprisonment. They suggest that it should be an aggravating factor instead.

3.6 The Magistrates Association (MA) suggested that if the damage meant a victim's property is no longer secure, i.e. through broken locks/windows, which in turn leads to them feeling unsafe in their home, this should be reflected within harm. A possible factor to reflect this could be '*damage caused meant victim's home no longer secure leading to the victim feeling unsafe*'. Arguably this could already be captured already by '*serious distress caused*', in which case it could be an aggravating factor instead.

Question 4: Does the Council agree with the suggestion made by the Law Society regarding sentimental value? Does the Council wish to reflect victims being unsafe in their homes within harm or as an aggravating factor?

3.7 At the October meeting the Council agreed to a suggestion made by the CBA, that, given the proportion of offenders with mental health issues within these offences, there should be a reference inserted above the sentence table that prompts consideration of a community order with mental health treatment requirements as an alternative to a short or moderate custodial sentence. It was also agreed to add a reference to community orders with drug rehabilitation or alcohol treatment requirements, as offenders with these addictions are very common within these

offences. This wording can now be seen on page three of all the guidelines discussed in this paper.

3.8 The Council also agreed at the last meeting to the suggestion made by the Prison Reform Trust (PRT) that the wording relating to psychiatric reports should be moved from step two to step one, and placed at the start of the guideline. This has been done and can be seen at the top of page two of **Annexes A and B**, and within the threats to destroy property offence at **Annex G**. The Council decided not to include a reference to psychiatric reports within the criminal damage offences, so it does not appear.

3.9 As noted at the start of this paper, sentence levels across the offences will be discussed at the next meeting. There were very few comments regarding the aggravating/ mitigating factors made by respondents, the vast majority of responses agreed with the proposed factors so there are no proposed changes.

Racially or religiously aggravated offences criminal damage and public order offences

3.10 Guidance for the racially or religiously aggravated offence of criminal damage is provided after the steps that will have enabled the court to have reached an initial sentence for the basic offence. This can be seen on page five of **Annex C**. This approach is based on Court of Appeal guidance in *R v Saunders*¹ and *R v Kelly and Donnelly*², which essentially set out that the court should sentence the basic offence first, then make an uplift to the sentence to reflect the level of aggravation involved. This has the effect of clearly demonstrating how seriously courts and society take racially or religiously aggravated offences, as the additional increase in sentence for the aggravated offence is made clear and distinct from what can be fairly trivial basic offences of criminal damage and so on.

3.11 The proposed guidance provides a short list of factors, specific to the aggravated offence, to decide whether the level of aggravation is high, medium or low, then guidance is given on how to increase the sentence for each of these levels. Due to the low volumes of these offences (134 in 2017), and the fact that the vast majority of these offences take place in magistrates courts, it is not possible to provide more specific guidance, such as a sentencing table or percentage ranges for the uplift. This is because there is not enough available evidence with which to

¹ R v Saunders [2000]

² R v Kelly and Donnelly [2001] EWCA crim 170

develop a sentencing table, determine what factors would make an offence more serious, or to help define what the sentence ranges should be.

3.12 At the same time as this guideline was out to consultation, the draft public order guideline was also being consulted on, which also contains racially or religiously aggravated offences, these are the section 4, 4A and 5 public order offences. Guidance for these offences initially follows the same approach outlined in previous paragraphs, requiring the court to sentence the basic offence first, then make an uplift to the sentence to reflect the level of aggravation involved. However, within public order offences although the same factors were used to decide the level of aggravation, a different approach was used for some offences in terms of how to increase the sentence. For the s4 and s4A offence, a separate sentencing table was used, as can be seen on page four of **Annex E**, for the s5 offence the same method was used as in criminal damage (that is, guidance is given on how to uplift the basic sentence given).

3.13 Volumes of the s4 and s4A aggravated public order offences are much higher than the criminal damage ones, which provided enough data to develop robust sentencing tables, unlike volumes for criminal damage. Another difference between the two guidelines was the positioning of the aggravating and mitigating factors, in criminal damage the court considered them in order to reach an initial sentence before the uplift for the aggravated offence, which mirrors the approach used in the MCSG currently, in public order they were considered as part of the final sentence.

3.14 Consultation respondents were generally in agreement with the proposed approach to sentencing the aggravated offences. However Professor Mark Walters, an expert in hate crime, in his response raised an issue with the guidance on hate crime in the explanatory materials to the MCSG on the website, which also relates to the approach taken within these offences.

3.15 The approach to sentencing both the criminal damage and public order offences adopted the approach taken within the MCSG. This states that courts should not treat an offence as racially or religiously aggravated for the purposes of section 145 of the Criminal Justice Act (CJA) 2003, where a racially or religiously aggravated form of the offence was charged but resulted in an acquittal³. Also, that the court should not normally treat an offence as racially or religiously aggravated if a racially or religiously aggravated form of the offence was available but was not

³ R v Gillivray [2005] EWCA Crim 604 (CA)

charged⁴. Accordingly, where a racially or religiously aggravated form of the offence was available in either criminal damage or public order, the list of statutory aggravating factors for the basic offence does not include religion or race, whereas these factors were included for the offences without an aggravated form of the offence.

3.16 One set of participants during road testing noticed the absence of these factors, and queried this, the guideline does not explain why the factors are not present, as it was assumed that this would be self-explanatory.

3.17 Professor Walters says that.. *'exceptionally s. 145 of the CJA may still apply in cases involving racial or religious aggravation so long as the indictment at no point included an aggravated form of the offence in question; the defence had an opportunity to challenge the issue at a trial; the judge concludes to the criminal standard that the offence was racially or religiously aggravated; and the Judge's finding is not so inconsistent with a jury verdict, this reflects the decision of O'Leary⁵.*'

3.18 Professor Walters suggests that additional wording to reflect his point (in essence what he says above) is added to the guidelines. Given that this may apply in only exceptional cases, it is recommended that the approach used in the consultation is maintained, and that the Council does not add additional wording which may only apply in a handful of cases. Another option would be to explain why the factors are not present within the statutory aggravating factors for offences that have an aggravated form of the offence, but as this was only raised as an issue once, it is again suggested that this is not necessary.

Question 5: Does the Council wish to add additional wording as suggested by Professor Walters?

3.19 Road testing was also conducted during the consultation on both criminal damage and public order aggravated offences guidelines, this allowed for comparison of the two slightly different approaches used to be examined, a summary of this is attached at **Annex F**. Opinion was divided as to which approach was preferred, but sentencing using the table appeared to take up more of participants' time, and produced much higher sentences.

3.20 It is therefore recommended that the approach used in criminal damage, guidance on how to uplift sentences rather than a sentence table, should be maintained. The aggravated harassment offences recently published also uses

⁴ R v O'Callaghan [2005] EWCA Crim 317 (CA)

⁵ R v O'Leary [2015] EWCA Crim 1306

guidance on how to uplift sentences rather than a sentence table. The approach to the aggravated public order offences will be discussed in due course during Council discussions on public order.

Question 6: Does the Council agree to maintain the approach used in criminal damage during consultation, providing guidance on how to uplift sentences?

3.21 Participants also noted the different positioning of the aggravating and mitigating factors, and felt that consistency across guidelines is important. It is suggested that they appear in the same place within guidelines, namely that they are considered as part of the decision on the basic sentence, as in criminal damage, before consideration of the aggravated offence.

Question 7: Does the Council agree to the recommendation regarding the positioning of aggravating and mitigating factors?

3.22 A finding from the road testing concerned the issue of distress, and the risk of double counting. Some participants felt unable to apportion the distress caused by the aggravated offence from the distress caused overall, so they in effect counted distress twice, and arrived at a higher categorisation, compared to those who focused on other factors. For both public order and criminal damage, distress is considered at harm in step one, to consider the basic offence, and within the aggravated offence, there is a factor relating to distress in all the categories, which states '*aggravated nature of the offence caused distress to the victim or victim's family over and above the distress already considered at step one*' (page five of **Annex C**).

3.23 It is not recommended that the distress factors are removed from the aggravated offences, as they are an integral consideration within this offence. Instead it is recommended that the wording '*over and above the distress already considered at step one*' is put in bold, and there is some wording added to remind sentencers to take care not to double count, as shown below, and on page 5 of **Annexes C and D**. This should then mitigate against the risk of double counting.

Care should be taken to avoid double counting factors already taken into account at step one
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Question 8: Does the Council agree to the recommendation to bolden the wording '*over and above the distress already considered at step one*', and to add wording reminding sentencers not to double count?

Threats to destroy or damage property- Annex G

3.24 Respondents generally agreed with the draft guideline for this offence, save for some suggested amendments and additions. Starting with culpability on page two of **Annex G**, the National Fire Chief's Council (NFCC) suggested that motivation should extend beyond revenge, a factor in high culpability, to include references to offenders using the threat to destroy/damage property to intimidate or coerce victims for financial gain or control purposes, in the context of modern day slavery or organised crime. If the Council wished to expand the revenge factor to accommodate this suggestion the factor could read: '*Offence motivated by revenge, or to intimidate in order to coerce or control others*'.

3.25 The MA queried why the factor of '*involved through coercion, intimidation or exploitation*' which was included as a lesser culpability factor in all other guidelines, was not included for this one. They stated that this factor could also apply to those sentenced for this offence, which arguably it could be.

Question 9: Does the Council wish to include additional wording for the revenge factor, and to include the additional factor in lesser culpability?

3.26 Turning to harm on page two, the NFCC suggested that a consequential financial impact on the victim, through measures they may have to take as a result of such threats, should also be a harm factor. There is such a factor within the assessment of harm for all the rest of the offences covered within this guideline, '*serious consequential economic or social impact of the offence*' and there is an argument for a similar factor for category one harm for this offence, if a victim incurs considerable costs, and inconvenience as a result of having to move addresses, for example. For this offence the potential social impact is less relevant, so the factor could be '*high level of consequential financial harm and inconvenience caused to the victim*'.

Question 10: Does the Council wish to include a harm factor regarding consequential financial harm/inconvenience?

3.27 With regards to aggravating features, the Law Society suggests that there should be a factor of '*offence connected to some other unlawful activity and/or pursued for personal gain*.' This could be threats made to damage property in the context of gang activity, or putting pressure on commercial rivals, or in the context of unpaid debts, etc. If however the Council decide to include amended wording in culpability, as discussed above, then this factor may be unnecessary. In terms of mitigating factors, the Law Society suggest '*positive conduct of offender since*

offence committed'. Sentence levels for this offence will be discussed at the next meeting.

Question 11: Does the Council wish to add the suggested additional aggravating and mitigating factor?

4 IMPACT/RISK

4.1 A final resource impact assessment will be prepared and circulated amongst the Council for comment in due course.

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Arson (criminal damage by fire)

Criminal Damage Act 1971, s.1

This is a serious specified offence for the purposes of section 224 of the Criminal Justice Act 2003.

Triable either way

Maximum when tried summarily: Level 5 fine and/or 6 months' custody

Maximum when tried on indictment: Life

Offence range: Discharge – 8 years' custody

Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline

Courts should consider requesting a report from: liaison and development services, a medical practitioner, or where it is necessary, ordering a psychiatric report, so to both ascertain whether the offence is linked to a mental disorder or learning disability (to assist in the assessment of culpability) and whether any mental health disposal should be considered.

STEP ONE

Determining the offence category

The court should determine the offence category with reference only to the factors 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:

- High degree of planning or premeditation
- Revenge attack
- Use of accelerant
- Intention to cause very serious damage to property
- Intention to create a high risk of injury to persons

B - Medium culpability:

- Cases that fall between categories A and C because:
- Factors are present in A and C which balance each other out and/or
- The offender's culpability falls between the factors described in A and C
- Some planning
- Recklessness as to whether very serious damage to property caused
- Recklessness as to whether serious injury to persons caused

C - Lesser culpability:

- Little or no planning; offence committed on impulse
- Recklessness as to whether some damage to property caused
- Offender's responsibility substantially reduced by mental disorder or learning disability
- Involved through coercion, intimidation or exploitation

Harm

The level of harm is assessed by weighing up all the factors of the case.

Category 1

- Serious physical and/or psychological harm caused
- Serious consequential economic or social impact of offence
- High value of damage caused

Category 2

- Harm that falls between categories 1 and 3

Category 3

- No or minimal physical and/or psychological harm caused
- Low value of damage caused

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.

In exceptional cases within category 1A, sentences of above 8 years may be appropriate.

Where the offender is dependent on or has a propensity to misuse drugs or alcohol, **which is linked to the offending**, a community order with a drug rehabilitation requirement under section 209, or an alcohol treatment requirement under section 212 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Where the offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Harm	Culpability		
	A	B	C
Category 1	<p>Starting point 4 years' custody</p> <p>Category range 2 to 8 years' custody</p>	<p>Starting point 1 year 6 months' custody</p> <p>Category range 9 months to 3 years' custody</p>	<p>Starting point 9 months' custody</p> <p>Category range 6 months – 1 year 6 months' custody</p>
Category 2	<p>Starting point 2 years' custody</p> <p>Category range 1 to 4 years' custody</p>	<p>Starting point 9 months' custody</p> <p>Category range 6 months- 1 year 6 months' custody</p>	<p>Starting point High level Community order</p> <p>Category range Medium level Community order-9</p>

			months' custody
Category 3	Starting point 1 years' custody	Starting point High level Community order	Starting point Low level Community order
	Category range 6 months - 2 years' custody	Category range Medium level Community order- 9 months' custody	Category range Discharge- High level Community order

The court should then consider any adjustment for any aggravating or mitigating factors. Below is 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.

Factors increasing seriousness

Statutory aggravating factors:

- A1.** 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
- A2.** Offence committed whilst on bail
- A3.** Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation, or transgender identity.

Other aggravating factors:

- A4.** Commission of offence whilst under the influence of alcohol or drugs
- A5.** Offence committed for financial gain
- A6.** Offence committed to conceal other offences
- A7.** Victim is particularly vulnerable
- A8.** Fire set in or near a public amenity
- A9.** Damage caused to heritage [and /or cultural](#) assets
- A10.** Significant impact on emergency services or resources
- A11.** Established evidence of community/wider impact
- A12.** Failure to comply with current court orders
- A13.** Offence committed on licence or post sentence supervision
- A14.** Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

- M1. No previous convictions or no relevant/recent convictions
- M2. [Steps taken to minimise the effect of the fine or summons assistance](#)
- M3. Remorse
- M4. Good character and/or exemplary conduct
- M5. Serious medical condition requiring urgent, intensive or long-term treatment
- M6. Age and/or lack of maturity where it affects the responsibility of the offender
- M7. Sole or primary carer for dependent relatives
- M8. Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

STEP THREE

Consider any factors which indicate a reduction, such as 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

The court should consider whether having regard to the criteria contained in Chapter 15 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions the notional determinate sentence should be used as the basis for the setting of a minimum term.

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 must consider whether to make a compensation order and/or other ancillary orders.

Compensation order

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

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.

Criminal damage/arson with intent to endanger life or reckless as to whether life endangered

Criminal Damage Act 1971, s.1(2)

This is a serious specified offence for the purposes of section 224 of the Criminal Justice Act 2003.

Triable only on indictment
Maximum: Life imprisonment

Offence range: High level Community order- 12 years' custody

Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline

Courts should consider requesting a report from: liaison and development services, a medical practitioner, or where it is necessary, ordering a psychiatric report, so to both ascertain whether the offence is linked to a mental disorder or learning disability (to assist in the assessment of culpability) and whether any mental health disposal should be considered.

STEP ONE

Determining the offence category

The court should determine the offence category with reference only to the factors in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

Within this offence, culpability is fixed, culpability A is for intent, culpability B is for recklessness.

Culpability A:

- Offender intended to endanger life

Culpability B:

- Offender was reckless as to whether life was endangered

Harm

The level of harm is assessed by weighing up all the factors of the case.

Category 1

- Very serious physical and/or psychological harm caused
- High risk of very serious physical and/or psychological harm
- Serious consequential economic or social impact of offence caused
- Very high value of damage caused

Category 2

- Significant physical and/or psychological harm caused
- Significant risk of serious physical and/or psychological harm
- Significant value of damage caused
- All other harm that falls between categories 1 and 3

Category 3

- No or minimal physical and/or psychological harm caused
- Low risk of serious physical and/or psychological harm
- Low value of damage caused

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.

In exceptional cases within category 1A, sentences of above 12 years may be appropriate.

Where the offender is dependent on or has a propensity to misuse drugs or alcohol, **which is linked to the offending**, a community order with a drug rehabilitation requirement under section 209, or an alcohol treatment requirement under section 212 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Where the offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Harm	Culpability	
	A	B
Category 1	Starting point 8 years' custody Category range 5 years to 12 years' custody	Starting point 6 years' custody Category range 4 years to 10 years' custody
Category 2	Starting point 6 years' custody Category range 4 to 8 years' custody	Starting point 4 years' custody Category range 2 to 6 years' custody
Category 3	Starting point 2 years' custody Category range 6 months custody to 3 years' custody	Starting point 1 years' custody Category range High level Community order- 2 years 6 months' custody

The court should then consider any adjustment for any aggravating or mitigating factors. Below is 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.

Care should be taken to avoid double counting factors already taken into account in assessing the level of harm at step one

Factors increasing seriousness

Statutory aggravating factors:

- A1.** 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
- A2.** Offence committed whilst on bail
- A3.** Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation, or transgender identity.

Other aggravating factors:

- A4.** Commission of offence whilst under the influence of alcohol or drugs.
- A5.** Revenge attack
- A6.** Significant degree of planning or premeditation
- A7.** Use of accelerant
- A8.** Fire set in or near a public amenity
- A9.** Victim is particularly vulnerable
- A10.** Damage caused to heritage assets
- A11.** Multiple people endangered
- A12.** Significant impact on emergency services or resources
- A13.** Established evidence of community/wider impact
- A14.** Failure to comply with current court orders
- A15.** Offence committed on licence or post sentence supervision
- A16.** Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

- M1.** No previous convictions **or** no relevant/recent convictions
- M2.** Offender's responsibility substantially reduced by mental disorder or learning disability
- M3.** Lack of premeditation
- M4.** Involved through coercion, intimidation or exploitation
- M5.** Remorse
- M6.** Good character and/or exemplary conduct
- M7.** Serious medical condition requiring urgent, intensive or long-term treatment

- M8.** Age and/or lack of maturity where it affects the responsibility of the offender
- M9.** Sole or primary carer for dependent relatives
- M10.** Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

STEP THREE

Consideration of mental health disposals

Where custody is being considered:

Where:

- (i) the evidence of medical practitioners suggests that the offender is currently suffering from a mental disorder,
- (ii) that the offending is wholly or in significant part attributable to that disorder,
- (iii) treatment is available, and
- (iv) the court considers that a hospital order (with or without a restriction) may be an appropriate way of dealing with the case,

the court should consider these matters in the following order:

Section 45A hospital and limitation direction

- a. Before a hospital order is made under s.37 MHA (with or without a restriction order under s41), consider whether the mental disorder can appropriately be dealt with by custody with a hospital and limitation direction under s.45A MHA. In deciding whether a s.45A direction is appropriate the court should bear in mind that the direction will cease to have effect at the end of a determinate sentence.
- b. If the mental disorder can appropriately be dealt with by a direction under s.45A(1), then the judge should make such a direction. (Not available for a person under the age of 21 at the time of conviction).

Section 37 hospital order and s41 restriction order

- c. If a s.45A direction is not appropriate the court must then consider, before going further, whether: (1) the mental disorder is treatable, (2) once treated there is no evidence the offender would be dangerous, and (3) the offending is due to that mental disorder. If these conditions are met a hospital order under s.37/41 is likely to be the correct disposal.

Section 47 transfer to hospital

- d. The court must also have regard to the question of whether other methods of dealing with the offender are available including consideration of whether the powers under s47 MHA for transfer from custody to hospital for treatment would, taking in to consideration all of the circumstances, be appropriate.
- There must always be sound reasons for departing from the usual course of imposing a custodial sentence and where a custodial sentence is not imposed, the judge must set out these reasons.

Non-custodial option:

If a non-custodial option is considered, and where an offender suffers from a

medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be appropriate. The offender should express a willingness to comply with the requirement.

STEP FOUR

Consider any factors which indicate a reduction, such as 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 FIVE

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 SIX

Dangerousness

The court should consider whether having regard to the criteria contained in Chapter 15 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions the notional determinate sentence should be used as the basis for the setting of a minimum term.

STEP SEVEN

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 EIGHT

Compensation and ancillary orders

In all cases, the court must consider whether to make a compensation order and/or other ancillary orders.

Compensation order

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

STEP NINE

Reasons

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

STEP TEN

Consideration for time spent on bail

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

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Criminal damage (other than by fire) value over £5,000

Criminal Damage Act 1971, s.1 (1)

Triable either way

Maximum when tried summarily: Level 5 fine and/or 6 months

Maximum when tried on indictment: 10 years

Offence range: Discharge – 4 years' custody

Racially or religiously aggravated criminal damage

Crime and Disorder Act 1998, s.30

Triable either way

Maximum when tried summarily: Level 5 fine and/or 6 months

Maximum when tried on indictment: 14 years

Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline

STEP ONE

Determining the offence category

The court should determine the offence category with reference only to the factors 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:

- High degree of planning or premeditation
- Revenge attack
- Intention to cause very serious damage to property
- ~~Recklessness~~ or intention to create a high risk of injury to persons

B - Medium culpability:

- All other cases that fall between categories A and C because
- Factors are present in A and C which balance each other out and/or
- The offender's culpability falls between the factors described in A and C
- Some planning
- ~~Intention~~ Recklessness as to whether very serious ~~to cause significant~~ damage to property caused
- ~~Reckless~~ ness as to whether ~~or intention to create a significant risk of~~ serious injury to persons caused

C - Lesser culpability:

- Little or no planning; offence committed on impulse
- Recklessness as to whether some damage to property caused
- Offender's responsibility substantially reduced by mental disorder* or learning disability
- Involved through coercion, intimidation or exploitation

~~*Reduced weight may be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice~~

Harm

The level of harm is assessed by weighing up all the factors of the case.

Category 1

- Serious distress caused
- Serious consequential economic or social impact of offence
- High value of damage or damaged items of great sentimental value

<p>Category 2</p> <ul style="list-style-type: none"> • Harm that falls between categories 1 and 3
<p>Category 3</p> <ul style="list-style-type: none"> • No or minimal distress caused • Low value damage
<p>STEP TWO Starting point and category range</p> <p>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.</p>

Where the offender is dependent on or has a propensity to misuse drugs or alcohol, which is linked to the offending, a community order with a drug rehabilitation requirement under section 209, or an alcohol treatment requirement under section 212 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Where the offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Maximum when tried on indictment: 10 years' custody

Harm	Culpability		
	A	B	C
Category 1	<p>Starting point 1 year 6 months' custody</p> <p>Category range 6 months to 4 years' custody</p>	<p>Starting point 6 months' custody</p> <p>Category range High level Community order to 1 year 6 months' custody</p>	<p>Starting point High level Community order</p> <p>Category range Medium Level community order – 1 years' custody</p>
Category 2	<p>Starting point 6 months' custody</p> <p>Category range High level Community order-1 year 6 months' custody</p>	<p>Starting point High level community order</p> <p>Category range Medium level community order-1 year's custody</p>	<p>Starting point Low level Community order</p> <p>Category range Band C fine-High level Community order</p>

Category 3	Starting point High level Community order Category range Medium level Community order-1 year's custody	Starting point Low level Community order Category range Band C fine- High level Community order	Starting point Band B fine Category range Discharge- Low level Community order
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The court should then consider any adjustment for any aggravating or mitigating factors. Below is 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.

Factors increasing seriousness

Statutory aggravating factors:

- A1.** 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
- A2.** Offence committed whilst on bail
- A3.** 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.

Other aggravating factors:

- A4.** Commission of offence whilst under the influence of alcohol or drugs
- A5.** Victim is particularly vulnerable
- A6.** Damage caused to heritage and or cultural assets
- A7.** Significant evidence of community/wider impact
- A8.** Established evidence of community/wider impact
- A9.** Failure to comply with current court orders
- A10.** Offence committed on licence or post sentence supervision
- A11.** Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

- M1.** No previous convictions **or** no relevant/recent convictions
- M2.** Remorse
- M3.** Good character and/or exemplary conduct
- M4.** Serious medical condition requiring urgent, intensive or long-term treatment

M5. Age and/or lack of maturity where it affects the responsibility of the offender

M6. Sole or primary carer for dependent relatives

M7. Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

RACIALLY OR RELIGIOUSLY AGGRAVATED CRIMINAL DAMAGE OFFENCES ONLY

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.

Maximum sentence for the aggravated offence on indictment is 14 years' custody (maximum when tried summarily is a level 5 fine and/or 6 months)

Care should be taken to avoid double counting factors already taken into account in assessing the level of harm at step one

HIGH LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION	SENTENCE UPLIFT
<ul style="list-style-type: none">▪ Racial or religious aggravation was the predominant motivation for the offence.▪ Offender was a member of, or was associated with, a group promoting hostility based on race or religion.▪ 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	Increase the length of custodial sentence if already considered for the basic offence or consider a custodial sentence, if not already considered for the basic offence.

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

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.

STEP THREE

Consider any factors which indicate a reduction, such as 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 must consider whether to make a compensation order and/or other ancillary orders.

Compensation order

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

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.

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Criminal damage (other than by fire) value under £5,000

Criminal Damage Act 1971, s.1 (1)

Triable only summarily:

Maximum: Level 4 fine and/or 3 months' custody

Offence range: Discharge to 3 months' custody

Racially or religiously aggravated criminal damage

Crime and Disorder Act 1998, s.30

Triable either way

Maximum when tried summarily: Level 5 fine and/or 6 months

Maximum when tried on indictment: 14 years

Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline

STEP ONE

Determining the offence category

The court should determine the offence category with reference only to the factors 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:

- High degree of planning or premeditation
- Revenge attack
- Intention to cause very serious damage to property
- ~~Recklessness or intention to create a high risk of injury to persons~~

B – Medium culpability

- All other cases that fall between categories A and C because:
- Factors are present in A and C which balance each other out and/or
- The offender's culpability falls between the factors described in A and C
- Some planning
- ~~Intention~~ Recklessness as to whether very serious to cause significant damage to property caused
- ~~Recklessness as to whether or intention to create a significant risk of serious injury to persons caused~~

C - Lesser culpability:

- Little or no planning; offence committed on impulse
- Recklessness as to whether some damage to property caused
- Offender's responsibility substantially reduced by mental disorder* or learning disability
- Involved through coercion, intimidation or exploitation

~~* Reduced weight may be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice~~

Harm

The level of harm is assessed by weighing up all the factors of the case.

Category 1

- Serious distress caused
- Serious consequential economic or social impact of offence
- High value of damage or damaged items of great sentimental value

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.

Where the offender is dependent on or has a propensity to misuse drugs or alcohol, which is linked to the offending, a community order with a drug rehabilitation requirement under section 209, or an alcohol treatment requirement under section 212 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Where the offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Under £5,000 maximum Level 4 fine and/or 3 months

Harm	Culpability		
	A	B	C
Category 1	Starting point High level Community order Category range Medium level Community order- 3 months' custody	Starting point Low level community order Category range Band C fine- High level Community order	Starting point Band B fine Category range Discharge-Low level Community order
Category 2	Starting point Low level Community order Category range Band C fine- High level Community order	Starting point Band B fine Category range Discharge- Low level Community order	Starting point Band A fine Category range Discharge- Band B fine

The court should then consider any adjustment for any aggravating or mitigating factors. Below is 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.

Factors increasing seriousness

Statutory aggravating factors:

- A1.** 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
- A2.** Offence committed whilst on bail
- A3.** 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.

Other aggravating factors:

- A4.** Commission of offence whilst under the influence of alcohol or drugs
- A5.** Victim is particularly vulnerable
- A6.** Damage caused to heritage and or cultural assets
- A7.** Significant evidence of community/wider impact
- A8.** Established evidence of community/wider impact
- A9.** Failure to comply with current court orders
- A10.** Offence committed on licence or post sentence supervision
- A11.** Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

- M1.** No previous convictions **or** no relevant/recent convictions
- M2.** Remorse
- M3.** Good character and/or exemplary conduct
- M4.** Serious medical condition requiring urgent, intensive or long-term treatment
- M5.** Age and/or lack of maturity where it affects the responsibility of the offender
- M6.** Sole or primary carer for dependent relatives
- M7.** Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

RACIALLY OR RELIGIOUSLY AGGRAVATED CRIMINAL DAMAGE OFFENCES ONLY

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.

Maximum sentence for the aggravated offence on indictment is 14 years' custody (maximum when tried summarily is a level 5 fine and/or 6 months)

[Care should be taken to avoid double counting factors already taken into account in assessing the level of harm at step one](#)

HIGH LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION	SENTENCE UPLIFT
<ul style="list-style-type: none"> ▪ Racial or religious aggravation was the predominant motivation for the offence. ▪ Offender was a member of, or was associated with, a group promoting hostility based on race or religion (where linked to the commission of the offence). ▪ Aggravated nature of the offence caused severe distress to the victim or the victim's family (over and above the distress already considered at step one). ▪ Aggravated nature of the offence caused serious fear and distress throughout local community or more widely. 	<p>Increase the length of custodial sentence if already considered for the basic offence or consider a custodial sentence, if not already considered for the basic offence.</p>
MEDIUM LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION	SENTENCE UPLIFT
<ul style="list-style-type: none"> ▪ Racial or religious aggravation formed a significant proportion of the offence as a whole. ▪ Aggravated nature of the offence caused some distress to the 	<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>

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

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.

STEP THREE

Consider any factors which indicate a reduction, such as 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 must consider whether to make a compensation order and/or other ancillary orders.

Compensation order

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

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.

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Annex E

Section 4 – threatening behaviour – fear or provocation of violence

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 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:

- 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

Annex E

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	<p>Starting point 12 weeks' custody</p> <p>Range Medium Level community order - 26 weeks' custody</p>	<p>Starting point High level community order</p> <p>Range Band C Fine – 12 weeks' custody</p>
Category 2	<p>Starting point High level community order</p> <p>Range Band C Fine – 12 weeks' custody</p>	<p>Starting point Low level community order</p> <p>Range Discharge - medium level community order</p>

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.

Annex E

HIGH LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION
<ul style="list-style-type: none">▪ Racial or religious aggravation was the predominant motivation for the offence.▪ Offender was a member of, or was associated with, a group promoting hostility based on race or religion.▪ 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
<ul style="list-style-type: none">▪ Racial or religious aggravation formed a significant proportion of the offence as a whole.▪ Aggravated nature of the offence caused some distress to the victim or the victim's family (over and above the distress already considered at step one).▪ Aggravated nature of the offence caused some fear and distress throughout local community or more widely.
LOW LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION
<ul style="list-style-type: none">▪ Aggravated element formed a minimal part of the offence as a whole.▪ Aggravated nature of the offence caused minimal or no distress to the victim or the victim's family (over and above the distress already considered at step one).

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;

Annex E

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

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.

Annex E

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness

Statutory aggravating factors:

- 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: sex, disability, sexual orientation or transgender identity

Other aggravating factors:

- Planning
- Offence committed against those working in the public sector or providing a service to the public
- Leading role in group
- 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/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

- Peripheral role in 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

Annex E

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Annex F

Road testing of criminal damage and public order guidelines for racially aggravated cases

Background and method

At a series of events with magistrates, scenario-based exercises were used to test out how the criminal damage and public order guidelines might work 'in the field' for racially or religiously aggravated cases.¹ 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 Magistrates' Association AGM in November 2017, attended by approximately 80 magistrates (n = 15 responses for public order, n = 10 responses for criminal damage).
- A further regional magistrates' AGM in April 2018, attended by approximately 60 magistrates (n = 17 and n = 8, for the two public order scenarios tested).²
- Two further, smaller consultation events held in different parts of the country in May 2018, the first of which was attended by 11 magistrates (n = 4 responses for each of the two scenarios tested) and the second of which was attended by three magistrates (n = 3 responses for each of the two scenarios tested, as because of the low attendance, magistrates worked singly at this event).

Four scenarios (two racially aggravated public order, two racially aggravated criminal damage) were reviewed across these events. At the two smaller events, participants sentenced both a racially aggravated criminal damage scenario and a racially aggravated public order scenario, which presented an opportunity for them to directly compare the approaches across the two guidelines.³

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

- All 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.

¹ The guidelines tested were: threatening behaviour (section 4) and disorderly behaviour with intent (section 4A) and criminal damage less than £5,000.

² Only public order scenarios were tested at this event.

³ 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.

Annex F

- Across both guidelines and sets of scenarios, the categorisation of the level of racial aggravation was much more variable than the categorisation of the basic offence. For example, for one criminal damage scenario opinion was divided as to whether this was a medium or low level of racial aggravation, depending on whether they saw the victim's distress as 'no/minimal' or 'some' and/or the proportion of the offence that was racially/religiously motivated as 'significant' or 'minimal'.
- A key reason why the categorisation of the level of racial aggravation was variable appeared to be double counting of the victim's distress. Table 1 details the level of racial aggravation chosen for the threatening behaviour scenario,⁴ and the reason(s) for that choice, from the three most recent consultation events (n = 24 pairs/groups/individuals). 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 this variability in categorising the level of racial aggravation sentences for this scenario were quite wide-ranging – between a high- level CO (or medium level, in one case) 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 base their decision about the level of racial or religious aggravation on a global sense of distress – hence there is an element of double counting. There was a little bit of qualitative evidence to this effect (arising from the s4A scenario⁵): at the smallest event, where the magistrates worked on their own, 2/3 categorised the level of racial aggravation as medium on the basis of 'aggravated nature caused some distress' but one magistrate seemed to be more careful: she said she rejected this 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.

⁴ In this scenario the drunk offender argued with a newsagent about his change, threatening to smash the shopkeeper's head in, kicked a display and delivered two racial slurs. The shopkeeper and others in the shop were extremely frightened for their safety. 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'.

⁵ In this scenario, the offender became very angry when issued with a parking ticket and abused the traffic warden, including a racial slur 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.

Annex F

- The other notable finding for the **threatening behaviour** scenario was that in most instances, magistrates saw their end sentence (based on the 'racially aggravated' sentencing table) as too tough for this defendant in this scenario. For example, one group who gave a sentence of 26 weeks pre-GP, 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**, 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 a close bereavement, he was very remorseful) so magistrates may have simply felt sorry for him.
- One of the discussions with one of the smaller groups suggested there may be a slight lack of understanding on the part of magistrates about how the racially aggravated offence should be treated. They said that for racially aggravated cases, magistrates are told by legal advisers to move up to a higher level of sentence because the racist component is considered 'an aggravating feature', but they were not particularly aware that they were required to articulate the sentence for the non-aggravated offence first. In another group, one magistrate pair erroneously counted the statutory factor of 'Offence motivated by....' and another pair questioned why race and religion were not included in this factor. There is therefore a possible need for to make the **explanatory part of the guideline as salient and clear as possible**, particularly the direction to arrive at a basic sentence first before adding the uplift and the need to state the basic sentence as well as the uplifted one in open court.
- The two smaller consultation events presented a good opportunity to compare the way racially aggravation is dealt with in the two guidelines. In one of the groups, the inclusion of the table was preferred by the majority of magistrates (3/4 pairs) because it was felt that it was clear and would lead to consistency (although as discussed earlier, they were concerned about the severity of the penalties in the table). However, one group of three felt strongly that the approach in the criminal damage guideline (i.e. with no table) was better, because it gave them flexibility re. the 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 caused a significant amount of to-ing and fro-ing (participants also 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 it was pointed out that sentence for the basic offence needs to be stated in open court). In this group, 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 this 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 aggravating and mitigating factors placed in a **consistent position across guidelines**.

Annex F

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

	Level of racial aggravation	First factor ticked	Second 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

Threat to destroy or damage property

Criminal Damage Act 1971, s.2

Triable either way

Maximum when tried summarily: Level 5 fine and/or 6 months custody

Maximum when tried on indictment: 10 years custody

Offence range: Discharge to 5 years' custody

Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline

Courts should consider requesting a report from: liaison and development services, a medical practitioner, or where it is necessary, ordering a psychiatric report, so to both ascertain whether the offence is linked to a mental disorder or learning disability (to assist in the assessment of culpability) and whether any mental health disposal should be considered.

STEP ONE

Determining the offence category

The court should determine the offence category with reference only to the factors 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:

- Significant planning or premeditation
- Offence motivated by revenge
- Threat to burn or bomb property

B - Medium culpability:

- All other cases that fall between categories A and C

C - Lesser culpability:

- Little or no planning; offence committed on impulse
- Offender's responsibility substantially reduced by mental disorder* or learning disability

~~* Reduced weight may be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice~~

Harm

The level of harm is assessed by weighing up all the factors of the case.

Category 1

- Serious distress caused to the victim
- Serious disruption/inconvenience caused to others

Category 2

- Harm that falls between categories 1 and 3

Category 3

- No or minimal distress caused to the victim

STEP TWO

Starting point and category range

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

Where the offender is dependent on or has a propensity to misuse drugs or alcohol, which is linked to the offending, a community order with a drug rehabilitation requirement under section 209, or an alcohol treatment requirement under section 212 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Where the offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Harm	Culpability		
	A	B	C
Category 1	<p>Starting point 2 years 6 months' custody</p> <p>Category range 1 year to 5 years' custody</p>	<p>Starting point 9 months' custody</p> <p>Category range 6 months to 1 year 6 months' custody</p>	<p>Starting point High level Community order</p> <p>Category range Medium level Community order- 9 months' custody</p>
Category 2	<p>Starting point 9 months' custody</p> <p>Category range 6 months to 1 year 6 months' custody</p>	<p>Starting point High level Community order</p> <p>Category range Medium level Community order- 9 months' custody</p>	<p>Starting point Medium level Community order</p> <p>Category range Band C fine-High level Community order</p>
Category 3	<p>Starting point High level Community order</p> <p>Category range Medium level Community order- 9 months' custody</p>	<p>Starting point Medium level Community order</p> <p>Category range Band C fine- High level Community order</p>	<p>Starting point Band B fine</p> <p>Category range Discharge- Medium level Community order</p>

The court should then consider any adjustment for any aggravating or mitigating factors. Below is 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.

Factors increasing seriousness

Statutory aggravating factors:

A1. 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

A2. Offence committed whilst on bail

A3. Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation, or transgender identity.

Other aggravating factors:

A4. Commission of offence whilst under the influence of alcohol or drugs

A5. Victim is particularly vulnerable

A6. Threats made in the presence of children

A7. Considerable damage threatened

A8. Established evidence of community/wider impact

A9. Failure to comply with current court orders

A10. Offence committed on licence or post sentence supervision

A11. Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

M1. No previous convictions **or** no relevant/recent convictions

M2. Remorse

M3. Good character and/or exemplary conduct

M4. Serious medical condition requiring urgent, intensive or long-term treatment

M5. Age and/or lack of maturity where it affects the responsibility of the offender

M6. Sole or primary carer for dependent relatives

M7. Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

STEP THREE**Consider any factors which indicate a reduction, such as 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**

The court should consider whether having regard to the criteria contained in Chapter 15 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions the notional determinate sentence should be used as the basis for the setting of a minimum term.

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 must consider whether to make a compensation order and/or other ancillary orders.

Compensation order

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

STEP EIGHT**Reasons**

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

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

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

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

25th January 2019
SC(19)JAN05 – Public Order
Sarah Munro & Rebecca Crane
Lisa Frost
0207 071 5784

1 ISSUE

1.1 This is the first meeting to consider consultation responses to the draft guidelines for Public Order offences.

2 RECOMMENDATION

2.1 The Council is asked to;

- consider points raised in consultation for the draft guidelines for Riot and Violent Disorder and;
- agree revisions to the definitive versions of the guidelines.

3 CONSIDERATION

3.1 The consultation on the Public order guideline took place between 9th May 2018 to 8th August 2018. The draft guideline includes the offences of Riot, Violent Disorder, Affray, s4, s4A and s5 offences and their racially aggravated counterparts, and other hate crime offences provided for by the Public Order Act.

3.2 A total of 95 responses were received, 44 hard copy and 51 online responses. The vast majority of these were from individual members of the public and predominantly focused on the hate crime and racial aspect of the guidelines. A number were an identical template response from members of a far-right organisation in protest at the inclusion of a guideline for hate crime. This left a limited number of responses which were balanced and useful in suggesting changes which may be required to the guidelines. Such responses were received from the Criminal Bar Association, CPS, District Judge Legal Committee, Law Society, Magistrates Association and London Criminal Courts Solicitors Association.

3.3 Extensive road testing of the guidelines was also undertaken during the consultation period. Issues noted in road testing are included at Annex A and have informed or supported some of the changes proposed in this paper.

3.4 Annex B 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 to assist members not present during the development stage.

Riot

3.5 The draft guideline which was subject to consultation is included at Annex B. A summary of the decisions in relation to the content of the draft guideline is as follows;

- It was agreed that the riot guideline should reflect established principles¹ that the role played by an individual offender within riot offences will not be the main driver of an individual's sentence. Rather, it is the incident itself and the overall level and scale which is the predominant factor influencing sentences, with the offenders' individual role in the incident assessed to a lesser extent.
- While the incident itself does result in a 'baseline' sentence, cases illustrated that some individual behaviour – such as an organising or leading role, or throwing a petrol bomb or using a highly dangerous weapon such as a firearm - does inflate the sentence above this, so it was agreed such activity should attract the highest culpability categorisation.
- Only two culpability categories were included as it was agreed it is difficult to envisage, and no cases analysed identified, any case which would not be captured within the two categories proposed. All cases analysed were large scale and/or serious incidents, involved significant planning or were persistent and sustained, and it is likely that any offence charged as riot would include these characteristics.

Culpability factors

3.6 Respondents were asked if they approved of proposed culpability factors. The majority of respondents did, although there were a small number of dissenting views. The HM Council of Circuit Judges questioned whether a guideline was necessary at all given the low volumes of offences, and thought that for the same reason one level of culpability would be sufficient. However, as was stated in the consultation document, the factors reflect cases which highlighted some individual behaviour within a riot incident inflates sentences from a base line sentence, so two categories are necessary. Respondents were also asked if they preferred the list of descriptive factors at culpability B, or if one factor of 'any incident of riot' would be sufficient. The majority preferred the individual factor, with both the Law Society

¹ *R v Blackshaw (& others)* [2011] EWCA Crim 2312; *R v Caird* [1970] 54 Cr. App. R 499 at 506

and CBA suggesting this factor be worded as ‘any incident of riot where category A factors are not present’. The MA did not understand why the riot guideline would not include the additional factor included in the violent disorder guideline of ‘offender participated in incident involving serious acts of violence’. This factor was included in violent disorder given the potential for it to apply in group fights, and it was not thought necessary to expressly include it in the riot guideline as any riot would include the other factors expressed.

3.7 A small number of individual responses submitted that the factors should provide for lower culpability in incidents where police presence or activity exacerbates an incident. It is not thought that this would be appropriate given the very difficult job for the police in managing riot incidents, and this will be explained in the consultation response document.

Question 1: Does the Council agree that culpability B should be amended to ‘any incident of riot where factors in category A are not present’?

3.8 A further issue raised regarding culpability factors related to both the riot and violent disorder guidelines, and the reference to ‘highly dangerous weapons’. The CBA requested that *‘where the particularly dangerous weapon explanation is given, we’d ask that it is made clear that where the definition of an offensive weapon is considered, where it falls into the category of offensive weapon where injury is intended, that the intended injury required is serious injury’ - CBA*

It is not proposed this amendment be made as the wording included was as used in the bladed articles guideline, and the wording reflects legislation which refers only to ‘injury’ and not to ‘serious injury’.

The MA also requested greater guidance be provided on the term ‘highly dangerous weapon’;

The MA would request a firmer definition, or more detail, on what is meant by ‘highly dangerous weapon’ rather than it being defined simply by reference to the fact that the dangerous nature must be substantially above and beyond the statutory definition of an offensive weapon, which is ‘any article made or adapted for use for causing injury, or is intended by the person having it with him for such use’. Our members will also require training on this.- Magistrates Association

3.9 The wording relating to highly dangerous weapons has been debated over the course of a number of guidelines, and it has been agreed that it is not possible to provide an exhaustive list of such weapons, and that it will be for the court to determine whether a weapon is highly dangerous on the facts and circumstances of the case. A slightly broader definition has recently been agreed for the assault guidelines to specifically define knives

and firearms as highly dangerous weapons and to provide a threshold for non-highly dangerous weapons, by including the wording; '*Non-highly dangerous weapon equivalents may include but are not limited to a shod foot, headbutting, use of animal in commission of offence*'. It is not thought that expanded wording would be appropriate or relevant here, given that the highly dangerous weapon is referenced in the factor relating to firearms and no distinction is required to define non-highly dangerous weapons as the factors do not provide for assessment of other weapons. It is thought sentencers will be clear a relevant weapon would require a very high threshold to be captured.

Question 2: Does the Council agree to retain the wording relating to highly dangerous weapons in the definitive guideline?

Harm factors

3.10 There were a number of points raised in relation to the harm factors. HM Circuit Judges and the CBA both questioned whether any offence of riot would fall outside of the factors included in Category 1 harm factors, which were intended to describe impacts considered to be at the very highest level of seriousness. This was an issue considered during the development of the guideline, where it was evident that all of the cases analysed did include one or more of the factors described. The factors were therefore qualified with threshold wording added such as 'very serious' and 'substantial'. It was also agreed that the guideline should provide for potential exceptional cases where a lower level of harm could be present, although none were identified in analysis of cases. Some respondents noted that it would be difficult to envisage any offence charged as riot not involving at least one of the harm factors, and that all offences being assessed as harm 1 was extremely likely. Given the relationship between a serious large scale violent disorder offence and riot, the same harm factors are included for violent disorder. During road testing of violent disorder it was noted that all cases achieved a harm 1 categorisation, suggesting concerns of those respondents are founded. Although a threshold was intended to be applied to the factor by referring to 'serious' or 'substantial' harm, road testing illustrated that this is not necessarily noted.

3.11 To avoid every case automatically being assessed as harm 1, it is proposed that the harm model be amended. A proposed alternative approach would be to include category 1 factors at category 2, and for category 1 to provide for 'multiple or extreme category 2 factors present.' This would then avoid all cases being categorised in the highest category which is currently likely, and would provide for particularly severe incidents to be categorised appropriately. In the riot cases analysed which attracted the highest sentences multiple harm factors were present. The harm model would look as follows;

Harm The level of harm is determined by weighing up all the factors of the case to determine the harm that has been caused or was intended to be caused.	
Category 1	<ul style="list-style-type: none"> • Cases involving multiple or extreme category 2 factors
Category 2	<ul style="list-style-type: none"> • Incident results in serious physical injury or serious fear and/or distress and/or disruption • Incident causes serious disruption or severe detrimental impact to community • Incident causes loss of livelihood or substantial costs to businesses • Incident causes substantial costs to be incurred to public purse • Incident results in attacks on police or public servants • Incident results in extensive damage to property

Question 3: Does the Council agree that the harm model should be amended as proposed?

Sentence levels

3.12 There was broad approval of sentence levels, with very few dissenting views. An exception was the Howard League who thought all sentences were too high, and did not appreciate that the case law precedent of *Blackshaw* was relevant to all other offences, believing it was a response to the offences sentenced in that case only.

3.13 The CBA also thought that sentences were too high, noting the following;

We note that the proposed starting point for the lowest category is around the mean sentence reported. We question whether this is indicative of the starting points being set too high for this category and failing to incorporate the sentences that would have fallen below the mean given the (in)frequency that the bottom category of sentencing guidelines are used in practice. The council has indicated this guideline should not in an increase of the sentences imposed. We express a concern that given these starting points and the approach to harm discussed above, that the stated intention of the sentencing council may be unintentionally undermined. - CBA

This point was based on statistics included in the resource assessment but did not appreciate these related to post guilty plea sentences, whereas the guideline starting points are pre-plea sentences. The average custodial sentence length for this offence included in the statistical bulletin was 5 years 3 months after plea. 5 years is the lowest starting point (pre plea) in the guideline, so if anything this may suggest sentences are too low, as a sentence of the guideline's highest starting point of 7 years with maximum discount for plea would be slightly lower than the average sentence length. However, due to the limited number of cases represented by the statistics (35 offenders were sentenced for riot in the period 2007-2017), the average sentence length cannot be said to be fully representative of all cases that may come before the court.

3.14 Based on this inaccurate observation the CBA suggested starting points be reduced. They also noted that in all but category A1 sentences, the starting point was considerably closer to the top of the category range. However, this starting point reflected current sentencing practice for the most serious offences, and it is not thought any offence involving these factors, even with mitigation, would be lower than the bottom of the category range.

Question 4: Does the Council agree to retain the sentence levels included in the draft guideline?

Aggravating and Mitigating factors

3.15 A number of respondents, including the CBA and the Howard League, raised concerns that the aggravating factors included increased the risk of double counting;

We have concerns that for public order offences in particular, a number of the aggravating factors are the basis for the charge itself and/or fall into the culpability and harm assessment. We suggest that it may be particularly important that this guideline reminds sentencers to avoid the dangers of double counting such factors where they have either led to conviction, the culpability assessment or the harm assessment.- CBA

3.16 As already noted the culpability model reflects established principles that offenders participating in a riot or large scale disorder share culpability with other offenders. It is not proposed that any aggravating factors be removed as these were relevant in cases analysed as factors which did aggravate the offence, and were not attributable to every participant in a riot. However, it may be appropriate to include additional wording to remind sentencers of the need to guard against double counting where offender behaviour has been taken into account in assessing culpability as high, where some aggravating factors may also be relevant to a leading role (actively recruited other participants, incitement of others), and the high culpability factors relating to the use or possession of a weapon or petrol bomb

(possession of article intended to injure, offender used weapon). This could be added to the wording at step two in bold type so the text reads;

Care should be taken not to double count aggravating factors which were relevant to the culpability assessment, particularly in cases where culpability is assessed as high.

Question 5: Does the Council agree to include the proposed additional wording to remind sentencers of the risk of double counting?

Additional guidance – riot related offending

3.17 There was broad approval of the inclusion of guidance instructing courts that in sentencing offences committed in the context of a riot the context should be treated as a severely aggravating feature. The Law Society suggested that the guidance should go further;

‘We refer to the paragraph ‘riot related offending’, concerning other offences committed in the context of a riot, and consider that it is helpful for the guideline to address this. However, we suggest it ought to be made clear that this may justify sentencing above the normal ‘range’ for the offence(s) in question’ – Law Society

3.18 This may assist in addressing a point made by the LCCSA who stated;

‘The committee did question the need to state that “where sentencing other offences committed in the context of riot, the court should treat the context as a severely aggravating feature of any offence charged”. This is simply stating the obvious and is unhelpful without guidance on what uplift should be applied to a feature that is “severely aggravating” ‘

3.19 To address these points the wording could be amended to read; ‘where sentencing other offences committed in the context of a riot, the court should treat the context of the offending as a severely aggravating feature of any offence charged which may justify a sentence in excess of any specific category range for the offence.’

Question 6: Does the Council wish to amend the wording of the guidance relating to other offences committed in the context of a riot?

Violent Disorder

3.20 The draft guideline which was subject to consultation is included at Annex B. The guideline is required to reflect a broad range of potential activity in relation to this offence. In developing the draft guideline analysis of cases identified that violent disorder can be charged in relation to offences akin to riot where all of the elements of a riot offence may not

be made out (e.g. football related violence and disorder, fights between groups in public places, or group violence towards individuals). Existing MCSG guidance also recognises that violent disorder offences may involve rare cases which involve minor violence or threats of violence leading to no or minor injury. The factors developed were intended to capture all such offences.

3.21 A summary of the decisions in relation to the content of the draft guideline is as follows:

- Highest culpability cases are those where a factor in category B is present and also involve the more the serious activity listed at category A.
- Highest culpability also captures targeting of an individual by a group, as analysis of cases indicated such offences currently attract sentences in the range of 3-4 years pre-plea.
- Group fights involving active and enthusiastic participation currently attract sentences in the region of 12-18 months, and are intended to be captured by middle and lower culpability categories. Category B factors relating to serious violence and persistent and sustained unlawful activity in a public place are intended to capture the most serious of these cases.
- A factor included at culpability A in the riot guideline relates to an offenders actions escalating the level of violence and disorder involved. It was agreed that this should only be included as an aggravating factor in the violent disorder guideline, as analysis of cases illustrated the potential for significant inflation of sentences for some violent disorder offences if this was included as a high culpability factor.
- As violent disorder can involve threats or minor violence it was suggested that Category C culpability should reflect these cases. The other factor agreed was 'offence involved lower level of violence or activity than included in Category B'.

Culpability factors

3.22 Respondents broadly approved of the culpability factors, and in particular that the factors provide for cases akin to riot to be captured. The District Judge Legal Committee responded;

The committee agree with the Sentencing Council in that experience shows that cases charged as violent disorder are often very similar to riot, often the only difference being the scale of the violence rather than the level of violence. The committee agree that it is rational

and appropriate to take a similar approach to assessing culpability as taken within the guideline for riot.- DJ Legal Cttee

3.23 A specific issue was raised again relating to the definition of weapons. The consultation document highlighted that the Council considered highly dangerous weapons could have broader application in a violent disorder offence and, in particular, it was noted that dogs being used or threatened as a weapon was becoming more common. Respondents were asked for views as to whether such a case would be captured by the factor. Respondents noting the point thought that this was unlikely;

In discussion of the draft violent disorder guideline the question is posed as to whether 'use of weapons' would be taken to include the use of a dog as a weapon. In our view, this is somewhat tenuous. If it is intended that the use of a dog as a weapon should be included, we would suggest that this should be made explicit in the guideline, to remove any risk of inconsistency in the approach taken by different courts.- Law Society

The consultation suggests that a recent issue the Sentencing Council (SC) considered is the use of dogs in a threatening way during an offence. The SC says that the 'highly dangerous weapon' factor is intended to capture such cases where appropriate to do so, but we do not think such a case would or should be captured by the factor. We do not think it is likely that there will be situations where dogs would be considered a highly dangerous weapon. We query whether a dog could be considered as an offensive weapon under the statutory definition, and if it is not covered by the basic definition, it would not be covered by something above and beyond the basic definition. We would argue that even if a dog could be considered an offensive weapon, it is highly unlikely to be considered highly dangerous. We acknowledge that there may be circumstances when use of a dog trained or otherwise particularly threatening might increase culpability. We would therefore suggest that if the SC wish to ensure such circumstances are covered, a separate culpability factor of using a dog to threaten violence should be included. – Magistrates Association

3.24 As the wording relating to highly dangerous weapons is not specific, it was thought that if a dog were used to cause a high level of serious injury it would be capable of being captured. However, given the responses the Council may wish to consider including such a feature as an aggravating factor of any violent disorder offence.

Question 7: Does the Council wish to include an additional aggravating factor of 'attack by animal used or threatened in commission of offence'?

3.25 As highlighted in Annex A, a number of issues arose with the application of culpability factors in road testing. One of these related to the interpretation of a 'ringleader' role, which would also be relevant to a riot culpability assessment.

3.26 Sentencers differed in the threshold applied in determining whether an individual in the scenario they tested was a significant aggressor or a ringleader. This led to differing culpability assessments for the same offender when sentenced by different judges. It appears there is a nuance for sentencers in whether an offender is a ringleader or a very active participant, and it may be that the offender in the scenario was seen as on the cusp; more active than other participants, but not crossing the threshold into a leading role. Nevertheless, the Council are asked to confirm if they are content with the factor as worded, as comments during road testing highlighted that judges did approve of a ringleader being assessed at a higher level of culpability.

Question 8: Is the Council content with the wording and inclusion of a high culpability factor 'offender was a ringleader or carried out a leading role'?

3.27 A further issue arising from road testing related to the factor 'targeting of individual by a group'. The factor was tested in a scenario with four judges, and three of those did not categorise the offender as high culpability, which was unexpected as the scenario was a clear case of targeting an individual in their own home. However, the scenario involved threats of violence only which may be why judges did not assess culpability as high. This may actually indicate that the guideline provides for a more proportionate approach to be taken to balancing the factors in an offence, and avoid a high culpability categorisation where actual violence is not used. However, it may be that 'targeting' has too high a threshold. The MA response indicated that it may not be clear where the factor applies;

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.- Magistrates Association

It was not intended that this factor not be able to capture an opportunistic attack on a random individual by a group, so it may be preferable to remove the targeting aspect for clarity. Alternative wording of the factor could be 'group violence committed towards an individual'.

Question 9: Does the Council wish to rephrase the culpability factor 'targeting of individual(s) by a group'?

Harm factors

3.28 Road testing highlighted the issue discussed already in considering the harm categorisation in riot. There were no cases tested which did not result in a harm 1 categorisation, and it was thought that discussion of the threshold for some of the harm

factors may occur but this did not happen. While in riot for the offence to be charged the harm will always be of a very high level, this may not be the case for violent disorder and it is necessary to consider that sentence inflation may occur if the majority of offences are categorised as high harm.

3.29 Replicating the proposed amendment to riot harm factors to the violent disorder guideline could address this. However, a lesser harm category would still be required as this would effectively create a very high harm category and an additional tier of harm. The harm model would look as follows;

Harm The level of harm is determined by weighing up all the factors of the case to determine the harm that has been caused or was intended to be caused.	
Category 1	<ul style="list-style-type: none"> • Cases involving multiple or extreme category 2 factors
Category 2	<ul style="list-style-type: none"> • Incident results in serious physical injury or serious fear and/or distress and/or disruption • Incident causes serious disruption or severe detrimental impact to community • Incident causes loss of livelihood or substantial costs to businesses • Incident causes substantial costs to be incurred to public purse • Incident results in attacks on police or public servants • Incident results in extensive damage to property
Category 3	<ul style="list-style-type: none"> • Offence involved threats of violence only • Offence involved lower level of violence or activity than included in category 2

3.30 This also links to an issue that was raised with sentence levels in road testing of the draft guideline. The Council are asked to consider whether an additional harm category should be included, in conjunction with considering sentence levels.

Sentence levels

3.31 No respondents disapproved of the proposed sentence levels, although the CBA again misunderstood the basis of the figures in the resource assessment and warned against sentence inflation.

3.32 Issues with the sentence levels were identified in road testing. Some judges felt they were too low, and that the guideline should provide more adequately for the most serious offences. The sentences were based on current sentencing practice and informed by sentences considered in the guideline development. It was anticipated that sentencers would go outside of the range in a very serious case.

3.33 However, updated statistics not available during the guideline development illustrate that the distribution of sentences may not currently be adequately reflected in the sentences in the draft guideline. The table below illustrates that an estimated 26% of immediate custodial sentences imposed in 2017 were above 3 years (pre guilty plea), and reflect the concerns of judges raised in road testing. It should be noted that a considerable increase is evident in the longest sentences imposed from 2016 to 2017;

Sentence length band ²	Number of offenders sentenced		Proportion of offenders sentenced	
	2016	2017	2016	2017
Up to and including 1 year	38	18	16%	10%
1 to 2	108	55	46%	32%
2 to 3	58	55	25%	32%
3 to 4	24	27	10%	16%
4 to 5	8	17	3%	10%
Total	236	172	100%	100%

The table below illustrates sentence types imposed in the years 2016 and 2017. This illustrates that immediate custodial sentences declined and suspended sentences considerably increased between the periods;

Year	Fine	Community Order	Suspended sentence	Immediate custody
2016	0%	6%	23%	69%
2017	0%	3%	34%	62%

² Sentence length bands do not include the lower bound, but do include the upper bound sentence length. For example, the category 'Up to and including 1 year' includes sentence lengths less than or equal to 1 year, and '1 to 2' includes sentence lengths over 1 year, and up to and including 2 years.

3.34 The table below illustrates how statistics would be reflected in sentences if the Council agree that an additional tier of harm and higher sentences are appropriate for the most serious cases;

Harm	Culpability		
	A	B	C
Category 1	Starting point 4 years	Starting point 3 years	Starting point 2 year
	Category range 2 – 4 years 6 months	Category range 2 – 4 years	Category range 1 – 3 years
Category 2	Starting point 3 years	Starting point 2 year	Starting point 1 yr
	Category range 2 – 4 years	Category range 1 – 3 years	Category range HL CO- 2 yrs custody
Category 3	Starting point 2 years	Starting point 1 year	Starting point 26 weeks
	Category range 1 – 3 years	Category range HL CO - 2 years	Category range ML CO – 1 year

3.35 Alternatively sentences which more closely reflect the 2016 sentences could look as follows. These sentences reflect a more conservative approach and take into account the 'jump' in sentence proportions between the two periods;

Harm	Culpability		
	A	B	C
Category 1	Starting point 3 years 6 mths	Starting point 2 years 6 mths	Starting point 1 yr 6 mths
	Category range 2 – 4 years 6 mths	Category range 1 – 3 years 6 mths	Category range 6 mths- 2 yrs 6 mths custody
Category 2	Starting point 2 years 6 mths	Starting point 1 yr 6 mths	Starting point 1 year
	Category range 1 – 3 years 6 mths	Category range 6 mths- 2 yrs 6 mths custody	Category range HL CO - 2 years

Category 3	Starting point 1 yr 6 mths	Starting point 1 year	Starting point 26 weeks
	Category range 6 mths- 2 yrs 6 mths custody	Category range HL CO - 2 years	Category range ML CO – 1 year

Question 10: Does the Council agree that an additional category of harm should be included to address sentencer observations and updated statistics, and if so which sentence table is preferred?

Aggravating and Mitigating factors

3.36 The same points raised for aggravating and mitigating riot factors were raised in relation to violent disorder offences. As for riot offences, the factors included were all found to aggravate offences in transcripts analysed and it is not proposed that any be removed. However, the proposal to include additional wording to remind sentencers to exercise caution in relation to double counting factors is relevant to these offences.

Question 11: Does the Council agree to include the proposed additional wording to remind sentencers of the risk of double counting?

4 ISSUES

4.1 There is currently no existing guidance available for these draft guidelines. Riot and violent disorder are the most serious of the public order offences, but are relatively low volume. Consultation responses broadly welcomed the development of guidelines for the range of public order offences.

5 RISKS

5.1 The draft resource assessment did not anticipate any inflationary or deflationary impacts of the guideline, although it is more difficult to assess sentencing behaviour in the absence of any existing guidelines for these offences, as pre and post factor application cannot be considered. 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.

Public Order Offences Crown Court Judges Road Testing

Introduction

Twelve interviews were conducted with Crown Court judges to test the *Violent Disorder* draft guidelines. These interviews were conducted either by telephone or face to face with judges across England and Wales. Each judge considered one scenario (details on the scenarios can be found in table 1), sentencing the scenario as if they were in court today (without the draft guideline) and then sentencing using the draft guideline. The research has provided valuable information on how the guideline might work in practice to support development of the *Public Order* guideline. However, there are limitations to the work¹, and as a result the research findings presented below should be regarded as **indicative** only and not conclusive.

Table 1. Scenarios used in interviews and the number of judges sentencing each scenario

Scenario	No. of judges
<p>A, B, C, D & E were attending a demonstration in a busy city centre on a Saturday afternoon. A small number of other people were present to object to the demonstration, and the leader of this group was using a loudspeaker to voice his objections. A became very angry at the interference with the demonstration and objected to the views expressed. He threw a brick towards the opposing group, and violence quickly ensued. A number of police officers attended to deal with the situation and were attacked. The metal barriers around the demonstration area were pushed over, bricks were thrown at the police and towards passing vehicles, public property including a fountain was smashed and severely damaged and business premises attacked and shop windows smashed. Attempts were made to start a fire in a public bin, and a number of offenders concealed their faces within their clothing and threw bricks at CCTV cameras. Mounted police arrived and batons were used against those involved, which eventually caused the crowd to disperse. Children and elderly people were among the members of the public who hid in shops terrified at the violence and disorder which lasted for approximately 40 minutes. Injuries were caused to police officers and others by missiles that were thrown. One officer received a broken nose and teeth after being hit by a brick.</p> <p>All pleaded guilty to violent disorder at the PTPH.</p> <p>A – was a significant aggressor; intimidating police officers by tearing off his top and screaming ‘come on you bastards I’ll kill you’ at them, ripping up a concrete bollard from the ground, and persistently threatening violence and throwing objects including metal and bricks towards police and others. He had consumed 3 pints of lager prior to the offence, and in mitigation states he is the sole carer for his elderly mother.</p> <p>B – Acted aggressively toward police, tore down metal barriers, threw and hit police officer with wood, threw metal sign at police, chanted racially/religiously abusive slogans, threw unknown liquid and a fire extinguisher taken from a shop at police.</p> <p>C- smashed shop window, chanted, disguised himself and threw bricks at CCTV cameras causing damage, and heavily involved in damage to fountain and attempted to start fire in bin.</p> <p>D- Threw objects towards police, including empty can of coke and stones, partly disguised himself by having hood up. Defendant had a number of previous convictions for theft and disorderly behaviour, and is 23.</p>	4

¹ Limitations include: this is a small sample which is not necessarily representative; the guidelines were out for consultation at the time of the research which means judges may have seen the guideline before this exercise (biasing the ‘pre-guideline’ sentence); and the scenarios only include limited detail of the actual case, which makes comparison with the sentence given by the judge in the actual case difficult.

<p>E- Part of crowd waving flag and a placard. Threw placard and stones at the police. Threw a further missile. Was persistently involved and threw missiles on two occasions. 22 years old. In mitigation the offender pleaded he suffers with ADHD.</p>	
<p>Violent disorder 2 - L, M, N & O were on a night out to celebrate O's forthcoming nuptials and had been drinking heavily. Towards the end of the evening they entered a pub where a group objected to their use of language and raucous behaviour. L & M became aggressive, telling the customers to 'come outside and sort it out there.' The landlady intervened and asked them to leave, at which point a fight started. Weapons were used or threatened and a number of serious injuries were caused. Innocent customers had their evening ruined and were frightened for their safety during the violence. Damage was caused to furniture and glasses were smashed.</p> <p>L - assaulted a customer who objected to the behaviour. Jumped on toes like a boxer, stating he was a boxing champion and would smash his face in, then dealt a severe blow knocking the victim unconscious.</p> <p>M- brandished a snooker cue and waved it threateningly while pursuing another, although it did not actually make contact with others.</p> <p>N- encouraged others to join in and participate in violence. Punched and kicked a man on the ground causing broken teeth and bruising.</p> <p>O- Pursued a man outside. Involved in the general scuffle and kicked out at a male and threw a metal chair through a window.</p> <p>All pleaded guilty at first hearing.</p>	4
<p>Violent disorder 3 - Q, R & T visited the flat of an individual who owed R money. They were armed with baseball bats and a cosh. Upon the victim answering the door they pushed him inside and Q held him by the throat demanding the money, while R and T wielded the weapons threateningly towards the victim's head. The victim's sister and her 5-year-old son were visiting at the time and were terrified at the scene. The sister managed to lock herself and her son in the bathroom shouting that she was calling the police. This interrupted the offence and Q banged the victim's head against the wall, telling him, "You better have the fucking money tomorrow or you're dead". On leaving the flat R smashed a mirror with the baseball bat and T kicked the bathroom door telling the victim's sister, "You'd better keep your fucking mouth shut". The victim, his sister and child were extremely distressed and terrified during the incident. All pleaded not guilty and were found guilty after trial.</p>	4

Key findings

- In most cases, judges using the new draft guideline categorised offences in the way expected by policy, and in the majority of instances judges gave the same sentence pre and post guideline. There were mixed findings regarding how judges felt about their final sentences, with some feeling content and others believing they were too low. Some judges who gave an A1 and B1 categorisation felt their sentences were too low, and were keen to have a higher starting point for A1 (this is discussed in more detail below).
- There were a few issues raised, which Council may wish to consider:
 - Across all three violent disorder scenarios all but one judge categorised each offender as A1 or B1 or A1/B1. Those who placed an offender in A1 largely did so using the factor, 'Offender was a ringleader or carried a leading role'. *"If you could spot that, who is the ring leader then that's a jolly good reason to weight it on the ring leader, who takes a heavy responsibility for it and reduce it for the others who positively weren't the ring leader."*

However, the road testing further identified that use of this factor depends on how judges perceive a ringleader role/his or her actions and this can lead to discrepancies in categorisation. This occurred for offenders A and B in scenario 1 and offenders L and N in scenario 2. The quotes below illustrate two judges' opposing perceptions of offender A in scenario 1, with the first judge appearing to have a higher threshold for considering an offender as a ringleader compared to the second:

"Well we call him a significant aggressor, but I'm not sure he's a ringleader or leading role really, on the facts, so I'm not sure he gets into A".

"Significant aggressor. He threw missiles. He threw a missile I think. He threw missiles. He escalated the [inaudible] violence. It takes place in a busy, well, he started it basically. He is, let's look at the culpability. He is a ring leader or carried out a leading role. That's why he is in culpability A

The road testing suggests that judges who did not see the offender as being 'a ring leader or carried a leading role' tended not to see the offender having 'led' others even though they were a significant aggressor.

- For the offenders in scenario 3 (three offenders) only one judge categorised the offender as A1 based on the factor, 'Targeting of individual(s) by a group'. Other judges saw this factor as relevant but categorised the offender as on the cusp of A1/B1, however, policy expected judges to use this factor to categorise the offender as culpability A. The quote below illustrates that even though the judge felt that the factor 'Targeting of individual (s) by a group' was relevant, it still left them on the cusp of culpability B as opposed to culpability A.

"I cannot find he is a ring leader.... In this instance we do have a targeting of an individual by a group. And there is also some evidence from B, this is a persistent activity, there must have been planning. There isn't serious violence but there is very clearly a threat of serious violence, so that brings me, broadly speaking in the cusp of a B".

- Judges unanimously categorised all 12 offenders, across the three scenarios, as harm 1.
- In a few instances B1 categorisation led to higher sentences than A1 categorisation for the same offender. The biggest difference was for an offender in scenario 2 where one judge gave 3-3.5 years (categorised as B1) and one judge gave 2 years (categorised as A1). The judge who categorised the offender as B1 applied several aggravating factors to increase the sentence from the starting point of 2 years to 3-3.5 years including 'Incident occurred in busy public area', 'Use of significant physical violence', 'Offender used weapon', Commission of offence whilst under the influence of alcohol or

drugs' and also cited serious acts of group violence as a factor. Considering that the judge applied 'Offender participated in incident involving serious acts of violence' as the culpability factor, there is a potential that the judge was double counting. The judge who categorised the offender as A1 felt that they were able to mitigate the sentence, and they reduced it by 1 year from the starting point of 3 years, although their reason for this was not captured. This happened on several more occasions however, there is not enough information to understand why this is.

- A third of judges said that they would want A1 to be higher than it currently is, with a starting point of 4 years. There was a general feeling that 3 years' custody starting point was not enough for some of the more serious cases. In particular a couple of judges mentioned that the current starting point was too low for cases including a petrol bomb or incendiary device. Some judges also felt that the middle category (B1) would need to follow suit and be increased as well.

Annex C: Draft guidelines

Riot Public Order Act 1986 (section 1)

Triable only on indictment
Maximum: 10 years' custody

Offence range: 3 years' – 9 years' custody

This 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**.

Culpability demonstrated by one or more of the following:

A	<p>Factors in Category B present AND any of;</p> <ul style="list-style-type: none"> • Offender used or intended to use petrol bomb or incendiary device • Offender used or intended to use firearm or other highly dangerous weapon* • Offender was a ringleader or carried out a leading role • Offenders actions escalated level of violence and/or disorder
B	<ul style="list-style-type: none"> • Offender participated in incident which caused widespread and/or large scale acts of violence on people and/or property • Offender participated in incident involving significant planning of unlawful activity • Offender participated in incident involving persistent and/or sustained unlawful activity in a public place

* *The court must determine whether the weapon is highly dangerous on the facts and circumstances of the case. The dangerous nature must be substantially above and beyond the legislative definition of an offensive weapon, which is 'any article made or adapted for use for causing injury, or is intended by the person having it with him for such use'.*

Harm

The level of **harm** is determined by weighing up all the factors of the case to determine the harm that has been caused or was intended to be caused.

Category 1	<ul style="list-style-type: none"> • Incident results in serious physical injury or serious fear and/or distress • Incident causes serious disruption or severe detrimental impact to community • Incident causes loss of livelihood or substantial costs to businesses • Incident causes substantial costs to be incurred to public purse • Incident involves attacks on police or public servants • Incident results in extensive damage to property
Category 2	<ul style="list-style-type: none"> • Cases where a lower level of harm is present than in category 1

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 from the appropriate sentence table below. The starting point applies to all offenders irrespective of plea or previous convictions.

Harm	Culpability	
	A	B
Category 1	Starting point 7 years' custody	Starting point 6 years' custody
	Category range 6 – 9 years' custody	Category range 4 – 7 years' custody
Category 2	Starting point 6 years' custody	Starting point 5 years' custody
	Category range 4 – 7 years' custody	Category range 3 – 6 years' custody

The **non-exhaustive** lists below include additional factual elements providing context to the offender's role in an offence and other factors relating to the offender.

First identify factors relating to the offender's role in the offence to identify whether any combination of these should result in an upward or downward adjustment from the sentence arrived at so far.

In cases where a number of aggravating factors are present, it may be appropriate to either move up a culpability category or move outside the identified category range.

Relevant mitigating factors should then be considered to determine if further adjustment to the sentence is required.

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: religion, race, disability, sexual orientation or transgender identity

Offence committed whilst on bail

Other aggravating factors:

Active and persistent participant

Incitement of others

Offender masked or disguised to evade detection

Incident occurred in busy public area

Took steps to prevent emergency services from carrying out their duties

Offender used weapon

Offender threw missiles/objects

Use of significant physical violence

Injury to animal carrying out public duty

Actively recruited other participants

Possession of weapon or article intended to injure

Vulnerable persons or children present during incident

Commission of offence whilst under the influence of alcohol or drugs

Ignored warnings or exclusion notices

Offence committed while on licence or subject to post sentence supervision

History of failing to comply with court orders

Factors reducing seriousness or reflecting personal mitigation

Low level involvement

No previous convictions

Remorse

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

Previous good character

Sole or primary carer for dependent relatives

Other offences committed within incidents of riot

Where sentencing other offences committed in the context of riot, the court should treat the context of the offending as a severely aggravating feature of any offence charged.

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

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.

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Violent disorder Public Order Act 1986 (section 2)

Triable either way
Maximum: 5 years' custody

Offence range: Community order – 4 years' custody

This 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**.

Culpability demonstrated by one or more of the following

A	<p>Factors in Category B present AND any of:</p> <ul style="list-style-type: none"> • Offender used or intended to use petrol bomb or incendiary device • Offender used or intended to use firearm or other highly dangerous weapon* • Offender was a ringleader or carried out a leading role • Targeting of individual(s) by a group
B	<ul style="list-style-type: none"> • Offender participated in incident which involved widespread and/or large scale acts of violence on people and/or property • Offender participated in incident involving serious acts of violence • Offender participated in incident involving significant planning of unlawful activity • Offender participated in incident involving persistent and/or sustained unlawful activity
C	<ul style="list-style-type: none"> • Offence involved threats of violence only • Offence involved lower level of violence or activity than included in Category B

* *The court must determine whether the weapon is highly dangerous on the facts and circumstances of the case. The dangerous nature must be substantially above and beyond the legislative definition of an offensive weapon, which is 'any article made or adapted for use for causing injury, or is intended by the person having it with him for such use'.*

Harm

The level of **harm** is determined by weighing up all the factors of the case to determine the harm that has been caused or was intended to be caused.

Category 1	<ul style="list-style-type: none"> • Incident results in serious physical injury or serious fear and/or distress • Incident causes serious disruption or severe detrimental impact to community • Incident causes loss of livelihood or substantial costs to businesses • Incident causes substantial costs to be incurred to public purse • Incident results in attacks on police or public servants • Incident results in extensive damage to property
Category 2	<ul style="list-style-type: none"> • Cases where a lower level of harm is present than in category 1

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 from the appropriate sentence table below. The starting point applies to all offenders irrespective of plea or previous convictions.

Harm	Culpability		
	A	B	C
Category 1	Starting point 3 years' custody	Starting point 2 years' custody	Starting point 1 year's custody
	Category range 2 – 4 years' custody	Category range 1 – 3 years' custody	Category range High level community order – 2 years
Category 2	Starting point 2 years' custody	Starting point 1 year's custody	Starting point 26 weeks' custody
	Category range 1 – 3 years' custody	Category range High level community order – 2 years' custody	Category range Medium level community order – 1 year 6 months' custody

The **non-exhaustive** lists below include additional factual elements providing context to the offender's role in an offence and other factors relating to the offender.

First identify factors relating to the offender's role in the offence to identify whether any combination of these should result in an upward or downward adjustment from the sentence arrived at so far.

In cases where a number of aggravating factors are present, it may be appropriate to either move up a culpability category or move outside the identified category range.

Other relevant aggravating and mitigating factors should then be considered to determine if further adjustment to the sentence is required.

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: religion, race, disability, sexual orientation or transgender identity

Offence committed whilst on bail

Other aggravating factors:

Active and persistent participant

Offender's actions escalated level of violence and/or disorder

Incitement of others

Offender masked or disguised to evade detection

Incident occurred in busy public area

Offender used weapon

Offender threw missiles/objects

Use of significant physical violence

Injury to animal carrying out public duty

Possession of weapon or article intended to injure

Incident occurred in victim's home

Vulnerable persons or children present during incident

Commission of offence whilst under the influence of alcohol or drugs

History of failing to comply with court orders

Offence committed while on licence or subject to post sentence supervision

Factors reducing seriousness or reflecting personal mitigation

No previous convictions

Evidence of steps initially taken to defuse incident

Low level involvement

Minor/peripheral role

Remorse

Previous good character

Sole or primary carer for dependent relatives

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

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**

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.

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Sentencing Council meeting:
Paper number:

25 January 2019
**SC(19)JAN06 –Expanded explanations in
offence specific guidelines**

Lead Council member:
Lead official:

Maura McGowan
Ruth Pope
0207 071 5781

1 ISSUE

1.1 At the December meeting the Council agreed how the explanations provided for factors in the General guideline could apply to factors in offence specific guidelines.

1.2 The Council is asked to sign off the expanded explanations for offence specific guidelines at this meeting with a view to launching the consultation at the end of February.

1.3 The plan is then to consider the responses to that consultation in June 2019 and to publish both phases of the project to replace the SGC Seriousness guideline at the end of July 2019. This will allow for training on the guidelines in September and October 2019.

2 RECOMMENDATION

2.1 That the Council agrees the text of the expanded explanations at **Annex A** to be applied to offence specific guidelines, and considers the proposed changes to the mitigating factor on ill health (M15) (paragraphs 3.4 to 3.9).

2.2 That the Council considers the proposed changes to definitive guidelines set out in draft at **Annex B** and agrees to consult on making these changes across all relevant guidelines.

2.3 That the Council considers a draft policy for making future changes to digital guidelines at **Annex C** and agrees to consult on the policy. (paragraphs 3.11 to 3.22)

2.4 That the Council considers the likely impact of the expanded explanations on sentencing severity and agrees to asking questions in the consultation on the likely effect of the expanded explanations on sentencing practice. (paragraphs 3.23 to 3.24)

2.5 That the Council notes the comments from the Justice Select Committee on providing information on the five purposes of sentencing and considers whether this should be addressed in the consultation document. (paragraphs 3.26 to 3.31)

2.6 That the Council agrees the approach to be taken to Sentencing Guidelines Council guidelines. (paragraphs 3.32 to 3.34)

2.7 That the Council agrees to consult on whether the General guideline should be made available as an overarching guideline. (paragraphs 3.35 to 3.37)

2.8 That the Council agrees to refer the issue of fines for high income earners to the MCSG working group. (paragraphs 3.38 to 3.39)

3 CONSIDERATION

Expanded Explanations

3.1 Annex A contains the expanded explanations and the factors to which they will be applied. These are the same as those agreed for the General guideline subject to minor changes agreed at the December meeting to allow for differences in the way some factors are worded in offence specific guidelines.

3.2 There is no requirement to do so, but if Council members wish to view the expanded explanations as applied to offence specific guidelines:

Go to: <https://sentencing-staging.bang-on.net/>

User name: sentencing_staging

Password: surcharging-footwork

You may be asked to enter these more than once (sorry).

This will take you to the homepage of the test website.

3.3 On the test website click on 'Sentencing Guidelines for use in Magistrates' Court' or 'Sentencing Guidelines for use in the Crown Court'. This will bring you to the search offences screen. Work is ongoing to add explanations to all guidelines but at time of writing the expanded explanations have been applied to Step 2 factors in the following guidelines:

- Assault occasioning actual bodily harm / Racially and religiously aggravated ABH
- Possession of an article with blade/point in a public place,
- Non-domestic burglary
- Breach of criminal behaviour order/ ASBO
- Owner or person in charge of a dog dangerously out of control
- Possession of a controlled drug with intent to supply it to another
- Organisations: Unauthorised or harmful deposit, treatment or disposal etc of waste
- Fraud
- Individuals: Breach of food safety and food hygiene regulations
- Harassment (putting people in fear of violence)
- Unlawful act manslaughter (Crown Court only)
- Robbery – street and less sophisticated commercial (Crown Court only)
- Sexual assault
- Encouragement of terrorism
- Careless driving (magistrates' guidelines only)
- Football related offences (magistrates' guidelines only)

Serious medical condition

3.4 At the December meeting there was a brief discussion regarding the mitigating factor (M15) relating to ill health. In the General guideline the factor is worded:

- Physical disability or serious medical conditions requiring urgent, intensive or long-term treatment.

3.5 In all offence specific guidelines the factor is worded:

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

(In some guidelines it says 'conditions' rather than 'condition'.)

3.6 The expanded explanation reads:

Such conditions as may affect the impact of a sentence on the offender may justify a reduction in sentence.

3.7 The issue for the Council to consider relates to whether this explanation is as helpful as it might be and whether it accurately reflects the case law on the subject. Several relevant decisions of the CACD are helpfully summarised in the case of [R v AS and R v SM \[2018\] EWCA 318 \(Crim\)](#).

R v Bernard [1997] 1 Cr App R (S) 135

(i) a medical condition which may at some unidentified future date affect either life expectancy or the prison authorities' ability to treat a prisoner satisfactorily may call into operation the Home Secretary's powers of release by reference to the Royal Prerogative of mercy or otherwise but is not a reason for this court to interfere with an otherwise appropriate sentence;

(ii) the fact that an offender is HIV positive, or has a reduced life expectancy, is not generally a reason which should affect sentence;

(iii) a serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate;

(iv) an offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate.

R v Qazi [2011] 2 Cr App R (S) 8

v) Once a sentence of imprisonment has been imposed, unless it is to be contended on appeal that the judge should not have imposed a sentence of imprisonment because imprisonment anywhere would ipso facto cause a breach of Article 3, the relevance of an appellant's medical condition relates solely to the assessment of the overall length of the sentence in accordance with the principles established in Bernard.

vi) Any issues as to breach of the duties of the Secretary of State in relation to medical treatment and conditions in prison are matters for civil remedies and not for this division of the Court of Appeal.

R v Hall [2013] 2 Cr App R (S) 68

the sentencing court is fully entitled to take account of a medical condition by way of mitigation as a reason for reducing the length of the sentence, either on the ground of the greater impact which imprisonment will have on the appellant, or as a matter of generally expressed mercy in the individual circumstances of the case: see Bernard.

Those who are gravely ill, or severely disabled, or both, may well have to be imprisoned if they commit serious offences. Their condition cannot be a passport to absence of punishment. If this appellant should ever again offend seriously, that would no doubt be the inevitable outcome, and some loss of the quality of care compared with a self-organised home regime would no doubt necessarily follow. But for the reasons which we have already set out, the impact on this appellant of a sentence of imprisonment is greater by a margin which it is difficult to overstate than it would be on an ordinary appellant. There is no lack of punishment in what he has undergone since being sentenced in the summer of last year. He is now said by the hospital to be significantly more frail than at the time of sentence

R v Clarke; R v Cooper [2017] 1 WLR 3851, [2017] 2 Cr App R (S) 18.

Whilst we consider that an offender's diminished life expectancy, his age, health and the prospect of dying in prison are factors legitimately to be taken into account in passing sentence, they have to be balanced against the gravity of the offending, (including the harm done to victims), and the public interest in setting appropriate punishment for very serious crimes. Whilst courts should make allowance for the factors of extreme old age and health, and whilst courts should give the most anxious scrutiny to those factors as was recognised in R v Forbes [2017] 1 WLR 53, we consider that the approach of taking them into account in a limited way is the correct one.

a. The terminal prognosis is not in itself a reason to reduce the sentence even further than it might be reduced in accordance with the Bernard principles. The court must impose a sentence which properly meets the aims of sentencing even if it will carry the clear prospect that the offender will die in custody. The prospect of death in the near future will be a matter to be considered by the prison authorities and the Secretary of State under the ERCG provisions which we have mentioned.

b. However, the appellant's knowledge that he must now face the prospect of death in prison, subject only to the ERCG provisions, is a factor relevant to the application of the Bernard principles. So too is the prospect that his worsening condition during his decline towards death will make each day harder for him than it already is, and much harder than it is for prisoners in good health. The terminal prognosis must therefore be taken into account in assessing whether imprisonment weighs so much more heavily on the appellant than it does on other prisoners that the length of the sentence must exceptionally be reduced, even if this court concludes that no proper application of the Bernard principles could result in such a reduction as would enable the appellant to be released before death.

3.8 In the subsequent case of Gumble the court extracted the following points:

R v Gumble [2018] EWCA Crim 1800

- i) A serious medical condition, even when it is difficult to treat in prison, will not automatically entitle the defendant to a lesser sentence than would otherwise be appropriate;
- ii) An offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, to impose a lesser sentence than would

otherwise be appropriate, but there will always be a need to balance issues personal to an offender against the public interest in imposing appropriate punishment for serious offending;

- iii) A terminal prognosis is not in itself a reason to reduce the sentence even further. The Court must impose a sentence that properly meets the aims of sentencing even if it will carry the clear prospect that the offender will die in custody. The prospect of death in the near future will be a matter considered by the prison authorities and the Secretary of State under the early release on compassionate grounds procedure (Chapter 12 of Prison Service Order 6000) (“ERCG”);
- iv) But, an offender’s knowledge that he will likely face the prospect of death in prison, subject only to the ERCG provisions, is a factor that can be considered by the sentencing Judge when determining the sentence that it would be just to impose;
- v) Once a sentence of imprisonment has been imposed, unless it is to be contended on appeal that any sentence of imprisonment would cause a breach of Article 3, the relevance of the defendant’s medical condition at the date of sentence relates solely to the assessment of the overall length of the sentence that it would be just to impose;
- vi) If an offender relies upon matters that post-date sentence, then the general rule is that the Court of Appeal will only interfere with a sentence if persuaded that at the time it was passed it was unlawful or wrong in principle or manifestly excessive in length;
- vii) A more flexible approach can be adopted, and the Court may have regard to a significant deterioration in a medical condition, where the condition was known at the date of sentence, but the cases in which it will be appropriate to do so are rare;
- viii) If it is contended that a prisoner’s health is being prejudiced by a failure in care whilst in prison, it is through the civil courts not by way of appeal to the Criminal Division of the Court of Appeal that a remedy should be sought;
- ix) Where the medical condition affects either the life expectancy of the prisoner or the prison authority’s ability to treat the prisoner satisfactorily then the prisoner should seek release under the ERCG; it is not a reason for the Court of Appeal to interfere with an otherwise appropriate sentence.

3.9 Taking into account all of the above (but disregarding the issues that relate solely to appeals against sentence), the following points could be considered for inclusion in the expanded explanation:

- The court can take account of physical disability or a serious medical condition by way of mitigation as a reason for reducing the length of the sentence, either on the ground of the greater impact which imprisonment will have on the offender, or as a matter of generally expressed mercy in the individual circumstances of the case.
- However, a such a condition, even when it is difficult to treat in prison, will not automatically entitle the offender to a lesser sentence than would otherwise be appropriate.
- There will always be a need to balance issues personal to an offender against the gravity of the offending, (including the harm done to victims) and the public interest in imposing appropriate punishment for serious offending;
- A terminal prognosis is not in itself a reason to reduce the sentence even further. The court must impose a sentence that properly meets the aims of sentencing even if it will carry the clear prospect that the offender will die in custody. The prospect of death in the near future will be a matter considered by the prison authorities and the Secretary of State under the early release on compassionate grounds procedure (ERCG).

- But, an offender’s knowledge that he will likely face the prospect of death in prison, subject only to the ERCG provisions, is a factor that can be considered by the sentencing Judge when determining the sentence that it would be just to impose.

Question 1: Does the Council agree to consult on the above expanded explanation relating to serious medical conditions?

Other mitigating factors

3.10 The wording relating to care leavers in factor M13 and to pregnant women in factor M14 has been redrafted and circulated to members.

Question 2: Does the Council agree with the revised wording at M13 and M14?

Issues arising from the Justice Select Committee response to the General guideline consultation

3.11 The Chair of the JSC wrote to the Council in December with comments on the General guideline. The JSC was largely supportive of the General guideline and was keen to ensure that the explanations in the drop-down boxes should also be available for offence specific guidelines. The detailed points made cover four areas: The structure and format of the guideline; Consultation stage resource assessment; Age and/or lack of maturity; The five purposes of sentencing.

The structure and format of the guideline

We recognise that digital guidelines have the advantage of being easier to update than those in traditional formats. However, we suggest that the Council investigate setting up an online archive to preserve earlier versions of guidelines, as this would provide a valuable resource in appeal cases where the hearing takes place after the relevant guidelines have been amended.

3.12 The issue of maintaining an archive of guidelines and an accessible record of amendments made to digital guidelines is being addressed by the office. Additionally, it is proposed to mark the online copies of the printed guidelines to ensure that users are aware that these may no longer be up to date and that they should refer to the digital guidelines for the current definitive version.

3.13 An issue also arises as to when proposed changes to the digital guidelines should be subject to consultation and whether an abbreviated form of consultation might be appropriate in some cases. The requirement to consult on new and revised guidelines is set out in the Coroners and Justice Act 2009:

120 Sentencing guidelines

(1) In this Chapter “*sentencing guidelines*” means guidelines relating to the sentencing of offenders.

- (2) A sentencing guideline may be general in nature or limited to a particular offence, particular category of offence or particular category of offender.
- (3) The Council must prepare—
- (a) sentencing guidelines about the discharge of a court's duty under section 144 of the Criminal Justice Act 2003 (c. 44) (reduction in sentences for guilty pleas), and
 - (b) sentencing guidelines about the application of any rule of law as to the totality of sentences.
- (4) The Council may prepare sentencing guidelines about any other matter.
- (5) Where the Council has prepared guidelines under subsection (3) or (4), it must publish them as draft guidelines.
- (6) The Council must consult the following persons about the draft guidelines—
- (a) the Lord Chancellor;
 - (b) such persons as the Lord Chancellor may direct;
 - (c) the Justice Select Committee of the House of Commons (or, if there ceases to be a committee of that name, such committee of the House of Commons as the Lord Chancellor directs);
 - (d) such other persons as the Council considers appropriate.
- (7) In the case of guidelines within subsection (3), the Council must, after making any amendments of the guidelines which it considers appropriate, issue them as definitive guidelines.
- (8) In any other case, the Council may, after making such amendments, issue them as definitive guidelines.
- (9) The Council may, from time to time, review the sentencing guidelines issued under this section, and may revise them.
- (10) Subsections (5), (6) and (8) apply to a revision of the guidelines as they apply to their preparation (and subsection (8) applies even if the guidelines being revised are within subsection (3)).
- (11) When exercising functions under this section, the Council must have regard to the following matters—
- (a) the sentences imposed by courts in England and Wales for offences;
 - (b) the need to promote consistency in sentencing;
 - (c) the impact of sentencing decisions on victims of offences;
 - (d) the need to promote public confidence in the criminal justice system;
 - (e) the cost of different sentences and their relative effectiveness in preventing re-offending;
 - (f) the results of the monitoring carried out under section 128

3.14 The legislation permits the Council to issue guidelines without consultation in urgent cases but this provision has never been used by the Council:

123 Preparation or revision of guidelines in urgent cases

(1) This section applies where the Council—

- (a) decides to prepare or revise sentencing guidelines or allocation guidelines, and
- (b) is of the opinion that the urgency of the case makes it impractical to comply with the procedural requirements of section 120 or (as the case may be) section 122.

(2) The Council may prepare or revise the guidelines without complying with—

- (a) in the case of sentencing guidelines, section 120(5), and
- (b) in the case of allocation guidelines, section 122(3).

(3) The Council may—

- (a) in the case of sentencing guidelines, amend and issue the guidelines under section 120(7) or (8) without having complied with the requirements of section 120(6)(b) to (d), and
- (b) in the case of allocation guidelines, amend and issue the guidelines under section 122(5) without having complied with the requirements of section 122(4)(b) to (d).

(4) The guidelines or revised guidelines must—

- (a) state that the Council was of the opinion mentioned in subsection (1)(b), and
- (b) give the Council's reasons for that opinion.

3.15 This consultation on expanded explanations will be used as an opportunity to consult on a few proposed changes, but there may be future occasions when changes to guidelines would be helpful that do not warrant a full review of the guideline and consultation. Scenarios could include:

- a) When a typographical error is discovered in the original definitive guideline
- b) When a substantive error is discovered in the original definitive guideline
- c) When there has been change in legislation making part of a guideline inaccurate, incomplete or misleading.

3.16 Where errors in definitive guidelines are due simply to typographical errors, the practice in the past has been for the office to correct these on the online version and (where the error is sufficiently significant) communicate the change to users. The proposal is that this policy should continue and a log of all such corrections be maintained on the website.

3.17 Where the error is more substantive (an example was where two adjacent starting points in the money laundering guideline were the same) the practice has been for the

Council to agree how the error should be corrected, and to communicate the change to users. The proposal is that the Council should consider such situations on a case by case basis and decide whether any change is merely giving effect to the Council's original intention (which had already been subject to consultation) or whether the change represents a change that requires consultation. Where the Council decides that consultation is required, a targeted four to six week consultation with key stakeholders is likely to be appropriate.

3.18 Changes to legislation may affect guidelines in minor or more substantial ways. An example of a minor effect is in the final step in most guidelines which refers to the requirement for courts to consider whether to give credit for time spent on bail and subject to curfew in accordance with section 240A of the Criminal Justice Act 2003. Early guidelines (assault, burglary, drugs) also refer to giving credit for time spent in custody in accordance with s240 of the Criminal Justice Act 2003, which is no longer correct. It is proposed that in cases such as this, the digital guidelines can simply be made legally correct and the change logged. There would be no purpose in consulting on the change as there is no alternative under consideration and the change would not affect sentencing practice.

3.19 An example where this approach has been taken in the past is when the Council agreed in 2016 to make changes to the title page of certain sex offences to reflect changes to terminology in legislation without consultation. A slightly more substantive change was made to the Sex offences guideline in 2017 when the Council agreed to add a note to the 'trafficking people for sexual exploitation' guideline, as the legislation creating the offence had been repealed by the Modern Slavery Act. The addition of this note was made without formal consultation. The note is effectively a stop gap until a full guideline is produced for the new Modern Slavery Act offences.

3.20 Other more recent changes have been the addition of the new statutory aggravating factor regarding emergency workers to the guidelines to which it applies and a reference to offenders of particular concern in relevant guidelines.

3.21 Fundamental changes to guidelines as a result of legislative change (for example the proposed increases to the maximum sentences for Terrorism offences) will require a substantive review of the guideline and the Council will need to consider on a case by case basis how such changes can be accommodated in its work plan and the length and extent of the consultation on changes.

3.22 Users look to sentencing guidelines as a source of accurate information and it is therefore desirable that every attempt is made to keep the guidelines up to date. It is proposed that the Council uses this consultation to make the changes outlined at Annex B

and to set out its policy on updating and correcting guidelines in future. Suggested text for this policy is set out at Annex C.

Question 3: Does the Council wish to consult on making the changes outlined in Annex B?

Question 4: Does the Council agree with the proposed policy relating to making changes to guidelines set out in Annex C and, if so, does it agree to consult on this policy?

Consultation stage resource assessment

3.23 The JSC repeated its call for more robust consultation stage resource assessments (while recognising the limited resources that the Council has to do this). With regard to the General guideline the JSC was concerned about potential sentence inflation from referring to analogous offences and supported respondents who asked for more guidance on this – a point that the Council has already addressed.

3.24 With regard to the consultation stage resource assessment for the expanded explanations, this will be circulated to members for comment before the consultation is launched. The analysis and research team are gathering evidence where they can, but it will inevitably be impossible to provide an accurate assessment of the likely effect of the expanded factors on sentence severity. The consultation document will state that expanded explanations are designed to reinforce best practice rather than to have an effect on sentencing severity. However, it is possible that particularly with regard to young adults, there could be a decrease in sentencing severity as a result of the approach taken. It is proposed to ask respondents to the consultation if they think explanations will have an effect on sentences, and if so what effect.

Question 5: Does the Council agree to seek the views of respondents on the likely effect on sentencing of the expanded explanations?

Age and/or lack of maturity

3.25 The JSC welcomes the inclusion of guidance on this factor and makes two substantive suggestions for additional information. The first relates to atypical (impaired) brain development. This is an issue that is covered by the mental health overarching guideline. The second suggestion is to include a presumption that young adults up to the age of 25 are still maturing. This has already been addressed in the revised explanation.

The five purposes of sentencing

3.26 In its response the JSC said:

We note that Professor Sir Anthony Bottoms, in the report of his review of the Sentencing Council's exercise of its statutory functions (April 2018), suggested that guidelines might usefully include some reference to the legislative provisions under section 142 of the Criminal Justice Act 2003 setting out the five purposes of sentencing – not least to assist the understanding of victims, offenders and the public more generally. While we welcome the Council's decision to re-state these five purposes in the General Guideline, we agree with Professor Bottoms that public understanding, as well as that of sentencers, would be enhanced by including additional explanatory text for each statutory purpose; in particular, we agree with the Crown Prosecution Service that it would be helpful to explain how they relate to section 143(1) of the 2003 Act, which requires the court to consider the offender's culpability and any harm that the offence caused, or was intended to cause – suggesting a more censure-based approach to sentencing decisions than the predominantly consequentialist purposes set out in section 142. We observe that research evidence broadly supports the contention that increasing sentence lengths is less likely to act as a deterrent than increasing the offender's belief in the likelihood of detection, arrest and conviction;¹ we suggest that this evidence might usefully be brought to the attention of sentencers.

3.27 The test on the five purposes of sentencing in the General guideline is:

The court should consider which of the five purposes of sentencing (below) it is seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence.

- the punishment of offenders
- the reduction of crime (including its reduction by deterrence)
- the reform and rehabilitation of offenders
- the protection of the public
- the making of reparation by offenders to persons affected by their offences

3.28 At the October 2018 meeting the Council considered whether it should provide more information in the General guideline on the purposes and/or effectiveness of sentencing and concluded that it would not be practical to do so. There is no expanded explanation in offence specific guidelines on the five purposes of sentencing. This is because the explanations only expand on what is already in existing guidelines. It seems likely that the JSC will raise the issue again in response to this consultation.

3.29 The Council does make reference to particular purposes of sentencing in some guidelines, for example: the 'step back' factors in the environmental guidelines:

¹ See, for example, A E Bottoms and A von Hirsch 'The Crime Preventive Impact of Legal Sanctions' in P Cane and H M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010)

Where the sentence is or includes a fine, the court should 'step back' and, using the factors set out in steps five and six, review whether the sentence as a whole meets, in a fair way, the objectives of punishment, deterrence and removal of gain derived through the commission of the offence.

3.30 Similarly step five in the Diminished responsibility guideline includes the following:

The court should review whether the sentence as a whole meets the objectives of punishment, rehabilitation and protection of the public in a fair and proportionate way.

3.31 The consultation document could attempt to address the issue and explain that for each offence and offender the balance between the purposes of sentencing will be subtly different. Offence specific guidelines emphasis different aspects of the offending (in terms of harm and culpability) and the offender (in the culpability and aggravating and mitigating factors) that lead the sentencer to a sentence that balances the purposes of sentencing. Where it is particularly relevant some offence specific guidelines specifically remind the sentencer to consider rehabilitative sentences even when the custody threshold is passed (eg theft, drugs). A question could be asked in consultation as to whether further information of the purposes of sentencing would be of practical value in guidelines.

Question 6: Should the consultation document discuss the five purposes of sentencing and invite the views of respondents?

The approach to be taken to Sentencing Guidelines Council guidelines

3.32 There are still a number of SGC guidelines in force:

- Dangerous driving
- Vehicle licence/registration fraud
- Vehicle taking (aggravated). Damage caused to property other than the vehicle in accident or damage caused to vehicle
- Vehicle taking (aggravated). Dangerous driving or accident causing injury
- Arson (criminal damage by fire)
- Criminal damage (other than by fire) / Racially or religiously aggravated criminal damage (other than by fire)
- Disorderly behaviour (harassment, alarm or distress) / Racially or religiously aggravated disorderly behaviour
- Firearm, carrying in a public place
- Identity documents – possess false/ another's/ improperly obtained
- Threatening behaviour - fear or provocation of violence/ Racially or religiously aggravated threatening behaviour
- Trade mark, unauthorised use of etc.
- Witness intimidation
- Affray
- Causing death by careless driving when under the influence of drink or drugs, etc
- Causing death by careless or inconsiderate driving
- Causing death by dangerous driving
- Causing death by driving: unlicensed, disqualified or uninsured drivers

3.33 The majority of these are currently being revised, but it is likely that some of them will remain in force for at least two years after the Seriousness guideline is withdrawn. The SGC guidelines do not have the same format as Sentencing Council guidelines and so the approach of providing expanded explanations to step two factors only, does not translate to these guidelines. Typically SGC guidelines refer to the list of common aggravating and mitigating factors in the SGC Seriousness guideline. The proposal is to provide the list of factors from the Seriousness guideline as a drop down list where they are referred to in SGC guidelines. This will enable the Council to withdraw the Seriousness guideline when the definitive General guideline and expanded explanations come into effect.

3.34 Minor changes can be made to the SGC guidelines as contemplated at Annex B and in line with the policy at Annex C to keep them as up to date and relevant as possible, pending conversion to Sentencing Council format in due course.

Question 7: Does the Council agree with the proposed approach to SGC guidelines?

The availability of expanded explanations for factors that do not appear in offence specific guidelines.

3.35 Most of the factors for which expanded explanations have been created appear regularly at step two of offence specific guidelines, and when they do not appear it is because they are not relevant. However, there may be circumstances where information in the General guideline/ expanded explanations could be relevant to a sentencing exercise that does not include a link to that information.

3.36 An example is the factor 'offence committed in custody' (A17) which appears as a step two factor in only the terrorism guidelines and possession of a controlled drug guideline (it also appears at step one in the bladed article/ offensive weapon guidelines). There are other offences which could be committed in custody where the expanded explanation could be useful but there is no mechanism for users to access the information.

3.37 The proposal is that the consultation could seek views on whether the General guideline should be made available in the way that overarching guidelines are to enable users to refer to the general principles that it sets out.

Question 8: Does the Council agree to consult on treating the General guideline as an overarching guideline that may be relevant to any sentencing exercise?

Fines for high income earners

3.38 The Ministry of Justice has received representations about whether fines for high earners are being adjusted down by sentencers. The question is posed as to whether, if judicial discretion is used to bring a fine down from a basic calculation based on weekly

income, is the correct balance between a proportionate fine based on harm and culpability, and the stated aim of the fine having an “equal impact on offenders with different financial circumstances” being achieved? The suggestion from MoJ is that the Council could consider whether to update the guidance in the MCSG explanatory materials on the approach to be taken in such cases.

3.39 There are other matters relating specifically to the MCSG which the MCSG Working Group will be asked to consider in the spring and it is proposed that this issue should be investigated as part of that exercise.

Question 9: Does the Council agree to refer the issue of fines for high income earners to the MCSG working group?

Pre-sentence reports

3.40 As discussed at the December meeting work is ongoing on providing guidance in a practice direction on when court may sentence to community orders or custody without a pre-sentence report. Sophie Marlow may be able to update the Council on the progress of this work. The Council agreed to use the consultation on expanded explanations to consult on making a small change to the Imposition guideline (extracts from which appear in the expanded explanations) to direct users to the new practice direction for guidance on this issue.

The consultation

3.41 Work is ongoing on drafting the consultation document, which is subject to decisions made at this meeting. A draft of the document will be circulated to members outside of the meeting for comments in order to meet the target for publishing the consultation at the end of February.

4 RISKS/IMPACT

4.1 As discussed at paragraph 3.32 above there was some criticism of the Council for the lack of a detailed impact assessment for the General guideline and the same is likely to apply to the addition of explanations to offence specific guidelines.

Expanded Explanations for factors in offence specific guidelines

STEP TWO

Band Ranges

	Starting point	Range
Fine Band A	50% of relevant weekly income	25 – 75% of relevant weekly income
Fine Band B	100% of relevant weekly income	75 – 125% of relevant weekly income
Fine Band C	150% of relevant weekly income	125 – 175% of relevant weekly income
Fine Band D	250% of relevant weekly income	200 – 300% of relevant weekly income
Fine Band E	400% of relevant weekly income	300 – 500% of relevant weekly income
Fine Band F	600% of relevant weekly income	500 – 700% of relevant weekly income

- Where possible, if a financial penalty is imposed, it should remove any economic benefit the offender has derived through the commission of the offence including:
 - avoided costs;
 - operating savings;
 - any gain made as a direct result of the offence.
- The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; **it should not be cheaper to offend than to comply with the law.**
- In considering economic benefit, the court should avoid double recovery. Where the means of the offender are limited, priority should be given to compensation (where applicable) over payment of any other financial penalty (see further step eight below)

- Where it is not possible to calculate or estimate the economic benefit, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.
- When sentencing **organisations** the fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law.
- Obtaining financial information: It is for the offender to disclose to the court such data relevant to their financial position as will enable it to assess what they can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender's financial circumstances pursuant to section 162 of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case. In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied financial information to the contrary.

Community orders table

For further information see the [Imposition of community and Custodial Sentences guideline](#)

- The seriousness of the offence should be the **initial** factor in determining which requirements to include in a community order. Offence specific guidelines refer to three sentencing levels within the community order band based on offence seriousness (low, medium and high). The culpability and harm present in the offence(s) should be considered to identify which of the three sentencing levels within the community order band is appropriate. See below for **non-exhaustive** examples of requirements that might be appropriate in each.
- At least one requirement **MUST** be imposed for the purpose of punishment and/or a fine imposed in addition to the community order unless there are exceptional circumstances which relate to the offence or the offender that would make it unjust in all the circumstances to do so.
- A suspended sentence **MUST NOT** be imposed as a more severe form of community order. A suspended sentence is a custodial sentence.
- Community orders can fulfil all of the purposes of sentencing. In particular, they can have the effect of restricting the offender's liberty while providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities.
- A community order must not be imposed unless the offence is 'serious enough to warrant such a sentence'. Where an offender is being sentenced for a non-imprisonable offence, there is no power to make a community order.
- Sentencers must consider all available disposals at the time of sentence; even where the threshold for a community sentence has been passed, a fine or discharge may be an appropriate penalty. In particular, a Band D fine may be an appropriate alternative to a community order.

- The court must ensure that the restriction on the offender’s liberty is commensurate with the seriousness of the offence and that the requirements imposed are the most suitable for the offender.
- Sentences should not necessarily escalate from one community order range to the next on each sentencing occasion. The decision as to the appropriate range of community order should be based upon the seriousness of the new offence(s) (which will take into account any previous convictions).
- In many cases, a pre-sentence report will be pivotal in helping the court decide whether to impose a community order and, if so, whether particular requirements or combinations of requirements are suitable for an individual offender. Whenever the court reaches the provisional view that a community order may be appropriate, it should request a pre-sentence report (whether written or verbal) unless the court is of the opinion that a report is unnecessary in all the circumstances of the case. It may be helpful to indicate to the National Probation Service the court’s preliminary opinion as to which of the three sentencing ranges is relevant and the purpose(s) of sentencing that the package of requirements is expected to fulfil. Ideally a pre-sentence report should be completed on the same day to avoid adjourning the case. If an adjournment cannot be avoided, the information should be provided to the National Probation Service in written form and a copy retained on the court file for the benefit of the sentencing court. However, the court must make clear to the offender that all sentencing options remain open including, in appropriate cases, committal for sentence to the Crown Court.
- For further guidance on when a PSR may be unnecessary see [Criminal Practice Direction \[link\]](#)

Low	Medium	High
<p>Offences only just cross community order threshold, where the seriousness of the offence or the nature of the offender’s record means that a discharge or fine is inappropriate</p>	<p>Offences that obviously fall within the community order band</p>	<p>Offences only just fall below the custody threshold or the custody threshold is crossed but a community order is more appropriate in the circumstances</p>
<p>In general, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary</p>		<p>More intensive sentences which combine two or more requirements may be appropriate</p>
<ul style="list-style-type: none"> • Suitable requirements might include: • Any appropriate rehabilitative requirement(s) 	<ul style="list-style-type: none"> • Suitable requirements might include: • Any appropriate rehabilitative requirement(s) 	<ul style="list-style-type: none"> • Suitable requirements might include: • Any appropriate rehabilitative requirement(s)

- | | | |
|--|---|---|
| <ul style="list-style-type: none"> • 40 – 80 hours of unpaid work • Curfew requirement for example up to 16 hours per day for a few weeks • Exclusion requirement, for a few months • Prohibited activity requirement • Attendance centre requirement (where available) | <ul style="list-style-type: none"> • 80 – 150 hours of unpaid work • Curfew requirement for example up to 16 hours for 2 – 3 months • Exclusion requirement lasting in the region of 6 months • Prohibited activity requirement | <ul style="list-style-type: none"> • 150 – 300 hours of unpaid work • Curfew requirement for example up to 16 hours per day for 4 – 12 months • Exclusion requirement lasting in the region of 12 months |
|--|---|---|

If order does not contain a punitive requirement, suggested fine levels are indicated below:

BAND A FINE

BAND B FINE

BAND C FINE

Custodial sentences

Sentencing flowcharts are available at [Imposition of Community and Custodial Sentences guideline](#)

The approach to the imposition of a custodial sentence should be as follows:

1) Has the custody threshold been passed?

- A custodial sentence must not be imposed unless the offence or the combination of the offence and one or more offences associated with it was so serious that neither a fine alone nor a community sentence can be justified for the offence.
- There is no general definition of where the custody threshold lies. The circumstances of the individual offence and the factors assessed by offence-specific guidelines will determine whether an offence is so serious that neither a fine alone nor a community sentence can be justified. Where no offence specific guideline is available to determine seriousness, the harm caused by the offence, the culpability of the offender and any previous convictions will be relevant to the assessment.
- The clear intention of the threshold test is to reserve prison as a punishment for the most serious offences.

2) Is it unavoidable that a sentence of imprisonment be imposed?

- Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable. Custody should not be imposed where a community order could provide sufficient restriction on an offender’s liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime.
- For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.

3) What is the shortest term commensurate with the seriousness of the offence?

- In considering this the court must NOT consider any licence or post sentence supervision requirements which may subsequently be imposed upon the offender's release.

4) Can the sentence be suspended?

- A suspended sentence **MUST NOT** be imposed as a more severe form of community order. A suspended sentence is a custodial sentence. **Sentencers should be clear that they would impose an immediate custodial sentence if the power to suspend were not available.** If not, a non-custodial sentence should be imposed.
- The following factors should be weighed in considering whether it is possible to suspend the sentence:

Factors indicating that it would not be appropriate to suspend a custodial sentence

- Offender presents a risk/danger to the public
- Appropriate punishment can only be achieved by immediate custody
- History of poor compliance with court orders

Factors indicating that it may be appropriate to suspend a custodial sentence

- Realistic prospect of rehabilitation
- Strong personal mitigation
- Immediate custody will result in significant harmful impact upon others

The imposition of a custodial sentence is both punishment and a deterrent. To ensure that the overall terms of the suspended sentence are commensurate with offence seriousness, care must be taken to ensure requirements imposed are not excessive. A court wishing to impose onerous or intensive requirements should reconsider whether a community sentence might be more appropriate.

Pre-sentence report

Whenever the court reaches the provisional view that:

- the custody threshold has been passed; and, if so
- the length of imprisonment which represents the shortest term commensurate with the seriousness of the offence;

the court should obtain a pre-sentence report, whether verbal or written, **unless** the court considers a report to be unnecessary. Ideally a pre-sentence report should be completed on the same day to avoid adjourning the case.

- **For further guidance on when a PSR may be unnecessary see [Criminal Practice Direction \[link\]](#)**

Magistrates: Consult your legal adviser before deciding to sentence to custody without a pre-sentence report.

Suspended Sentences: General Guidance

- i) The guidance regarding pre-sentence reports applies if suspending custody.
- ii) If the court imposes a term of imprisonment of between 14 days and 2 years (subject to magistrates' courts sentencing powers), it may suspend the sentence for between 6 months and 2 years (the 'operational period'). The time for which a sentence is suspended should reflect the length of the sentence; up to 12 months might normally be appropriate for a suspended sentence of up to 6 months.
- iii) Where the court imposes two or more sentences to be served consecutively, the court may suspend the sentence where the aggregate of the terms is between 14 days and 2 years (subject to magistrates' courts sentencing powers).
- iv) When the court suspends a sentence, it may impose one or more requirements for the offender to undertake in the community. The requirements are identical to those available for community orders, see the guideline on [Imposition of Community and Custodial Sentences](#).
- v) A custodial sentence that is suspended should be for the same term that would have applied if the sentence was to be served immediately.

For sentencing flowcharts see the guideline on [Imposition of Community and Custodial Sentences](#).

Statutory aggravating factors

Short description:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

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

More information:

Guidance on the Use of Previous Convictions

The following guidance should be considered when seeking to determine the degree to which previous convictions should aggravate sentence:

Section 143 of the Criminal Justice Act states that:

In considering the seriousness of an offence ("the current offence") committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to—

(a) the nature of the offence to which the conviction relates and its relevance to the current offence, and

(b) the time that has elapsed since the conviction.

1. Previous convictions are considered at step two in the Council's offence specific guidelines.
2. The primary significance of previous convictions (including convictions in other jurisdictions) is the extent to which they indicate trends in offending behaviour and possibly the offender's response to earlier sentences;
3. Previous convictions are normally **relevant** to the current offence when they are of a similar type;
4. Previous convictions of a type different from the current offence **may** be relevant where they are an indication of persistent offending or escalation and/or a failure to comply with previous court orders;
5. Numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary;
6. If the offender received a non-custodial disposal for the previous offence, a court should not necessarily move to a custodial sentence for the fresh offence;
7. In cases involving significant persistent offending, the community and custody thresholds may be crossed even though the current offence normally warrants a lesser sentence. If a custodial sentence is it should be proportionate and kept to the necessary minimum.
8. The aggravating effect of relevant previous convictions reduces with the passage of time; **older convictions are less relevant** to the offender's culpability for the current offence and less likely to be predictive of future offending.
9. Where the previous offence is particularly old it will normally have little relevance for the current sentencing exercise;
10. The court should consider the time gap since the previous conviction and the reason for it. Where there has been a significant gap between previous and current convictions or a reduction in the frequency of offending this may indicate that the offender has made attempts to desist from offending in which case the aggravating effect of the previous offending will diminish.
11. Where the current offence is significantly less serious than the previous conviction (suggesting a decline in the gravity of offending), the previous conviction may carry less weight.
12. When considering the totality of previous offending a court should take a rounded view of the previous crimes and not simply aggregate the individual offences.
13. Where information is available on the context of previous offending this may assist the court in assessing the relevance of that prior offending to the current offence.

Short description:

Offence committed whilst on bail

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

S143 (3) Criminal Justice Act 2003 states:

In considering the seriousness of any offence committed while the offender was on bail, the court must treat the fact that it was committed in those circumstances as an aggravating factor.

Short description:

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

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

See below for the statutory provisions.

- **Note the requirement for the court to state that the offence has been aggravated by the relevant hostility.**
- **Where the element of hostility is core to the offending, the aggravation will be higher than where it plays a lesser role.**

Increase in sentences for racial or religious aggravation

s145(2) of the Criminal Justice Act 2003 states:

If the offence was racially or religiously aggravated, the court—

(a) must treat that fact as an aggravating factor, and

(b) must state in open court that the offence was so aggravated.

An offence is racially or religiously aggravated for these purposes if—

- at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence, hostility based on the victim's membership (or presumed membership) of a racial or religious group; **or**
- the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

“membership”, in relation to a racial or religious group, includes association with members of that group;

“presumed” means presumed by the offender.

It is immaterial whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned above.

“racial group” means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

“religious group” means a group of persons defined by reference to religious belief or lack of religious belief.

Increase in sentences for aggravation related to disability, sexual orientation or transgender identity

s146 of the Criminal Justice Act 2003 states:

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are—

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—

- (i) the sexual orientation (or presumed sexual orientation) of the victim,
- (ii) a disability (or presumed disability) of the victim, or
- (iii) the victim being (or being presumed to be) transgender, or

(b) that the offence is motivated (wholly or partly)—

- (i) by hostility towards persons who are of a particular sexual orientation,
- (ii) by hostility towards persons who have a disability or a particular disability or
- (iii) by hostility towards persons who are transgender.

(3) The court—

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and

(b) must state in open court that the offence was committed in such circumstances.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(5) In this section “disability” means any physical or mental impairment.

(6) In this section references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.

Short description:

Offence was committed against an emergency worker acting in the exercise of functions as such a worker.

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

See below for the statutory provisions.

- **Note the requirement for the court to state that the offence has been so aggravated.**
- **Note this statutory factor only applies to certain violent or sexual offences as listed below which were committed on or after 13 November 2018.**
- **For other offences the factor ‘Victim was providing a public service or performing a public duty at the time of the offence’ can be applied where relevant.**

The Assaults on Emergency Worker (Offences) Act 2018 states:

2 Aggravating factor

- (1) This section applies where—
- (a) the court is considering for the purposes of sentencing the seriousness of an offence listed in subsection (3), and
 - (b) the offence was committed against an emergency worker acting in the exercise of functions as such a worker.
- (2) The court—
- (a) must treat the fact mentioned in subsection (1)(b) as an aggravating factor (that is to say, a factor that increases the seriousness of the offence), and
 - (b) must state in open court that the offence is so aggravated.
- (3) The offences referred to in subsection (1)(a) are—
- (a) an offence under any of the following provisions of the Offences against the Person Act 1861—
 - (i) section 16 (threats to kill);
 - (ii) section 18 (wounding with intent to cause grievous bodily harm);
 - (iii) section 20 (malicious wounding);
 - (iv) section 23 (administering poison etc);
 - (v) section 28 (causing bodily injury by gunpowder etc);
 - (vi) section 29 (using explosive substances etc with intent to cause grievous bodily harm);
 - (vii) section 47 (assault occasioning actual bodily harm);
 - (b) an offence under section 3 of the Sexual Offences Act 2003 (sexual assault);
 - (c) manslaughter;
 - (d) kidnapping;
 - (e) an ancillary offence in relation to any of the preceding offences.
- (4) For the purposes of subsection (1)(b), the circumstances in which an offence is to be taken as committed against a person acting in the exercise of functions as an emergency worker include circumstances where the offence takes place at a time when the person is not at work but is carrying out functions which, if done in work time, would have been in the exercise of functions as an emergency worker.
- (5) In this section—
- “ancillary offence”, in relation to an offence, means any of the following—
 - (a) aiding, abetting, counselling or procuring the commission of the offence;
 - (b) an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) in relation to the offence;
 - (c) attempting or conspiring to commit the offence;
 - “emergency worker” has the meaning given by section 3.
- (6) Nothing in this section prevents a court from treating the fact mentioned in subsection (1)(b) as an aggravating factor in relation to offences not listed in subsection (3).
- (7) This section applies only in relation to offences committed on or after the day it comes into force.

3 Meaning of “emergency worker”

- (1) In sections 1 and 2, “emergency worker” means—
- (a) a constable;
 - (b) a person (other than a constable) who has the powers of a constable or is otherwise employed for police purposes or is engaged to provide services for police purposes;
 - (c) a National Crime Agency officer;
 - (d) a prison officer;

- (e) a person (other than a prison officer) employed or engaged to carry out functions in a custodial institution of a corresponding kind to those carried out by a prison officer;
- (f) a prisoner custody officer, so far as relating to the exercise of escort functions;
- (g) a custody officer, so far as relating to the exercise of escort functions;
- (h) a person employed for the purposes of providing, or engaged to provide, fire services or fire and rescue services;
- (i) a person employed for the purposes of providing, or engaged to provide, search services or rescue services (or both);
- (j) a person employed for the purposes of providing, or engaged to provide—
 - (i) NHS health services, or
 - (ii) services in the support of the provision of NHS health services, and whose general activities in doing so involve face to face interaction with individuals receiving the services or with other members of the public.

(2) It is immaterial for the purposes of subsection (1) whether the employment or engagement is paid or unpaid.

(3) In this section—

“custodial institution” means any of the following—

- (a) a prison;
- (b) a young offender institution, secure training centre, secure college or remand centre;
- (c) a removal centre, a short-term holding facility or pre-departure accommodation, as defined by section 147 of the Immigration and Asylum Act 1999;
- (d) services custody premises, as defined by section 300(7) of the Armed Forces Act 2006;

“custody officer” has the meaning given by section 12(3) of the Criminal Justice and Public Order Act 1994;

“escort functions”—

- (a) in the case of a prisoner custody officer, means the functions specified in section 80(1) of the Criminal Justice Act 1991;
- (b) in the case of a custody officer, means the functions specified in paragraph 1 of Schedule 1 to the Criminal Justice and Public Order Act 1994;

“NHS health services” means any kind of health services provided as part of the health service continued under section 1(1) of the National Health Service Act 2006 and under section 1(1) of the National Health Service (Wales) Act 2006;

“prisoner custody officer” has the meaning given by section 89(1) of the Criminal Justice Act 1991.

Other aggravating factors:

Short description:

A1. Commission of offence whilst under the influence of alcohol or drugs

More information:

<p>Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence</p>
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- The fact that an offender is **voluntarily** intoxicated at the time of the offence will tend to increase the seriousness of the offence provided that the intoxication has **contributed to the offending**.
- In the case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary, but the court should have regard to the extent to which the offender has engaged with any assistance in dealing with the addiction in making that assessment.
- An offender who has voluntarily consumed drugs and/or alcohol must accept the consequences of the behaviour that results, even if it is out of character.

Short description:

A2. Offence was committed as part of a group

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

The mere membership of a group (two or more persons) should not be used to increase the sentence, but where the **offence was committed as part** of a group this will normally make it more serious because:

- the **harm** caused (both physical or psychological) or the potential for harm may be greater and/or
- the **culpability** of the offender may be higher (the role of the offender within the group will be a relevant consideration).

Culpability based on role in group offending could range from:

Higher culpability indicated by a leading role in the group and/or the involvement by the offender of others through coercion, intimidation or exploitation, to

Lower culpability indicated by a lesser or subordinate role under direction and/or involvement of the offender through coercion, intimidation or exploitation.

Where the offending is part of an organised criminal network, this will make it more serious, and the role of the offender in the organisation will also be relevant.

When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and lack of maturity when considering the significance of group offending.

Short description:

A3. Offence involved use or threat of use of a weapon

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- A 'weapon' can take many forms and may include a shod foot
- The use or production of a weapon has relevance
 - to the **culpability** of the offender where it indicates planning or intention to cause harm; and
 - to the **harm** caused (both physical or psychological) or the potential for harm.
- Relevant considerations will include:
 - the dangerousness of the weapon;
 - whether the offender brought the weapon to the scene, or just used what was available on impulse;
 - whether the offender made or adapted something for use as a weapon;
 - the context in which the weapon was threatened, used or produced.

Short description:

A4. Planning of an offence

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- Evidence of planning normally indicates a higher level of intention and pre-meditation which increases the level of culpability.
- Planning may be inferred from the scale and sophistication of the offending
- The greater the degree of planning the greater the culpability

Short description:

A5. Commission of the offence for financial gain

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- Where an offence (which is not one which by its nature is an acquisitive offence) has been committed wholly or in part for financial gain or the avoidance of cost, this will increase the seriousness.
- Where the offending is committed in a commercial context for financial gain or the avoidance of costs, this will normally indicate a higher level of culpability.
 - examples would include, but are not limited to, dealing in unlawful goods, failing to disclose relevant matters to an authority or regulator, failing to comply with a regulation or failing to obtain the necessary licence or permission in order to avoid costs.
 - offending of this type can undermine legitimate businesses.
- See the guidance on fines if considering a financial penalty

Short description:

A6. High level of profit from the offence

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- A high level of profit is likely to indicate:
 - high culpability in terms of planning and
 - a high level of harm in terms of loss caused to victims or the undermining of legitimate businesses
- In most situations a high level of gain will be a factor taken in to account at step one – care should be taken to avoid double counting.
- See the guidance on fines if considering a financial penalty

Short description:

A7. Abuse of trust or dominant position

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- In order for an abuse of trust to make an offence more serious the relationship between the offender and victim(s) must be one that would give rise to the offender having a significant level of responsibility towards the victim(s) on which the victim(s) would be entitled to rely.
- Abuse of trust may occur in many factual situations. Examples may include relationships such as teacher and pupil, parent and child, professional adviser and client, or carer (whether paid or unpaid) and dependant. It may also include ad hoc situations such as a late-night taxi driver and a lone passenger. These examples are not exhaustive and do not necessarily indicate that abuse of trust is present.
- Where an offender has been given an inappropriate level of responsibility, abuse of trust is unlikely to apply.
- A close examination of the facts is necessary and a clear justification should be given if abuse of trust is to be found.

Short description:

A8. Gratuitous degradation of victim / maximising distress to victim

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

Where an offender deliberately causes **additional** harm to a victim over and above that which is an essential element of the offence - this will increase seriousness. Examples may include, but are not limited to, posts of images on social media designed to cause additional distress to the victim (where not separately charged).

Short description:

A9. Vulnerable victim

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- An offence is more serious if the victim is vulnerable because of personal circumstances such as (but not limited to) age, illness or disability (unless the vulnerability of the victim is an element of the offence).
- Other factors such as the victim being isolated, incapacitated through drink or being in an unfamiliar situation **may** lead to a court considering that the offence is more serious.
- The extent to which any vulnerability may impact on the sentence is a matter for the court to weigh up in each case.
- Culpability will be increased if the offender **targeted** a victim because of an actual or perceived vulnerability.
- Culpability will be increased if the victim is made vulnerable by the actions of the offender (such as a victim who has been intimidated or isolated by the offender).
- Culpability is increased if an offender persisted in the offending once it was obvious that the victim was vulnerable (for example continuing to attack an injured victim).
- The level of harm (physical, psychological or financial) is likely to be increased if the victim is vulnerable.

Short description:

A10. Victim was providing a public service or performing a public duty at the time of the offence

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

This reflects:

- the fact that people in public facing roles are more exposed to the possibility of harm and consequently more vulnerable and/or
- the fact that someone is working for the public good merits the additional protection of the courts.

Care should be taken to avoid double counting where the statutory aggravating factor relating to emergency workers applies.

Short description:

A11. Other(s) put at risk of harm by the offending

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- Where there is risk of harm to other(s) not taken in account at step one and not subject to a separate charge, this makes the offence more serious.
 - Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.
-

Short description:

A12. Offence committed in the presence of other(s) (especially children)

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- This reflects the psychological harm that may be caused to those who witnessed the offence.
 - The presence of one or more children may in some situations make the primary victim more vulnerable – for example an adult may be less able to resist the offender if concerned about the safety or welfare of children present.
-

Short description:

A13. Actions after the event including but not limited to attempts to cover up/ conceal evidence

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

The more sophisticated, extensive or persistent the actions after the event, the more likely they are to increase the seriousness of the offence.

When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and lack of maturity when considering the significance of such conduct.

Where any such actions are the subject of separate charges, they should be taken into account when assessing totality at step seven.

Short description:

A14. Blame wrongly placed on other(s)

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- Where the investigation has been hindered and/or other(s) have suffered as a result of being wrongly blamed by the offender, this will make the offence more serious.

- This factor will **not** be engaged where an offender has simply exercised his or her right not to assist the investigation or accept responsibility for the offending.
- When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and lack of maturity when considering the significance of such conduct.

Short description:

A15. Failure to respond to warnings or concerns expressed by others about the offender's behaviour

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

Where an offender has had the benefit of warnings or advice about their conduct but has failed to heed it, this would make the offender more blameworthy.

This may particularly be the case when:

- such warning(s) or advice were of an official nature or from a professional source and/or
- the warning(s) were made at the time of or shortly before the commission of the offence.

Short description:

A16. Offence committed on licence or post sentence supervision or while subject to court order(s)

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- An offender who is subject to licence or post sentence supervision is under a particular obligation to desist from further offending.
- Commission of an offence while subject to a **relevant** court order makes the offence more serious.
- The extent to which the offender has complied with the conditions of a licence or order will be a relevant consideration.
- Where the offender is dealt with separately for a breach of a licence or order regard should be had to totality (see step seven)
- Care should be taken to avoid double counting matters taken into account when considering previous convictions.

Short description:

A17. Offence committed in custody

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- Offences committed in custody are more serious because they undermine the fundamental need for control and order which is necessary for the running of prisons and maintaining safety.
- Generally the sentence for the new offence will be consecutive to the sentence being served as it will have arisen out of an unrelated incident. The court must have regard to the totality of the offender's criminality when passing the second sentence, to ensure that the total sentence to be served is just and proportionate. Refer to the [Totality guideline](#) for detailed guidance.
- Care should be taken to avoid double counting matters taken into account when considering previous convictions.

Short description:

A18. Offences taken into consideration

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

Taken from the [Offences Taken into Consideration Definitive Guideline](#):

General principles

When sentencing an offender who requests offences to be taken into consideration (TICs), courts should pass a total sentence which reflects all the offending behaviour. The sentence must be just and proportionate and must not exceed the statutory maximum for the conviction offence.

Offences to be Taken into Consideration

The court has discretion as to whether or not to take TICs into account. In exercising its discretion the court should take into account that TICs are capable of reflecting the offender's overall criminality. The court is likely to consider that the fact that the offender has assisted the police (particularly if the offences would not otherwise have been detected) and avoided the need for further proceedings demonstrates a genuine determination by the offender to 'wipe the slate clean'.

It is generally **undesirable** for TICs to be accepted in the following circumstances:

- where the TIC is likely to attract a greater sentence than the conviction offence;
- where it is in the public interest that the TIC should be the subject of a separate charge;
- where the offender would avoid a prohibition, ancillary order or similar consequence which it would have been desirable to impose on conviction. For example:
 - where the TIC attracts mandatory disqualification or endorsement and the offence(s) for which the defendant is to be sentenced do not;
- where the TIC constitutes a breach of an earlier sentence;
- where the TIC is a specified offence for the purposes of section 224 of the Criminal Justice Act 2003, but the conviction offence is non-specified; or

- where the TIC is not founded on the same facts or evidence or part of a series of offences of the same or similar character (unless the court is satisfied that it is in the interests of justice to do so).

Jurisdiction

The magistrates' court cannot take into consideration an indictable only offence.

The Crown Court can take into account summary only offences provided the TICs are founded on the same facts or evidence as the indictable charge, or are part of a series of offences of the same or similar character as the indictable conviction offence

Procedural safeguards

A court should generally only take offences into consideration if the following procedural provisions have been satisfied:

- the police or prosecuting authorities have prepared a schedule of offences (TIC schedule) that they consider suitable to be taken into consideration. The TIC schedule should set out the nature of each offence, the date of the offence(s), relevant detail about the offence(s) (including, for example, monetary values of items) and any other brief details that the court should be aware of;
- a copy of the TIC schedule must be provided to the defendant and his representative (if he has one) before the sentence hearing. The defendant should sign the TIC schedule to provisionally admit the offences;
- at the sentence hearing, the court should ask the defendant in open court whether he admits each of the offences on the TIC schedule and whether he wishes to have them taken into consideration;
- if there is any doubt about the admission of a particular offence, it should not be accepted as a TIC. Special care should be taken with vulnerable and/or unrepresented defendants;
- if the defendant is committed to the Crown Court for sentence, this procedure must take place again at the Crown Court even if the defendant has agreed to the schedule in the magistrates' court.

Application

The sentence imposed on an offender should, in most circumstances, be increased to reflect the fact that other offences have been taken into consideration. The court should:

1. Determine the sentencing starting point for the conviction offence, referring to the relevant definitive sentencing guidelines. No regard should be had to the presence of TICs at this stage.
2. Consider whether there are any aggravating or mitigating factors that justify an upward or downward adjustment from the starting point.

The presence of TICs should generally be treated as an aggravating feature that justifies an adjustment from the starting point. Where there is a large number of TICs, it may be appropriate to move outside the category range, although this must be considered in the context of the case and subject to the principle of totality. The court is limited to the statutory maximum for the conviction offence.

3. Continue through the sentencing process including:
 - consider whether the frank admission of a number of offences is an indication of a defendant's remorse or determination and/ or demonstration of steps taken to address addiction or offending behaviour;

- any reduction for a guilty plea should be applied to the overall sentence;
- the principle of totality;
- when considering ancillary orders these can be considered in relation to any or all of the TICs, specifically:
 - compensation orders;
 - restitution orders

Short description:

A19. Offence committed in a domestic context

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

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

Short description:

A20. Offence committed in a terrorist context

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

Where there is a terrorist element to the offence, refer also to the [Terrorism Offences Definitive Guideline](#)

Short description:

A21. Location and/or timing of offence

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- In general, an offence is not made more serious by the location and/or timing of the offence except in ways taken into account by other factors in this guideline (such as planning, vulnerable victim, offence committed in a domestic context, maximising distress to victim, others put at risk of harm by the offending, offence committed in the presence of others). Care should be taken to avoid double counting.
- Courts should be cautious about aggravating an offence by reason of it being committed for example at night, or in broad daylight, in a crowded place or in an isolated place unless it also indicates increased harm or culpability not already accounted for.
- An offence may be more serious when it is committed in places in which there is a particular need for discipline or safety such as prisons, courts, schools or hospitals.

Short description:

A22. Established evidence of community/ wider impact

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- This factor should increase the sentence only where there is clear evidence of wider harm not already taken into account elsewhere. A community impact statement will assist the court in assessing the level of impact.
- For issues of prevalence see the separate guidance.

Prevalence

- Sentencing levels in offence specific guidelines take account of collective social harm. Accordingly offenders should normally be sentenced by straightforward application of the guidelines without aggravation for the fact that their activity contributed to a harmful social effect upon a neighbourhood or community.
- It is not open to a sentencer to increase a sentence for prevalence in ordinary circumstances or in response to a personal view that there is 'too much of this sort of thing going on in this area'.
- First, there must be evidence provided to the court by a responsible body or by a senior police officer.
- Secondly, that evidence must be before the court in the specific case being considered with the relevant statements or reports having been made available to the Crown and defence in good time so that meaningful representations about that material can be made.
- Even if such material is provided, a sentencer will only be entitled to treat prevalence as an aggravating factor if satisfied
 - that the level of harm caused in a particular locality is significantly higher than that caused elsewhere (and thus already inherent in the guideline levels);
 - that the circumstances can properly be described as exceptional; **and**
 - that it is just and proportionate to increase the sentence for such a factor in the particular case being sentenced.

Factors reducing seriousness or reflecting personal mitigation (factors are not listed in any particular order and are not exhaustive)

Short description:

M1. No previous convictions or no relevant/recent convictions

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

- First time offenders usually represent a lower risk of re-offending. Re-offending rates for first offenders are significantly lower than rates for repeat offenders. In addition, first offenders are normally regarded as less blameworthy than offenders who have

committed the same crime several times already. For these reasons first offenders receive a mitigated sentence.

- Where there are previous offences but these are old and /or are for offending of a different nature, the sentence will normally be reduced to reflect that the new offence is not part of a pattern of offending and there is therefore a lower likelihood of reoffending.
- When assessing whether a previous conviction is 'recent' the court should consider the time gap since the previous conviction and the reason for it.
- Previous convictions are likely to be 'relevant' when they share characteristics with the current offence (examples of such characteristics include, but are not limited to: dishonesty, violence, abuse of position or trust, use or possession of weapons, disobedience of court orders). In general the more serious the previous offending the longer it will retain relevance.

Short description:

M2. Good character and/or exemplary conduct

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

This factor may apply whether or not the offender has previous convictions. Evidence that an offender has demonstrated positive good character through, for example, charitable works may reduce the sentence.

However, this factor is less likely to be relevant where the offending is very serious. Where an offender has used their good character or status to facilitate or conceal the offending it could be treated as an aggravating factor.

Short description:

M3. Remorse

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction at step four).

Lack of remorse should never be treated as an aggravating factor.

Short description:

M4. Self-reporting

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where an offender has self-reported to the authorities, particularly in circumstances where the offence may otherwise have gone undetected, this should reduce the sentence (separate from any guilty plea reduction at step four).

Short description:

M5. Cooperation with the investigation/ early admissions

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Assisting or cooperating with the investigation and /or making pre-court admissions may ease the effect on victims and witnesses and save valuable police time justifying a reduction in sentence (separate from any guilty plea reduction at step four).

Short description:

M6. Little or no planning

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where an offender has committed the offence with little or no prior thought, this is likely to indicate a lower level of culpability and therefore justify a reduction in sentence.

However, impulsive acts of unprovoked violence or other types of offending may indicate a propensity to behave in a manner that would not normally justify a reduction in sentence.

Short description:

M7. The offender was in a lesser or subordinate role if acting with others / performed limited role under direction

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Whereas acting as part of a group may make an offence more serious, if the offender's role was minor this may indicate lower culpability and justify a reduction in sentence.

Short description:

M8. Involved through coercion, intimidation or exploitation

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

- Where this applies it will reduce the culpability of the offender.
- This factor may be of particular relevance where the offender has been the victim of domestic abuse, trafficking or modern slavery, but may also apply in other contexts.
- Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation which the offender may find difficult to articulate, and where appropriate ask for this to be addressed in a PSR.
- This factor **may** indicate that the offender is vulnerable and would find it more difficult to cope with custody or to complete a community order.

Short description:

M9. Limited awareness or understanding of the offence

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

The factor may apply to reduce the culpability of an offender

- acting alone who has not appreciated the seriousness of the offence **or**
- where an offender is acting with others and does not appreciate the extent of the overall offending.

If the offender had genuinely failed to understand or appreciate the seriousness of the offence, the sentence may be reduced from that which would have applied if the offender had understood the full extent of the offence and the likely harm that would be caused.

Where an offender lacks capacity to understand the full extent of the offending see the guidance under 'Mental disorder or learning disability' below.

Short description:

M10. Little or no financial gain

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where an offence (which is not one which by its nature is an acquisitive offence) is committed in a context where financial gain could arise, the culpability of the offender may

be reduced where it can be shown that the offender **did not seek to gain financially** from the conduct and did not in fact do so.

Short description:

M11. Delay since apprehension

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where there has been an **unreasonable** delay in proceedings since apprehension which **is not the fault of the offender**, and which has had a detrimental effect on the offender, the court may take this into account by reducing the sentence.

Note: No fault should attach to an offender for not admitting an offence and/or putting the prosecution to proof of its case.

Short description:

M12. Activity originally legitimate

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where the offending arose from an activity which was originally legitimate, but became unlawful (for example because of a change in the offender's circumstances or a change in regulations), this **may** indicate lower culpability and thereby a reduction in sentence.

This factor will not apply where the offender has used a legitimate activity to mask a criminal activity.

Short description:

M13. Age and/or lack of maturity

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Age and/or lack of maturity can affect:

- the offender's responsibility for the offence and
- the effect of the sentence on the offender.

Either or both of these considerations may justify a reduction in the sentence.

The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).

In particular young adults (typically aged 18-25) are still developing neurologically and consequently may be less able to:

- evaluate the consequences of their actions
- limit impulsivity
- limit risk taking

Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.

Environment plays a role in neurological development and factors such as childhood adversity including deprivation and/or abuse will affect development.

An immature offender may find it particularly difficult to cope with custody and therefore may be more susceptible to self-harm in custody.

An immature offender may find it particularly difficult to cope with the requirements of a community order without appropriate support.

There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct.

Where the offender is a care leaver the court should enquire as to any effect a sentence may have on the offender's ability to make use of support from the local authority. (Young adult care leavers are entitled to time limited support. Leaving care services may change at the age of 21 and cease at the age of 25, unless the young adult is in education at that point). See also the Sentencing Children and Young People Guideline (paragraphs 1.16 and 1.17).

Where an offender has turned 18 between the commission of the offence and conviction the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed, but taking into account the purposes of sentencing adult offenders. See also the Sentencing Children and Young People Guideline (paragraphs 6.1 to 6.3).

When considering a custodial or community sentence for a young adult the National Probation Service should address these issues in a PSR.

Short description:

M14. Sole or primary carer for dependent relatives

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing. Where custody is unavoidable consideration of the impact on dependants may be relevant to

the length of the sentence imposed. For more serious offences where a substantial period of custody is appropriate, this factor will carry less weight.

In addition when sentencing an offender who is pregnant relevant considerations may include:

- any effect of the sentence on the health of the offender and
- any effect of the sentence on the unborn child

In such situations the court should ask the Probation Service to address these issues in a PSR.

Short description:

M15. Physical disability or serious medical conditions requiring urgent, intensive or long-term treatment

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Such conditions as may affect the impact of a sentence on the offender may justify a reduction in sentence.

Short description:

M16. Mental disorder or learning disability

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Mental disorders and learning disabilities are different things, although an individual may suffer from both. A **learning disability** is a permanent condition developing in childhood, whereas **mental illness** (or a mental health problem) can develop at any time, and is not necessarily permanent; people can get better and resolve mental health problems with help and treatment.

In the context of sentencing a broad interpretation of the terms 'mental disorder' and learning disabilities' should be adopted to include:

- Offenders with an intellectual impairment (low IQ);
- Offenders with a cognitive impairment such as (but not limited to) dyslexia, attention deficit hyperactivity disorder (ADHD);
- Offenders with an autistic spectrum disorder (ASD) including Asperger's syndrome;
- Offenders with a personality disorder;
- Offenders with a mental illness.

Offenders may have a combination of the above conditions.

Sentencers should be alert to the fact that not all mental disorders or learning disabilities are visible or obvious.

A mental disorder or learning disability can affect both:

1. the offender's responsibility for the offence and
2. the impact of the sentence on the offender.

The court will be assisted by a PSR and, where appropriate, medical reports (including from court mental health teams) in assessing:

1. the degree to which a mental disorder or learning disability has reduced the offender's responsibility for the offence. This may be because the condition had an impact on the offender's ability to understand the consequences of their actions, to limit impulsivity and/or to exercise self-control.
 - a relevant factor will be the degree to which a mental disorder or learning disability has been exacerbated by the actions of the offender (for example by the **voluntary** abuse of drugs or alcohol or by **voluntarily** failing to follow medical advice);
 - in considering the extent to which the offender's actions were voluntary, the extent to which a mental disorder or learning disability has an impact on the offender's ability to exercise self-control or to engage with medical services will be a relevant consideration.
2. any effect of the mental disorder or learning disability on the impact of the sentence on the offender; a mental disorder or learning disability may make it more difficult for the offender to cope with custody or comply with a community order.

Short description:

M17. Determination and /or demonstration of steps having been taken to address addiction or offending behaviour

More information:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where offending is driven by or closely associated with drug or alcohol abuse (for example stealing to feed a habit, or committing acts of disorder or violence whilst drunk) a commitment to address the underlying issue may justify a reduction in sentence. This will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation.

Similarly, a commitment to address other underlying issues that may influence the offender's behaviour may justify the imposition of a sentence that focusses on rehabilitation.

The court will be assisted by a PSR in making this assessment.

Proposed changes to definitive guidelines to reflect legislative and other external changes and improve clarity and consistency across guidelines.

[This list is in summary note form only. If agreed by the Council a comprehensive list of proposed changes and the guidelines to which they would apply will be provided at consultation]

1. Time spent on remand/ bail

All guidelines to which this applies to have the wording used in the child cruelty guidelines:

Consideration for time spent on bail (tagged curfew)

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

2. Dangerousness

For specified offences not subject to a life sentence:
In the title section of the guideline:

This is a specified offence for the purposes of section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003

At the relevant step (typically step 5) of the guideline:

Dangerousness

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).

This is a specified offence for the purposes of section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003

For specified offences carrying a life sentence and subject to the ‘two strikes’ provisions:
In the title section:

This is a serious specified offence for the purposes of sections 224 and 225(2) (life sentences for serious offences) of the Criminal Justice Act 2003.

This is an offence listed in Part 1 of Schedule 15B for the purposes of section 224A (life sentence for a second listed offence) and section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.

At the relevant step (typically step 5) of the guideline:

Dangerousness

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 a life sentence (section 224A or section 225) or an extended sentence (section 226A).

When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

3. Maximum sentence

Fines:

There is some inconsistency as to how the maximum sentence is expressed in the title section of guidelines, in some cases it is x years; custody and/or unlimited fine. In others x years custody. It is proposed that only where a fine is an option within a guideline that reference is made to the statutory maximum fine. Where the maximum fine is other than unlimited (e.g. level 3 fine) a link should be provided to a table giving the maximum amounts for each level.

Either way offences:

Most guidelines for either way offences give just one maximum sentence (effectively that for sentence on indictment) but some give the maximum when tried summarily and the maximum on indictment. It is proposed to only include the summary maximum if it is other than 6 months/unlimited fine

Changes to maximum sentence:

Where the change has been made since the guideline was issued a note should be included in the title section giving the date of the change and the 'before' and 'after' levels. If the change affects the applicability of the guideline the note should acknowledge this.

Guidelines where a change in the maximum sentence has not been reflected:

Causing death by disqualified driving – maximum has increased from two to 10 years.

4. Other external changes

References to obtaining financial information in guidelines for sentencing organisations: In the Environmental, Health and Safety, and Food Safety guidelines for organisations the following text is included:

For health trusts: the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via the [Monitor website](#). Detailed analysis of expenditure or reserves is unlikely to be called for.

Info on health trust in H&S g/l/s

Information on health trusts is no longer available on the Monitor website. The reference needs to be updated to direct users to the correct source of information.

Change references to 'Offence committed on licence' in the assault, burglary, dogs, fraud and environmental guidelines to 'Offence committed on licence or post sentence supervision'. This will ensure consistency across guidelines.

Draft Policy for Making changes to digital guidelines on the Sentencing Council website or app

1 Typographical errors in guidelines

1.1 Where it comes to the attention of the Council that there is an error in a definitive sentencing guideline on the Sentencing Council website which is the result of text being incorrectly entered, the error will be corrected as soon as possible and the correction will be noted on a log of changes accessible on the website.

1.2 Where the change has the potential to have a material effect on sentencing, a news item will be published on the website drawing attention to the correction and communications will be sent to relevant stakeholders (e.g. magistrates, judiciary, prosecutors, probation etc).

2 Substantive errors in guidelines

2.1 Where it comes to the attention of the Council that there is a substantive error, omission or lack of clarity in a guideline which is due to an oversight by the Council, the issue will be discussed by the Council at the earliest opportunity and the views of relevant stakeholders sought as to the preferred remedy.

2.2 Where the Council is satisfied that the error can be corrected in a manner which gives effect to the Council's original intention (which has already been subject to consultation) the correction will be made, noted on the log of changes, a news item will be published on the website drawing attention to the correction and communications will be sent to relevant stakeholders.

2.3 Where Council considers that the error cannot be corrected without a substantive change to the guideline that was not contemplated at the consultation stage, it will consult on the proposed amendment in accordance with the requirements in section 120 of the Coroners and Justice Act 2009. This requires at a minimum consultation with the Lord Chancellor and the Justice Select Committee of the House of Commons, but in practice would involve consultation with other key stakeholders (and would be likely to include those who responded to the original consultation on that guideline). The length of the consultation will depend on the nature and complexity of the proposed change and the urgency of correcting the error. The Council may issue a temporary note to highlight the error pending correction.

3 External changes that make part of a guideline inaccurate, incomplete or misleading

3.1 Where changes to legislation or other external changes necessitate amendment to guidelines, the Council will consider the options for updating the relevant guidelines and then seek the views of relevant stakeholders as to the preferred remedy.

3.2 Where the required change is mandated by legislation and will not have wider implications for the guideline, the Council will make the minimum change required to bring the guideline in line with legislation, note it on the log of changes, publish a news item on the website drawing attention to the correction and send communications to relevant stakeholders.

3.3 Where the change is merely to update information or terminology in a guideline and will not have wider implications for the guideline, the Council will make the minimum change required to bring the guideline up to date, note it on the log of changes and, as appropriate, publish a news item on the website drawing attention to the correction and/or send communications to relevant stakeholders.

3.4 Where there are different options for addressing the change, which may make a substantive change to guideline(s) the Council will consult on the proposed amendment as at paragraph 2.3 above.

3.5 Where changes to legislation necessitate wholesale changes to a guideline, the Council will add the review of the relevant guideline(s) to its workplan and conduct a full consultation of the proposed revised guideline in the normal course of its work. In such situations, the Council may issue a note to highlight the limitations of the existing guideline while the review is being carried out.

4 Urgent cases

4.1 Section 123 of the Coroners and Justice Act 2009 gives the Council the power to issue or amend guidelines without consulting on a draft guideline where the urgency of the case makes it impractical to do so. While it reserves the right to rely on section 123 the Council does not envisage a situation where it would do so.

Sentencing Council meeting: 25 January 2019
Paper: SC(19)JAN07 – Drugs guideline
Lead official: Eleanor Nicholls
Sarah Poppleton

1 ISSUE

1.1 This paper covers proposed revisions to the guideline for the offence of possession of a controlled drug under s5(2) of the Misuse of Drugs Act 1971 (the MDA). It is also the first consideration of guidelines for offences under the Psychoactive Substances Act 2016 (the PSA). The remaining elements of the revised drugs guideline, the approach to harm and quantities, and sentence levels, will be discussed in April and May, with sign-off for consultation planned for the May meeting.

2 RECOMMENDATION

2.1 That the Council agree:

- the proposed changes to the guideline for possession of a controlled drug;
- the proposed culpability, aggravating and mitigating factors for the guidelines on importation, supply and production offences under the PSA; and
- the amendments to the aggravating factors previously discussed for importation, supply and production offences under the MDA.

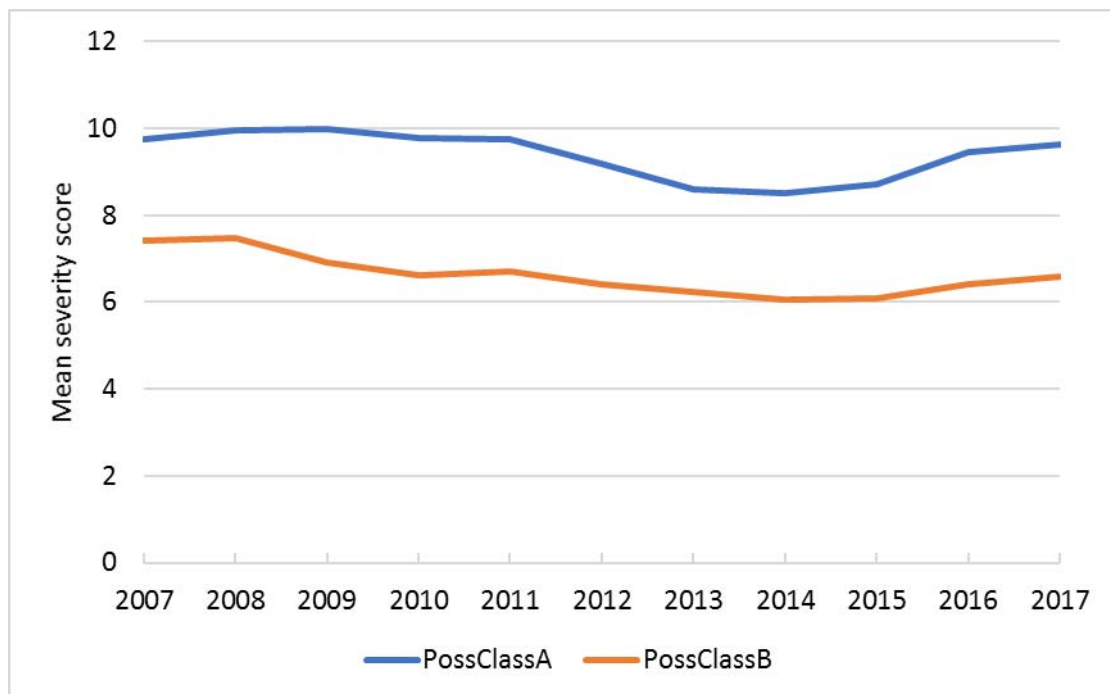
3 CONSIDERATION

Possession of a controlled drug (see draft guideline at Annex A)

3.1 Possession of a controlled drug is a high-volume offence that is mostly sentenced in the magistrates' courts (which accounted for 92 per cent of a total of just over 22,000 offenders sentenced in 2017). Over half of all these offenders were sentenced for cannabis possession, and most offenders received a fine.

The assessment of the guideline’s impact showed that for class A, sentencing severity fell slightly at the point of guideline implementation and the trend line flattened thereafter. For class B, which far outweighs all other drug offences in terms of volume of offenders sentenced, sentencing severity did not change following guideline implementation, however a pre-existing downward trend which began around 2009 (when cannabis was re-classified) continued. Since 2015, however, there has been a change in trend for both offences, with sentencing severity rising upwards to match 2011 levels.

Figure: Trends in sentencing severity for possession class A and possession class B (principal offence only)



3.2 Given these trends, we suggest that the overall aim of the new guideline should be to keep sentencing practice the broadly the same. One small tweak to the sentencing table (covered below in 3.6 and 3.7) may result in a small change to sentencing severity, but we would argue that this is justified because it corrects an unintended consequence of the current guideline (see 3.6 and 3.7).

Question 1: Is Council content with the aim generally of keeping sentencing severity constant for this offence?

3.3 We have considered adopting a more sophisticated model of offence seriousness than that in the current guideline, in which the offence category is determined solely on the basis of class of drug. However, transcripts reveal relatively little about the detail of possession cases, even at the top end, so it is difficult to think how we might elaborate on the culpability of offenders committing crimes at differing levels of seriousness

3.4 The most obvious signifier of harm, quantity, was rejected when the current guideline was written: the consultation version broke down seriousness into four categories, the most serious being possession in prison and the lower three levels based on quantity (with different indicative ranges by class of drug in each category), but this model was dropped post-consultation. Council agreed with consultation responses suggesting that for these possession offences quantity is an arbitrary measure of seriousness which could lead to perverse outcomes and disproportionality in sentencing. It was felt that the quantity in the offender's possession at time of arrest depends on a number of factors that are unrelated to culpability and harm, such as the way the drug user accesses the market (e.g. buying in bulk to limit contact with the criminal market) and their level of tolerance (e.g. more dependent addicts are likely to have a higher tolerance and so buy more of it). We see no reason why these arguments will have changed, and indeed they may be bolstered by newer trends: for example, some drugs supply may have moved to more of a 'little and often' model (e.g. via the dark web and post), and new drugs like fentanyl and carfentanyl are used in tiny quantities, making low quantity less relevant to the harm caused. We therefore suggest that quantity of drug is not built into step one (whether or not to build it into step two is considered later, see 3.11).

Question 2: Does Council agree that the seriousness model based on class only should remain the same?

Question 3: Does Council agree that quantity should not be incorporated into step one?

3.5 Placing possession in prison at the highest level of seriousness was also rejected by consultees, on the basis that there is no evidence that a longer sentence would work as a deterrent, rather it may simply create an extra market for drugs in prisons by keeping drug users in prison for longer. Whilst this argument may still hold true, the Council may feel that the current problem of drugs in prison warrants reflecting the seriousness of the offence in the prison

context at step one of the guideline rather than step two, as current (possession in prison being an aggravating factor). On balance, we suggest retaining, 'Possession of drug in prison' at step two, since its inclusion at step one might inflate sentences across the board (particularly if the factor was a superordinate category above drug class) and the argument about fuelling the market (by prolonging the time an individual is buying drugs in prison) still remains persuasive, perhaps outweighing the symbolic importance of having 'prison' at step one.

Question 4: Does Council agree with the retention of the factor, 'Possession of drug in prison' at step two, as opposed to placing it at step one?

3.6 We are suggesting only a very small change to the sentencing table. Council might remember that in our presentation on overarching learnings, we highlighted a very marked fall in the proportion of offenders receiving a community order (CO) for possession class A in the month immediately after guideline implementation, and a corresponding increase in the use of fines. We think this may be because a CO is not mentioned explicitly in the sentencing range for category 1 (and category 2) of this offence.

3.7 To encourage the use of community orders, particularly those with a rehabilitative drug treatment requirement, we suggest incorporating the invitation to consider a community order into the higher categories in the sentencing table, so the upper ranges for category 1 and 2 would incorporate the additional text, 'even in cases where the custody threshold has been passed, a community order may be a suitable sentence' (and this would link to the asterisked text in the current guideline).

3.8 This may mean that the proportion of offenders receiving a community order increases at the expense of custody. However, we think any variation in sentencing severity is justified as the changes are hopefully addressing an unintended consequence of the current guideline.

Question 5: Is Council content with this change to the sentencing table?

3.9 There have been two quite recent Court of Appeal cases where an offender was charged with possession with intent to supply (PWITS) and possession, and pleaded guilty to possession but was acquitted or the jury could not agree on PWITS. In each case large quantities of drugs were specified and high sentences were given. In *R v Russell*, the Court held that if, as the guideline suggests, quantity should be disregarded, there was insufficient basis for the high sentence,

the court inferring that large quantity was the main reason why the judge had passed a high sentence. In *R v Lawrence* the judgment was a little different: quantity was accepted as an aggravating factor alongside purity and the location of the offence (a nightclub), although the sentence was reduced for other reasons.

3.10 It is apparent from these cases and several cases within the transcripts we reviewed that an offender is sometimes convicted of possession of a large quantity of drugs in cases where there is not enough evidence to convict on PWITS. In line with the judgment in *R v Lawrence*, we have considered including 'high quantity' as an aggravating factor to prompt its consideration at step two in these types of case. However, it might be argued that the same arguments that we invoked for not including quantity at step one (see above) apply at step two.

3.11 Additionally, Council generally takes the approach that guidelines should be designed with the offence that has been charged, and for which the offender has been convicted, in mind. We therefore suggest that high quantity should not be an aggravating factor at step two. The corollary of this is small quantity, which we have considered as a potential mitigating factor. The guideline assessment found that small quantity was often used as a mitigating factor for possession cases in the magistrates' courts, in spite of not being cited as a factor in the guideline: in our data collection, sentencers were asked an open-ended question at the end of the form, 'Taking all things into consideration, what would you say was the single most important factor affecting your sentence?' and 'small quantity' was the most popular response, given in 22 per cent of cases (which is very high for an open-ended question). Whilst the very clear importance afforded to small quantity might be seen as an argument for including it as a mitigating factor in the guideline, we suggest not doing so, on the basis that: (i) sentencers are already taking it into account in nearly a quarter of cases; (ii) that if we add in small quantity, then it follows that high quantity should be included; and (iii) because of the argument made earlier around new drugs and new methods of supply making low quantity less meaningful as an indication of sentencing seriousness.

Question 6: does Council agree that high and low quantity should not be incorporated at step two?

3.12 The aggravating factor, 'Charged as importation of a very small amount' is included in the current possession guideline because Council felt that if only a small amount is imported, sentencers should follow the possession guideline rather than the more punitive 'importation' one (category 4 of the importation guideline directs the

reader to the 'possession' guideline). However, we have evidence that this factor is sometimes misconstrued by magistrates, who are likely to be unfamiliar with the 'importation' guideline. Specifically, in the guideline assessment, this factor was found to decrease sentence severity, rather than increase it. Likewise, in a recent sentencing scenario-based exercise in which the offender was caught with 'one very small wrap of cocaine', several participants ticked this factor, even though this was not an importation case. Most likely, scanning the form quickly, sentencers only took notice of the words 'small amount' and hence ticked this erroneously thinking this is a mitigating factor. Because of this confusion, we are suggesting rewording the factor along the lines of: 'Importation offence where the quantity falls under Category 4 in the importation guideline'.

Question 7: does Council agree with the rewording of this factor?

Offences under the Psychoactive Substances Act 2016 (PSA)

3.13 At your meeting in September, you agreed that the revised Drug Offences guideline should include guidelines on the main offences under the Psychoactive Substances Act 2016. These offences, which are very similar to offences under the Misuse of Drugs Act 1971, are given in the table below, along with the numbers of offenders sentenced in 2017.

Section	Offence	Statutory maximum penalty	No. sentenced in 2017
4(1)	Producing a psychoactive substance	7 years' custody	1
5(1) 5(2)	Supplying, or offering to supply, a psychoactive substance		14
7(1)	Possession of a psychoactive substance with intent to supply		96
8(1) 8(2)	Importing or exporting a psychoactive substance		0
9(1)	Possession of a psychoactive substance in a custodial institution	12 months' custody	30

3.14 In 2017, 111 offenders were sentenced for these offences, compared with 12,446 offenders sentenced for comparable MDA offences (excluding the Possession offences, which are different under the two Acts). Information on

sentence types and average (mean and median) custodial sentence lengths is given at Annex B. With such low numbers, direct comparison between the PSA and MDA offences is difficult, but it is perhaps worth noting that, as we might expect given the lower statutory maximum penalties, the mean and median custodial sentence lengths are considerably lower for PSA supply and PWITS offences than those for the comparable MDA offences, even for Class C drugs, as can be seen from the examples in the following table:

Mean custodial sentence length	PSA	Class A	Class B	Class C
Supply	8 months	4yrs 6mths	2 yrs 1mth	1yr 1mth
PWITS	10 months	3yrs 5mths	1yr 2mths	1yr 3mths

3.15 I have spoken to the Home Office lead on the Psychoactive Substances Act and considered the post-legislative review of the Act which was published on 19th November last year. This review does make some comparisons of sentences for PSA offences with those for MDA offences but makes no reference to the lack of specific guidelines for this offence. As the review mainly concerns availability of these substances and other aspects of enforcement, sentencing is only a minor part, and the conclusions do not appear to have implications for our guideline development other than, perhaps, in relation to the offence of possession in a custodial institution.

3.16 We have also reviewed 29 transcripts of Crown Court sentencing remarks for all the offences above (other than importation) looking in particular at the key factors in the decision, differences between sentencing these and MDA offences, and whether or not sentencers have made use of the current Drug Offences guideline. For supply and PWITS offences, judges have explicitly referred to the current Drug Offences guideline in the majority of cases, and in some others have used factors which are taken from that guideline.

3.17 In this paper, I will consider the assessment of culpability and aggravating/mitigating factors for the offences listed above other than possession in a custodial institution. Quantities as assessment of harm will be dealt with at a future meeting, alongside quantities of controlled drugs in the MDA offence guidelines. Possession in a custodial institution will also be dealt with at a future meeting,

following further discussion with HMPPS and confirmation of your views on the draft possession of a controlled drug guideline discussed above.

Supply/PWITS/Importation/Production offences - assessment of culpability

3.18 These four offences closely mirror the offences in the MDA, and the aim of the legislation was to control these activities for new psychoactive substances in the same way as for controlled drugs under the MDA. It is therefore not surprising that many of the culpability factors relevant to the comparable MDA offences (such as involving others in the operation, having some awareness of the scale of the operation, and being involved through naivety) have been cited by judges in the transcripts we have reviewed. Given these similarities, I propose to use the same approach to assessment of culpability, and the same factors, as have been agreed for the comparable MDA offences. A draft of this section of the guidelines is set out at Annex C. At consultation, I intend to explain this approach and ask respondents whether there are any different/additional considerations for psychoactive substances which would require a departure from the MDA offences factors.

3.19 Initial discussion with the Home Office has raised a potential difference, in that they say that they are not currently seeing organised crime gang involvement in NPS supply in the same way as in the trade in controlled drugs. This might suggest that the factors particularly relevant to large scale organised crime offending, such as commercial scale operations, may not be so relevant to the PSA offences. However, the approach to culpability based on role, and the factors we have agreed, would apply equally to smaller scale operations. In addition, we must bear in mind that the PSA only came into effect in 2016, and it may only be a matter of time before the organised crime gangs become more involved in the trade in PSA and the full range of factors may become more relevant.

3.20 In the majority of Supply and PWITS transcripts we have reviewed, the offender is being sentenced not just for the PSA offence, but also for a comparable MDA offence, commonly supply of cannabis, suggesting a strong link between the dealing in newer psychoactive substances and controlled drugs. The simultaneous sentencing of the different offences also means that to keep the culpability approach and factors the same would be simpler for the courts.

Question 8: Does the Council agree to replicating the approach to the assessment of culpability and culpability factors used in the MDA offences for the offences under the Psychoactive Substances Act?

Question 9: Does the Council agree to ask consultation respondents for views on additional culpability considerations relating to psychoactive substances which may not be covered by the existing factors?

Supply/PWITS/Importation/Production offences – assessment of harm

3.21 The assessment of harm for these offences under the PSA presents more of a challenge since, as there is no list of substances, the range of potential harm is so wide. Some of the substances involved in existing cases, such as nitrous oxide, have very limited harmful impacts, while others, such as some forms of synthetic cannabinoid which are not yet controlled, could cause harm similar to those of a Class B or even Class A drug. It is therefore not possible to take the same approach to the assessment of harm as taken in the current Drug Offences guidelines, particularly given that the nature of the substances involved in this offending will change over time. I will set out a proposed approach to the assessment of harm at the next meeting, alongside the assessment of harm and quantities for the MDA offences.

Supply/PWITS/Importation/Production offences – aggravating and mitigating factors

3.22 In general, the same arguments apply to aggravating and mitigating factors as to culpability; that the offences are similar enough to the MDA offences that the aggravating and mitigating factors agreed for the MDA offences should also be used for the PSA offences. Transcripts of these PSA offences also suggest that judges are using similar factors, whether or not they are explicitly referring to the current Drug Offences guideline. The exception is the difference in statutory aggravating factors. Firstly, for the PSA offences, there is no aggravation for a “third strike” drug trafficking offence so this would be removed. Secondly, in addition to some small differences in wording for the factors relating to supply near a school premises, and using a courier aged under 18, there is a statutory aggravating factor for an PSA supply offence committed “in a custodial institution” under s6(9) and s6(10) of the PSA. The wording of statutory aggravating factors for the supply offence would therefore read (changes from the MDA offence version in italics):

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- In connection with the offence, the offender used a courier who, at the time of the commission of the offence, was aged under 18
- The offence was committed on or in the vicinity of school premises at a relevant time
- The offence was committed in a custodial institution
- Offence committed on bail

Question 10: Does the Council agree to retaining the aggravating and mitigating factors agreed for the equivalent MDA offence guidelines for the PSA offence guidelines, subject to the changes to statutory aggravating factors above?

Misuse of Drugs Act offences – supply/PWITS, importation/exportation and production/cultivation

3.23 At the Council meeting in November, you agreed aggravating and mitigating factors for these offences and I have set out the agreed version at Annex D. You asked me to reconsider the wording of three separate aggravating factors relating to what, in the current guideline, is drafted as “exposure of others to more than usual danger”, to make it clear that the factors could apply to three distinct groups of people and take account of concerns expressed by judges, the Home Office and the NCA about new forms of offending. The revised factors are set out below. It is difficult to strike a balance between giving sufficient information and drafting too broadly, and the factors can be tested through a specific consultation question and in road testing. The drafting below is similar to that used in other guidelines (for example, Child Cruelty) to indicate situations where there is additional harm beyond that which is inherent in the offence.

- Exposure of drug user to the risk of serious harm, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to the risk of serious harm, for example through method of transporting drugs
- Exposure of third parties to the risk of serious harm, for example through the site of the drug-related activity

Question 11: Is the Council content with the redrafting of the aggravating factors above?

4. IMPACT AND RISKS

4.1 Further information about the impact and risks of this revised guideline will be available prior to consultation. In particular, the Council agreed that further analytical work on the role of ethnicity and gender in the sentencing of drug offences will be carried out; discussion of this is currently scheduled for the April meeting.

Possession of a controlled drug

Misuse of Drugs Act 1971 (section 5(2))

Triable either way

Class A

Maximum: 7 years' custody

Offence range: Fine – 51 weeks' custody

Class B

Maximum: 5 years' custody

Offence range: Discharge – 26 weeks' custody

Class C

Maximum: 2 years' custody

Offence range: Discharge – Community order

STEP ONE
Determining the offence category

The court should identify the offence category based on the class of drug involved.

Category 1	Class A drug
Category 2	Class B drug
Category 3	Class C drug

STEP TWO
Starting point and category range

The court should use the table below to identify the corresponding starting point. The starting point applies to all offenders irrespective of plea or previous convictions. The court should then consider further adjustment within the category range for aggravating or mitigating features, set out below.

~~Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial sentence.~~

Offence category	Starting Point (applicable to all offenders)	Category Range (applicable to all offenders)
Category 1 (class A)	Band C fine	Band A fine – 51 weeks' custody <u>(or, even in cases where the custody threshold has been passed, a community order may be an appropriate sentence)*</u>
Category 2 (class B)	Band B fine	Discharge – 26 weeks' custody <u>(or, even in cases where the custody threshold has been passed, a community order may be an appropriate sentence)*</u>
Category 3 (class C)	Band A fine	Discharge – medium level community order

* Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial sentence.

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 particular, possession of drugs in prison is likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Where appropriate, consider the custody threshold as follows:

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

Where appropriate, the court should also consider the community threshold as follows:

- has the community threshold been passed?

Factors increasing seriousness

Statutory aggravating factors

- Previous convictions, having regard to a) nature of the offence to which conviction relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail

Other aggravating factors include

- Possession of drug in prison
- Presence of others, especially children and/or non-users
- Possession of drug in a school or licensed premises
- Failure to comply with current court orders
- Offence committed on licence
- Attempts to conceal or dispose of evidence, where not charged separately
- ~~Charged as importation of a very small amount~~ Importation offence where the quantity falls under Category 4 in the Importation guideline because amount is too small for the importation guideline to be used
- Established evidence of community impact

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Offender is using cannabis to help with a diagnosed medical condition
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Isolated incident
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

Table 1: Number of adult offenders sentenced for offences under the Psychoactive Substances Act 2016, 2007-2017^{1,2}

Annex B

Legislation	Section	Offence	Court type	Number of adult offenders sentenced													
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017			
Psychoactive Substances Act 2016	4(1) & 10(1)	Produce a psychoactive substance	MC	-	-	-	-	-	-	-	-	-	-	-	0	0	
			CC	-	-	-	-	-	-	-	-	-	-	-	1	1	
			Total	-	-	-	-	-	-	-	-	-	-	-	-	1	1
	5(1) & 10(1)	Supply a psychoactive substance	MC	-	-	-	-	-	-	-	-	-	-	-	-	4	4
			CC	-	-	-	-	-	-	-	-	-	-	-	-	1	9
			Total	-	-	-	-	-	-	-	-	-	-	-	-	-	5
	5(2) & 10(1)	Offer to supply a psychoactive substance	MC	-	-	-	-	-	-	-	-	-	-	-	-	0	0
			CC	-	-	-	-	-	-	-	-	-	-	-	-	0	1
			Total	-	-	-	-	-	-	-	-	-	-	-	-	-	0
	7 & 10(1)	Possess a psychoactive substance with intent to supply	MC	-	-	-	-	-	-	-	-	-	-	-	-	6	28
			CC	-	-	-	-	-	-	-	-	-	-	-	-	5	68
			Total	-	-	-	-	-	-	-	-	-	-	-	-	-	11
	8(1) & 10(1)	Import a psychoactive substance	MC	-	-	-	-	-	-	-	-	-	-	-	-	1	0
			CC	-	-	-	-	-	-	-	-	-	-	-	-	0	0
			Total	-	-	-	-	-	-	-	-	-	-	-	-	-	1
9(1) & 10(2)	Possess a psychoactive substance in a custodial institution	MC	-	-	-	-	-	-	-	-	-	-	-	-	4	21	
		CC	-	-	-	-	-	-	-	-	-	-	-	-	2	9	
		Total	-	-	-	-	-	-	-	-	-	-	-	-	-	6	30
Total psychoactive substances offences		MC	-	-	-	-	-	-	-	-	-	-	-	-	15	53	
		CC	-	-	-	-	-	-	-	-	-	-	-	-	9	88	
		Total	-	-	-	-	-	-	-	-	-	-	-	-	-	24	141

Source: Court Proceedings Database, Ministry of Justice

Notes:

1) No offenders were sentenced during this period for the following offences under the Psychoactive Substances Act 2016: Export a psychoactive substance, Fail to comply with a prohibition / premises order re psychoactive substances, Remain on / enter premises in contravention of access prohibition re psychoactive substances, Obstruct a person entering premises / securing premises against entry re psychoactive substances, Obstruct enforcement officer in performance of functions under Psychoactive Substances Act 2016, and Fail to comply / prevent compliance with requirement / direction under Psychoactive Substances Act 2016.

2) The Psychoactive Substances Act came into effect in 2016, and so no offenders were convicted or sentenced for these offences prior to 2016.

Table 2: Sentence outcomes for adult offenders sentenced for offences under the Psychoactive Substances Act 2016, 2017

Legislation	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Psychoactive Substances Act 2016	4(1) & 10(1)	Produce a psychoactive substance	0	0	0	0	0	1	0	1
	5(1) & 10(1)	Supply a psychoactive substance	0	1	2	2	1	7	0	13
	5(2) & 10(1)	Offer to supply a psychoactive substance	0	0	0	0	1	0	0	1
	7 & 10(1)	Possess a psychoactive substance with intent to supply	0	2	4	22	36	30	2	96
	8(1) & 10(1)	Import a psychoactive substance	0	0	0	0	0	0	0	0
	9(1) & 10(2)	Possess a psychoactive substance in a custodial institution	0	2	0	0	5	22	1	30

Offences under the Psychoactive Substances Act 2016

Legislation	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Psychoactive Substances Act 2016	4(1) & 10(1)	Produce a psychoactive substance	0%	0%	0%	0%	0%	100%	0%	100%
	5(1) & 10(1)	Supply a psychoactive substance	0%	8%	15%	15%	8%	54%	0%	100%
	5(2) & 10(1)	Offer to supply a psychoactive substance	0%	0%	0%	0%	100%	0%	0%	100%
	7 & 10(1)	Possess a psychoactive substance with intent to supply	0%	2%	4%	23%	38%	31%	2%	100%
	8(1) & 10(1)	Import a psychoactive substance	0%	0%	0%	0%	0%	0%	0%	0%
	9(1) & 10(2)	Possess a psychoactive substance in a custodial institution	0%	7%	0%	0%	17%	73%	3%	100%

Source: Court Proceedings Database, Ministry of Justice

Note:

1) Includes a number of orders, for example hospital orders, confiscation orders and compensation orders.

Table 3: Average custodial sentence lengths for adult offenders sentenced to immediate custody for offences under the Psychoactive Substances Act 2016, after any reduction for guilty plea, 2017

Legislation	Section	Offence	Mean sentence length ^{1,3}	Median sentence length ^{2,3}
Psychoactive Substances Act 2016	4(1) & 10(1)	Produce a psychoactive substance ⁴	*	*
	5(1) & 10(1)	Supply a psychoactive substance ⁵	8 months	8 months
	5(2) & 10(1)	Offer to supply a psychoactive substance ⁶	-	-
	7 & 10(1)	Possess a psychoactive substance with intent to supply	10 months	7 months
	8(1) & 10(1)	Import a psychoactive substance ⁶	-	-
	9(1) & 10(2)	Possess a psychoactive substance in a custodial institution	4 months	3 months

Source: Court Proceedings Database, Ministry of Justice

Notes:

- 1) The mean is calculated by taking the sum of all values and then dividing by the number of values.
- 2) The median is the value which lies in the middle of a set of numbers when those numbers are placed in ascending or descending order.
- 3) Excludes life and indeterminate sentences.
- 4) Figures have been excluded for this offence, due to the very low number of offenders sentenced to immediate custody in 2017 (less than five).
- 5) These figures should be treated with caution, due to the low number of offenders sentenced to immediate custody for this offence.
- 6) No offenders were sentenced to immediate custody for this offence in 2017.

Revision of Drug Offences Guideline – proposed sections for guidelines for Psychoactive Substances Act 2016 offences of importation/exportation, supply/PWITS and production

Importing or exporting a psychoactive substance

Psychoactive Substances Act 1971 (section 8)

Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

In assessing harm...[to be added]

Culpability demonstrated by the offender's role

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

Leading role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility
- Systematic exploitation of children and/or vulnerable persons to assist in the offending
- Exercising control over the home of another person for the purposes of the offending

Significant role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage, (save where this advantage is limited to meeting the offender's own habit) whether or not operating alone
- Some awareness and understanding of scale of operation

Lesser role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain

- Very little, if any, awareness or understanding of the scale of operation
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)
- Expectation of limited, if any, financial or other advantage (including meeting the offender's own habit)

Category of harm...[to be considered at a future meeting]

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

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.

Where appropriate, consider the custody threshold as follows:

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

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- In connection with the offence, the offender used a courier who, at the time of the commission of the offence, was aged under 18
- The offence was committed on or in the vicinity of school premises at a relevant time
- The offence was committed in a custodial institution
- Offence committed on bail

Other aggravating factors include:

- Targeting of any premises where children or other vulnerable persons are likely to be present
- Exposure of psychoactive substance user to the risk of serious harm, for example, through the method of production/mixing of the substance
- Exposure of those involved in dealing in the psychoactive substance to the risk of serious harm, for example through method of transporting the substance
- Exposure of third parties to the risk of serious harm
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders

- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

Factors reducing seriousness or reflecting personal mitigation

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Supply only of substance to which offender addicted
- Mistaken belief of the offender regarding the type of substance, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

Supplying, or offering to supply, a psychoactive substance
Psychoactive Substances Act 2016 (sections 5(1) or 5(2))

Possession of psychoactive substance with intent to supply
Psychoactive Substances Act 2016 (section 7(1))

Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

In assessing harm...[to be added]

Culpability demonstrated by the offender's role

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

Leading role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility, for example, prison employee, medical professional
- Systematic exploitation of children and/or vulnerable persons to assist in the offending
- Exercising control over the home of another person for the purposes of the offending

Significant role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage (save where this advantage is limited to meeting the offender's own habit), whether or not operating alone
- Some awareness and understanding of scale of operation

Lesser role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- Expectation of limited, if any, financial or other advantage (including meeting the offender's own habit)

Category of harm.....[to be considered at a future meeting]

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

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.

Where appropriate, consider the custody threshold as follows:

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

Where appropriate, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- In connection with the offence, the offender used a courier who, at the time of the commission of the offence, was aged under 18
- The offence was committed on or in the vicinity of school premises at a relevant time
- The offence was committed in a custodial institution
- Offence committed on bail

Other aggravating factors include:

- Targeting of any premises where children or other vulnerable persons are likely to be present
- Exposure of psychoactive substance user to the risk of serious harm, for example, through the method of production/mixing of the substance
- Exposure of those involved in dealing in the psychoactive substance to the risk of serious harm, for example through method of transporting the substance
- Exposure of third parties to the risk of serious harm
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact

- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

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

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

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

Factors reducing seriousness or reflecting personal mitigation

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Supply only of psychoactive substance to which offender addicted
- Mistaken belief of the offender regarding the type of substance, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

Producing a psychoactive substance

Psychoactive Substances Act 2016 (section 4(1))

Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

In assessing harm...[to be added]

Culpability demonstrated by the offender's role

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

Leading role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility
- Systematic exploitation of children and/or vulnerable persons to assist in the offending
- Exercising control over the home of another person for the purposes of the offending

Significant role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage (save where this advantage is limited to meeting the offender's own habit), whether or not operating alone
- Some awareness and understanding of scale of operation

Lesser role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- Expectation of limited, if any, financial advantage, (including meeting the offender's own habit)
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)

Category of harm...[to be considered at a future meeting]

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

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.

Where appropriate, consider the custody threshold as follows:

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

Where appropriate, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- In connection with the offence, the offender used a courier who, at the time of the commission of the offence, was aged under 18
- The offence was committed on or in the vicinity of school premises at a relevant time
- The offence was committed in a custodial institution
- Offence committed on bail

Other aggravating factors include:

- Nature of any likely supply
- Level of any profit element
- Use of premises accompanied by unlawful access to electricity/other utility supply of others, where not charged separately
- Ongoing/large scale operation as evidenced by presence and nature of specialist equipment
- Exposure of psychoactive substance user to the risk of serious harm, for example, through the method of production/mixing of the substance
- Exposure of those involved in dealing in the psychoactive substance to the risk of serious harm, for example through method of transporting the substance
- Exposure of third parties to the risk of serious harm
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity or high potential yield

- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

Factors reducing seriousness or reflecting personal mitigation

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Offender's vulnerability was exploited
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

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Revision of Drug Offences Guideline – proposed sections for new guideline October 2018

Changes from current guideline indicated by struck through/underlined text

Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug

Misuse of Drugs Act 1971 (section 3)

Customs and Excise Management Act 1979 (section 170(2))

Step one – determining the offence category

The court should determine the offender’s culpability (role) and the harm caused (quantity) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender’s culpability.

In assessing harm, quantity is determined by the weight of the product. Purity is not taken into account at step one but is dealt with at step two.

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.

Culpability demonstrated by the offender’s role

One or more of these characteristics may demonstrate the offender’s role. These lists are not exhaustive.

Leading role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility
- Systematic exploitation of children and/or vulnerable persons to assist in drug-related activity
- Exercising control over the home of another person for drug-related activity

Significant role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward

- Expectation of significant financial or other advantage, (save where this advantage is limited to meeting the offender's own habit) whether or not operating alone
- Some awareness and understanding of scale of operation

Lesser role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)
- Expectation of limited, if any, financial or other advantage (including meeting the offender's own habit)

Category of harm

Indicative quantities of the most common drugs, upon which the starting point is to be based) are as follows:

[TABLE OF QUANTITIES]

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

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.

Where appropriate, consider the custody threshold as follows:

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

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offender used or permitted a person under 18 to deliver a controlled drug to a third person
- Offender 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when school in use as such or at a time between one hour before and one hour after they are to be used.
- Offence committed on bail

Other aggravating factors include:

- Targeting of any premises where children or other vulnerable persons are likely to be present
- Exposure of drug user to the risk of serious harm, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to the risk of serious harm, for example through method of transporting drugs
- Exposure of third parties to the risk of serious harm, for example, through the site of the drug-related activity
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

Factors reducing seriousness or reflecting personal mitigation

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Supply only of drug to which offender addicted
- Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

Supplying or offering to supply a controlled drug
Misuse of Drugs Act 1971 (section 4(3))

Possession of a controlled drug with intent to supply it to another
Misuse of Drugs Act 1971 (section 4(3))

Step one – determining the offence category

The court should determine the offender’s culpability (role) and the harm caused (quantity) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender’s culpability.

In assessing harm, quantity is determined by the weight of the product. Purity is not taken into account at step one but is dealt with at step two. Where the offence is supply directly to users (including street dealing), the quantity of product is less indicative of the harm caused and therefore the starting point is not solely based on quantity. The court should consider all offences involving supplying directly to users as at least category 3 harm, and make an adjustment from the starting point within that category considering the quantity of drugs in the particular case.

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.

Culpability demonstrated by the offender’s role

One or more of these characteristics may demonstrate the offender’s role. These lists are not exhaustive.

Leading role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility, for example, prison employee, medical professional
- Systematic exploitation of children and/or vulnerable persons to assist in drug-related activity
- Exercising control over the home of another person for drug-related activity

Significant role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward

- Expectation of significant financial or other advantage (save where this advantage is limited to meeting the offender's own habit), whether or not operating alone
- Some awareness and understanding of scale of operation

Lesser role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- Expectation of limited, if any, financial or other advantage (including meeting the offender's own habit)

Category of harm

Indicative quantities of the most common drugs, upon which the starting point is to be based) are as follows:

[TABLE OF QUANTITIES]

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

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.

Where appropriate, consider the custody threshold as follows:

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

Where appropriate, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offender used or permitted a person under 18 to deliver a controlled drug to a third person
- Offender 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when school in use as such or at a time between one hour before and one hour after they are to be used.

- Offence committed on bail

Other aggravating factors include:

- Targeting of any premises where children or other vulnerable persons are likely to be present
- Exposure of drug user to the risk of serious harm, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to the risk of serious harm, for example through method of transporting drugs
- Exposure of third parties to the risk of serious harm, for example, through the site of the drug-related activity
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

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

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

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

Factors reducing seriousness or reflecting personal mitigation

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Supply only of drug to which offender addicted
- Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

Production of a controlled drug

Misuse of Drugs Act 1971 (section 4(2)(a) or (b))

Cultivation of cannabis plant

Misuse of Drugs Act 1971 (section 6(2))

Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused (output or potential output) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

In assessing harm, output or potential output are determined by the output or the potential output (the weight of the product or number of plants/scale of operation). For production offences purity is not taken into account at step one but is dealt with at step two.

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.

Culpability demonstrated by the offender's role

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

Leading role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility
- Systematic exploitation of children and/or vulnerable persons to assist in drug-related activity
- Exercising control over the home of another person for drug-related activity

Significant role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage (save where this advantage is limited to meeting the offender's own habit), whether or not operating alone
- Some awareness and understanding of scale of operation

Lesser role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation

- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- Expectation of limited, if any, financial advantage, (including meeting the offender's own habit)
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)

Category of harm

Indicative output or potential output, upon which the starting point is to be based:

[TABLE OF QUANTITIES]

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

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.

Where appropriate, consider the custody threshold as follows:

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

Where appropriate, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail

Other aggravating factors include:

- Nature of any likely supply
- Level of any profit element
- Use of premises accompanied by unlawful access to electricity/other utility supply of others, where not charged separately
- Ongoing/large scale operation as evidenced by presence and nature of specialist equipment
- Exposure of drug user to the risk of serious harm, for example, through the method of production/mixing of the drug

- Exposure of those involved in drug dealing to the risk of serious harm, for example through method of transporting drugs
- Exposure of third parties to the risk of serious harm, for example, through the site of the drug-related activity
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity or high potential yield
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

Factors reducing seriousness or reflecting personal mitigation

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Offender's vulnerability was exploited
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

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Sentencing Council meeting:

25 January 2019

Paper SC(19)JAN08 – Guideline

assessment for robbery: next steps

Sarah Poppleton and Sophie Klinger

Lead official:

1 ISSUE

Our assessment of the impact of the robbery guideline was circulated to the Council earlier this week. We are asking Council to approve its publication, and to decide whether or not reconsideration of the robbery guideline should be timetabled into the workplan, in the light of the findings from this work.

2 RECOMMENDATION

2.1 It is recommended that:

- the robbery report is published in February.
- consideration of the robbery guideline is added to the work plan, and that the final line of the report flags this intention in broad terms.

2.2 We do not consider the issues with the guideline problematic enough to warrant reconsideration in 2019/20, but rather suggest it is scheduled into the longer-term work plan.

3 BACKGROUND

3.1 The Sentencing Council Definitive Guideline for Robbery Offences took effect on 1 April 2016. A preliminary assessment of the impact of the guideline was presented to the Council last April and the final report was circulated to Council earlier this month.

3.2 The assessment found that sentencing severity increased beyond the upper boundary of what would have been expected from normal fluctuations in sentencing after the guideline was introduced. The average custodial sentence length (ACSL) for all robbery offences increased from 5 years to 5 years and 4 months.

3.3 Our analysis suggested that the increase may be related to a high proportion of cases being categorised as culpability A. In particular, the new high culpability factor relating to production of a bladed article or firearm to threaten violence was associated with the greatest effect in increasing ACSL. This indicates that the

guideline succeeded in meeting its stated objective of ensuring that robberies involving highly dangerous weapons continue to attract the toughest sentences. However, the inclusion of this factor also appears to have led to an unanticipated uplift in sentencing.

3.4 In interview, judges expressed broad support for the guideline. The general sense was that the guideline is working well and is being applied consistently. Some judges felt that the guideline had increased sentence levels, but they were supportive of the perceived uplift.

4 CONSIDERATION

Publication of the report

4.1 Council will be aware of its obligation to assess the effect of guidelines and to meet this objective and be seen to be doing so, the findings should go into the public domain. The report is now ready for publication, and we are suggesting we publish it in February, after theft.

Question 1: Does the Council agree to publishing this report in February?

Possible revision of the robbery guideline

4.2 There are arguments for and against revising the robbery guideline: the guideline appears to have led to an unanticipated uplift, but our research also suggests it has the judiciary's support and that there are no significant concerns with how it is being understood and implemented.

4.3 So far, the Council has committed to revisiting each of the guidelines which appear to have resulted in an unanticipated uplift in sentencing severity (e.g. assault, burglary, sexual assault). Given this, it would seem anomalous not to do so for robbery, although we believe that any decisions on whether changes should be made and the extent of any changes can be made at a later date. Judges are happy with the guideline, and we do not consider the uplift in sentence problematic enough to warrant immediate revision, hence we are suggesting building it into its longer-term planning.

Question 2: Does the Council agree that consideration of the robbery guideline should be timetabled into the long-term work plan, for revisiting after 2019/20?

4.4 Given the possibility that the Council may agree to revisit the guideline, a line has been inserted into the report to this effect. The Council is therefore asked to approve or amend the final line of the report, Currently, this reads, 'In the light of this

analysis, the Council will revisit the guideline and consider making changes to it in due course’.

Question 3: Is the Council content with the final line of the report?

5 RISK

5.1 There is a risk that publication of the report may attract the criticism that the Council is pushing up sentencing. We will mitigate this risk by preparing appropriate press lines.

5.2 We do not consider that there is any risk to publicly committing to reviewing the guideline. If the Council chooses not to make such a commitment, there may be a risk that it appears unresponsive to the results of its own evaluation and monitoring and that its approach is inconsistent, given the commitments to revisit other guidelines which have had unanticipated effects.

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Assessing the impact and implementation of the Sentencing Council's Robbery Definitive Guideline

Summary

- The Sentencing Council's *Robbery Definitive Guideline* came into force on 1 April 2016, replacing an earlier guideline issued by the Sentencing Council's predecessor body, the Sentencing Guidelines Council. It was designed to improve consistency in sentencing and was not anticipated to change sentencing practice significantly. The guideline covers all types of robbery and splits the single offence under section 8 of the Theft Act 1968 into three types, with different sentencing ranges for each:
 - Street and less sophisticated commercial;
 - Dwelling; and,
 - Professionally planned commercial robbery.
- The new guideline also had the aim of consolidating existing sentencing practice, ensuring that robberies with knives and guns should attract the toughest sentences. This was not expected to change sentence severity in practice, because the limited data available when the guideline was published suggested that these cases already received the toughest sentences.
- A quantitative and qualitative research approach was taken to assess the impact of the guideline on sentencing outcomes and assess whether there were any problems or issues with its implementation. This included analysing data from before and after the guideline came into force.
- A resource assessment that was previously undertaken to establish the likely effect of the guideline on correctional resources anticipated that there would be no impact on sentence severity. However, trend data showed that sentencing severity increased beyond the upper boundary of what would have been expected from normal fluctuations in sentencing after the guideline was introduced. The guideline therefore appeared to have an unanticipated, inflationary effect.
- The quantitative data suggested that this increase may be related to a high proportion of cases being categorised at the highest level of culpability (culpability A). Furthermore, regression analysis indicated that the new high culpability factor relating to producing a bladed article or firearm to threaten violence was associated with the greatest effect in increasing average custodial sentence length (ACSL). While this indicates that the guideline succeeded in ensuring that the robberies involving highly dangerous weapons

continued to attract the toughest sentences, the inclusion of this factor in the guideline also appears to have led to an unanticipated uplift.

- The introduction of ‘psychological harm’ as part of harm may also have played a role in the increase in sentencing severity, particularly in relation to dwelling and professionally planned commercial robberies, where psychological harm was often deemed serious.
- In interview, judges expressed broad support for the guideline. The general sense was that the guideline is working well and is being applied consistently. This was evidenced in the sentencing of two scenarios (as part of these interviews with judges), which resulted in consistent use of factors and consistent final sentences across judges.

Introduction

The Sentencing Council’s Robbery Definitive Guideline

Robbery is a relatively low volume, serious offence involving both violence and acquisitive elements. All robbery cases are dealt with in the Crown Court. In 2017, 2,800 adult offenders were sentenced for the robbery offences covered by the robbery guideline, a decrease from 3,900 sentenced in 2014 and a marked decrease from the most recent peak of 5,500 in 2011.¹ Offenders sentenced for robbery currently account for less than one per cent of all offenders sentenced, but because the sentences for robbery are long, those sentenced for these offences (including assault with intent to rob, which is not covered by the definitive guideline) made up 10 per cent of the sentenced prison population as at the end of June 2018.²

The Sentencing Guidelines Council (SGC)³ produced a robbery guideline which came into force in 2006, however after almost a decade in operation this guidance required updating, in particular to reflect concerns about robberies involving knives and firearms.⁴ The Sentencing Council consulted and produced the new robbery guideline, which came into force in April 2016.⁵

The SGC guideline provided one set of guidance covering street robbery, robbery of small businesses and less sophisticated commercial robbery.⁶ The Sentencing Council guideline covers these but, unlike the SGC guideline, now also includes specific guidance on sentencing professionally planned robbery and robbery in a dwelling. The new guideline was designed to ensure consistency in sentencing. It

¹ Source: Court Proceedings Database, Ministry of Justice.

² Source: Offender Management Statistics, Ministry of Justice.

³ The SGC was the predecessor body to the Sentencing Council.

⁴ Sentencing Council Press Release, 28th January 2016:

<https://www.sentencingcouncil.org.uk/news/item/new-robbery-sentencing-guidelines-put-emphasis-on-seriousness-of-robberies-involving-knives-and-guns/>

⁵ Sentencing Council (2016) Robbery: Definitive Guideline, available at

<https://www.sentencingcouncil.org.uk/publications/.../robbery-definitive-guideline-2>

⁶ Sentencing Guidelines Council (2006) Robbery: Definitive Guideline, available at

https://www.sentencingcouncil.org.uk/wp-content/uploads/web_robbery-guidelines.pdf

was also designed to ensure that those offences which cause serious harm to the victim and those which involve knives and firearms, including imitation firearms, continue to result in the toughest sentences, something that it was believed that sentencing practice already reflected; therefore, the new guideline was not anticipated to have an impact on sentencing severity.

The Sentencing Council guideline groups robberies into three types, with a separate guideline for each: street and less sophisticated commercial, professionally planned commercial, and dwelling. Within each guideline, the sentencing exercise takes the form of a two-step process. At step one, the guideline indicates the factors to be considered when deciding the offender's level of culpability and the harm caused. Culpability ranges from A (highest) to C (lowest) and harm ranges from 1 (highest) to 3 (lowest). Step two specifies an appropriate sentencing range and starting point based on the level culpability and harm decided at step one. The judge then takes into account aggravating and mitigating factors, which are specified in a non-exhaustive list, to determine the final sentence within the specified range. It is the application of step one that is likely to have the greatest influence on sentencing.

Street and less sophisticated commercial robbery is the most common type of robbery offence, comprising 85 per cent of offenders sentenced for robbery in 2014.⁷ For this type of robbery, the sentences indicated in the new guideline range from a community sentence to 12 years' custody.

When assessing the level of culpability, one of the factors to be taken into account is 'Use of a weapon to inflict violence'. This factor places the offence in the most serious category of culpability (A), as does, 'Production of a bladed article or firearm or imitation firearm to threaten violence', 'Use of very significant force in the commission of the offence' or 'Offence motivated by, or displaying hostility based on any of the following characteristics or presumed characteristics of the victims: religion, race, disability, sexual orientation or transgender identity'.

In terms of harm, the most serious offences (in level 1) are those which cause serious physical or psychological harm. Inversely, the least serious (level 3) are those where there is no or minimal harm, or in the case of businesses no or minimal detrimental effect. In between, level 2 harm, covers cases where there is neither serious nor minimal harm. Serious psychological harm is a feature which is new to this guideline. Listed amongst the aggravating factors for street and less sophisticated commercial robbery are, 'High value goods or sums targeted or obtained (whether economic, personal and sentimental)' and the targeting of a victim on the basis of their vulnerability.

⁷ The Ministry of Justice does not include the type of robbery in its administrative data collection. Data are therefore taken from the Crown Court Sentencing Survey (CCSS). The CCSS began on 1 October 2010 and data collection ceased on 31 March 2015, hence 2014 is the last full year and gives the most up-to-date breakdown. A survey form was expected to be completed for every new criminal case sentenced at the Crown Court in 2014. Where an offender was being sentenced for more than one offence on the same indictment, the sentencing judge was required to consider only the most severe or "principal" offence. In 2014, the survey data were collected using twelve different offence form types, one of which was robbery. The data was used to produce an annual publication which provides a high-level summary of the data collected, available at <http://www.sentencingcouncil.org.uk/analysis-and-research/ccss-annual-2014- results/>

Robberies in dwellings comprised 12 per cent of all offenders sentenced for robbery in 2014. For this type of robbery, the sentences indicated in the new guideline range from 1 to 16 years' custody. The main culpability factors are the same as those specified for street and less sophisticated commercial robbery, for example those relating to use or production of a weapon. However, as with professionally planned commercial robbery (see below), the offender's role within a group is also relevant (for example, whether they lead, play a significant or minimal role), as well as abuse of position. In addition, the level of planning is also relevant to culpability, with the highest level ascribed to dwelling robberies of a sophisticated, organised nature and the lowest level to those involving little or no planning. Harm is categorised in the same way as street and less sophisticated commercial robberies but in addition the value of the goods obtained or targeted is relevant and the highest level of harm takes into account soiling, ransacking and vandalism of the property, whereas the lowest refers to limited damage or disturbance to the property. These factors are all taken into account at step one of the sentencing process, ensuring they have maximum impact on the final sentence. At step two, the targeting of a victim on the basis of their vulnerability is listed as one of the aggravating features of a dwelling robbery, as is 'Restraint, detention or additional degradation of the victim'.

Professionally planned commercial robbery is the least common type of this offence, comprising just two per cent of offenders sentenced for robbery in 2014. For this type of robbery, the sentences indicated in the new guideline range from 1 year and 6 months to 20 years' custody. When assessing the level of culpability, the main factors to be taken into account are the same as for robbery of a dwelling. In relation to harm, as well as the level of psychological and/or physical harm caused, the high or low value of the goods is a factor, as is 'Serious detrimental effect on the business'.

Prior to the introduction of the guideline, a resource assessment was carried out to predict its likely impacts on prison and probation resources.⁸ The assessment showed that the average custodial sentence length for robbery has been increasing since 2007. The aim of the new robbery guideline was to replicate current sentencing practice rather than to increase the length of custodial sentences or change disposal types. The resource assessment noted that any change in practice could have a significant impact on prison places because a high proportion of offenders sentenced for robbery receive a custodial sentence. The limited data available at the time suggested that robberies committed with weapons were already amongst those which received the toughest sentences.⁹ It was therefore anticipated that the new guideline would not increase sentences but consolidate existing practice.

The research

The Sentencing Council has a statutory duty to monitor the operation of its guidelines. The Council commissioned the University of Leicester to assess the impact and implementation of the sentencing guideline for robbery.¹⁰ The

⁸ Sentencing Council (2016) Robbery: Final Resource Assessment, available at <https://www.sentencingcouncil.org.uk/wp.../Robbery-Final-Resource-Assessment.pdf>

⁹ Sentencing Council (2016) Robbery: Final Resource Assessment, para 5.2 available at <https://www.sentencingcouncil.org.uk/wp.../Robbery-Final-Resource-Assessment.pdf>

¹⁰ Sexual offences guidelines also formed part of the assessment and are the subject of a separate report. – please insert link when we have it post publication

assessment considers whether each guideline had an impact on sentencing outcomes (and whether these impacts differed from those expected) and the existence of any issues or problems with their implementation.

Methodology

Stage one

The Ministry of Justice's Court Proceedings Database (CPD) was used to explore trends in the types of disposals being imposed and the average custodial sentence lengths (ACSL) for robbery offences in the 12 months before the guideline came into effect (January – December 2015)¹¹ and the 12 months after (April 2016 – March 2017). It was not possible to break down the CPD data by type of robbery, so analyses were conducted on all types of robbery together. As the data included a mix of sentences of varying lengths and types, to ensure comparability between different types of sentences, they were converted into a continuous 'severity' scale, with scores ranging from 0 to 100, representing the full range of sentence outcomes, from discharge (score of 0) to 20 years' custody (score of 100). However, it is acknowledged that this measure is not perfect and so should not be seen as an absolute objective measure of sentence severity.

To take account of 'normal' fluctuations in the severity of sentencing (e.g. due to changes in severity of cases), time series analyses were undertaken using data from the CPD from 2005 to 2017. This allowed us to distinguish between these 'normal' fluctuations in sentencing and changes that could reasonably be attributed to the guideline.¹²

The time series model was created to forecast the likely range of sentence severity values for 21 months after the guideline came into force (April 2016 – December 2017)¹³, assuming that no guideline had been issued.

Stage two

Prior to the introduction of the Sentencing Council guideline, data were collected from courts through the Crown Court Sentencing Survey (CCSS), and then in a similar exercise post-guideline. The post-guideline data collection involved the distribution of a survey in the form of a paper or electronic PDF form to all Crown Courts in England and Wales with a request that judges complete a form for every offender sentenced for robbery between 1st November 2016 and 28th April 2017.

The response rate for the most recent survey was around 48 per cent, with 650 surveys received over the reporting period. These data were used to examine which guideline factors might have been influencing sentencing outcomes before and after the guideline was introduced. The analysis compared the factors impacting on sentences for 2013 and 2014 (before the implementation of the guideline) and for

¹¹ The analysis did not use data from the full 12 months before the guideline came into force in case judges' sentencing was impacted upon by the knowledge that new guideline was coming into effect (the guideline was published in January 2016 but did not come into force until April). This time frame also allowed for parity in terms of length of time and any potential impact of seasonality.

¹² See further detail at annex A.

¹³ These were the latest data available at the time of analysis.

November 2016 to 28 April 2017 (after implementation). Regression analyses were conducted to see which aggravating, mitigating, harm or culpability factors impacted on sentence severity score and ACSL. For this analysis, frequencies were generated for the aggravating, mitigating, harm and culpability factors. Separate analyses were conducted for the individual offences of dwelling robbery, street/less sophisticated commercial robbery and professionally planned commercial robbery.

Stage three

Stage three comprised a qualitative study involving semi-structured interviews with 26 Crown Court judges, mainly over the telephone. The majority of the participants were recruited via the Sentencing Council's existing research 'pool',¹⁴ but some were recruited via invitations circulated by court contacts. The interview schedule, devised in consultation with the Office of the Sentencing Council, aimed to explore with sentencers the extent to which the definitive guideline was being used in practice, whether or not they faced any difficulties when applying the guideline and the perceived existence of any unanticipated consequences.

In addition, in advance of the interview judges were asked to consider a scenario, either robbery in a dwelling or robbery in a taxi, and complete the sentencing survey which was being completed in courts at that time (see stage two). This was to facilitate discussion about their sentencing practices in these types of cases and explore how the guideline was being applied by different judges, in particular: whether they used it in a consistent way, and whether the judges' sentencing was in line with what we would expect for this scenario. Fuller details of the facts provided to the judges within these scenarios can be found in annex C.

The two scenarios were randomly allocated and sent to participants prior to the interview. Interviews were recorded (with judges' permission) and they lasted between 30 and 55 minutes. Interviews were then transcribed and all data were coded for themes.¹⁵

The reporting of the qualitative work below is an interpretative summary of some of the issues raised by participants in free-ranging discussions. Verbatim quotations have been selected from this analysis and are used for their vividness in capturing particular points of view, but they should not be taken as representative of the views of all judges. Rather, they are used to give a sense of the original data from which the interpretation was made, and to add detail to the points made.

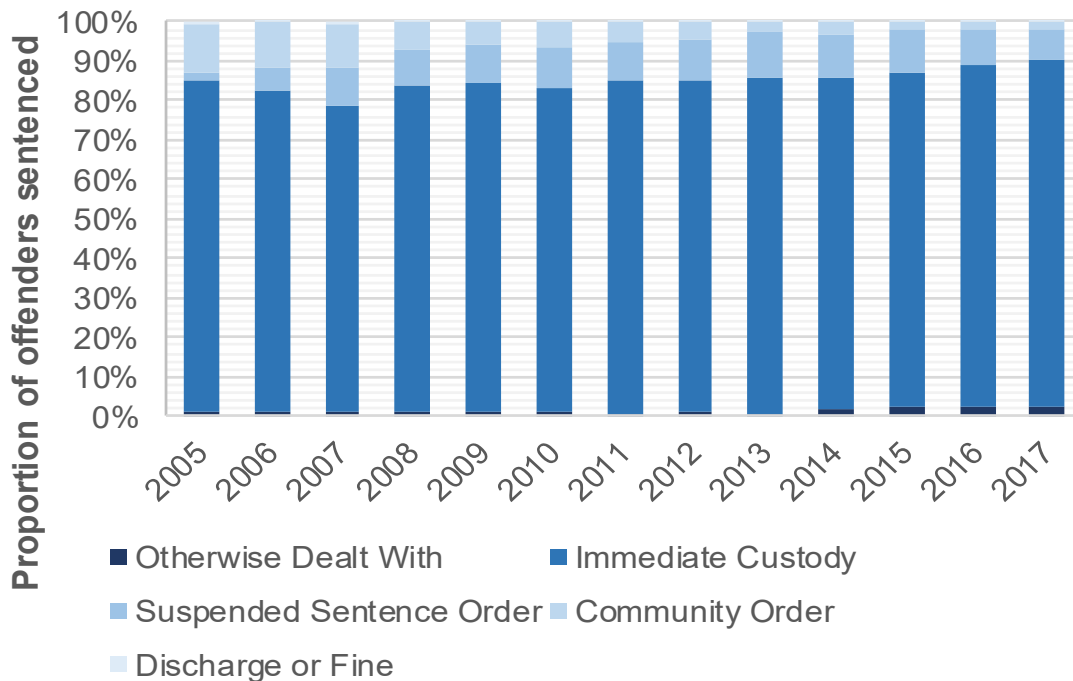
¹⁴ This is a database of judges who have agreed to be approached by the Sentencing Council to take part in research from time to time. It is acknowledged that selecting participants from a pool of willing judges might skew the sample in favour of judges who are well-disposed towards the Sentencing Council and/or are very used to our research. However, it should be noted that the pool is very large, including around one sixth of all Crown Court judges, so pool members are generally interviewed infrequently and so are not likely to be particularly familiar with our research. Moreover, a second sampling method was used (asking for volunteers via court contacts) and this should also help offset any bias in the sample.

¹⁵ The software package NVivo was used for this purpose.

Overall findings

The CPD analysis for all robbery offences¹⁶ showed that the vast majority of sentences imposed result in immediate custody. While this has been the case for the last 12 years, the percentage of immediate custodial sentences has been increasing since 2012, standing at 88 per cent in 2017. Over time, the proportion of offenders who received a community sentence has decreased and while the proportion of offenders receiving suspended sentences increased from 2005 to 2012, it stayed roughly the same between 2012 to 2015, and declined in 2016 and 2017. This finding corresponds with general trends in sentencing, whereby there was a decrease in community orders and an increase in suspended sentence orders between 2005 and 2015.¹⁷ Discharges and fines are rarely used for robbery.

Figure 1: Proportion of offenders sentenced for robbery, by year and disposal type 2005-17



The time series method allows us to disentangle the effect of pre-existing trends in sentencing from the effect of the introduction of the new guideline. As can be seen in figure 2, sentencing severity for robbery had been increasingly steadily from 2007 until the point of guideline implementation. It is difficult to say with confidence why this was, but CCSS data suggests that the offending coming before the courts may have become more serious during this period: for street or less sophisticated commercial robberies (the most common type), the proportion of offenders categorised at the lowest level of seriousness decreased in the years before the

¹⁶ In the CPD, robbery offences are not further sub-divided by type. Data are only available for all robbery offences.

¹⁷ Table Q5.1, *Criminal Justice Statistics Quarterly Update to December 2015*, Ministry of Justice, <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2015>

guideline came into force (from 31 per cent in 2012 to 27 per cent in 2014), while the proportion in the middle category of seriousness increased over this period (from 59 per cent to 64 per cent).¹⁸ In addition, the average number of aggravating factors taken into account in sentencing increased over this period (from an average of 2.8 aggravating factors taken into account in sentencing in 2012 to 2.9 in 2014), while the average number of mitigating factors taken into account decreased (from 1.7 to 1.5).¹⁹

The adjusted ACSL²⁰ increased significantly between the 12 months before and 12 months after the guideline came into force: from 5 years to 5 years and 4 months. There was a similarly statistically significant increase in the severity of sentences between these two time-periods. The time series graph (figure 2) illustrates this: at the point of guideline implementation in April 2016 there was a step change upwards, with a sharp rise following guideline implementation, which is beyond the upper estimate of where we would expect sentencing to fall had the guideline not been introduced (see the dotted line labelled 'forecast upper confidence limit', or 'forecast UCL').²¹ This suggests that sentence severity has increased beyond the level expected had the pre-guideline trend upwards merely continued, and so this rise is likely to have been attributable to the new guideline. As noted above, the resource assessment anticipated that there would be no impact on sentences, but the evidence suggests that the guideline has increased sentencing severity (for further detail on the time series method, see annex A).

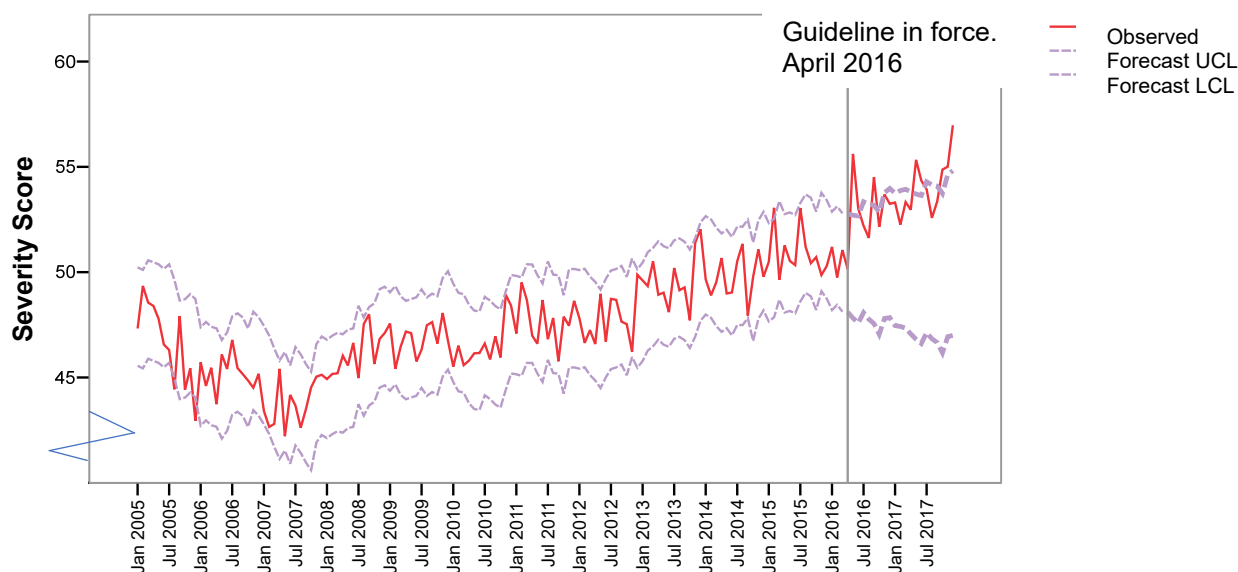
¹⁸ The analysis is based on the CCSS forms for adult offenders, and excludes records where the level of seriousness was missing. Where two boxes were ticked, for example the higher and middle levels of seriousness, the highest level of seriousness has been assumed to be the level of seriousness for the offender. Although the CCSS ran from late 2010, the 2012 dataset is the earliest one we can confidently use for this particular analysis.

¹⁹ The averages calculated represent the average number of factors ticked, where these factors were in the list presented on the CCSS form (there were 10 aggravating factors and 14 mitigating factors listed on the form). The CCSS form also had free text options for the sentencer to provide information about any other aggravating or mitigating factors taken into account when sentencing. These other factors, which were not listed on the form, have not been included in this analysis.

²⁰ This is ACSL as estimated pre-guilty plea, derived from post guilty plea data.

²¹ On the graphs the dotted lines show the confidence interval (also called the margin of error) of the estimate. At the 95 per cent confidence level, over many repeats of a survey under the same conditions, it is expected that the confidence interval would contain the true population value 95 times out of 100.

Figure 2: Sentencing severity time series analysis for all robbery offences²²



Since street/less sophisticated commercial robberies constitute around 85 per cent of robberies, any changes in the way this type of robbery was sentenced after the guideline took effect is likely to be driving the overall trend. As discussed in detail below, the survey data suggests that this was most likely due to the high proportion of cases falling into culpability A and the new guideline’s treatment of weapons.

The CCSS and survey data also suggest other possible reasons which may have contributed to the uplift in sentencing. For dwelling and professionally planned commercial robbery, there was a tendency not only for culpability to fall into A, but also for harm to fall into category 1, with 30 per cent and 56 per cent²³ of dwelling and professionally planned commercial robbery cases respectively being placed in this category (compared to only 10 per cent for street/less sophisticated commercial). As discussed below, this appeared to be linked to the high incidence of what was deemed to be ‘serious’ psychological harm. This was a new factor in the Sentencing Council guideline, present in around of third of dwelling and professionally planned commercial robberies.

While step one of the guideline is likely to have the highest influence on sentencing patterns, changes in the use of aggravating and mitigating factors may also have an effect. For example, for street/less sophisticated commercial robbery, the proportion of cases in which aggravating factors *only*, or both aggravating *and* mitigating factors were taken into account were similar at both times (31 per cent and 26 per cent; and 64 per cent and 65 per cent, respectively). However, the proportion of cases in which

²² The number on the vertical axes is the sentencing severity score. UCL refers to the upper 95% confidence interval limit. LCL refers to the lower 95% confidence interval limit.

²³ These percentages should be treated with caution because the sample size for dwelling robbery was low (n=80) and for professionally planned commercial, it was very low (n = 40). See annex B for tables.

any mitigating factors were taken into account fell post-guideline (from 73 per cent to 65 per cent), which may also help to account for the increase in sentencing severity. One reason for this decrease in the use of mitigating factors may have been the fact that some offence specific mitigating factors which were listed in the SGC guideline are not present in the Sentencing Council guideline at step one or step two. These included 'Peripheral involvement', 'Voluntary return of property taken', 'Unplanned/opportunistic' and 'Peer group pressure'.

During interviews, many judges commented positively on the guideline, considering it to be helpful, straightforward and a considerable improvement on the previous guidance. Judges were supportive of the recognition and categorisation of the different robbery types in the new guideline:

It's far better than the original robbery guideline, which was too limited in its outlook. It didn't deal really with professionally planned commercial robberies, and it didn't really deal with ... robberies in dwelling houses.

In particular, the new guideline's explicit recognition of dwelling and professionally planned robbery was held to be a significant improvement. Whilst some judges felt that the guideline had increased sentence levels, those that commented to this effect were supportive of this increase. Judges were also supportive of the guideline ranges, although some felt that the guideline could still lead to sentences which were too low. Judges' comments and performance on a scenario-based sentencing exercise revealed that they used the guideline in a consistent manner and had no major difficulties with its interpretation and implementation.

Offence specific findings

Analyses of CCSS data from before the guideline and new data collected post guideline implementation were conducted separately for the three offences of street/less sophisticated commercial robbery, dwelling robbery, and professionally planned commercial robbery. The results of this quantitative analysis and some of the offence specific qualitative findings from interviews with Crown Court judges are discussed below.

Street/less sophisticated commercial robbery

The quantitative data indicated that the sentencing severity for street and less sophisticated commercial robbery increased significantly after the introduction of the new guideline, with the adjusted ACSL for this offence increasing from 4 years and 3 months in 2013/14 to 4 years and 11 months in 2016/17.²⁴ This concurred with judges' subjective perceptions: in interviews, judges commented that the new guideline involved an uplift in sentencing in relation to street robbery. This increase was generally considered to be appropriate, and judges were broadly content with

²⁴ While the finding that the ACSL has increased is supported by the courts data, these estimated ACSL figures should be treated with caution, because overall, sentence lengths from the CCSS and data collection were found to be higher than sentence lengths in the courts data (on average (mean) by two months for the CCSS data and by seven months for the 2016/17 data collection), and therefore the analysis may be biased towards higher values.

the sentencing ranges in the guideline. The one exception to this was that a few judges raised doubts regarding the range for a robbery which falls into the lowest category of both culpability and harm (offences falling into culpability C, harm 3), with some surprise being expressed with regards to the potential of a non-custodial sentence for street and less sophisticated commercial robbery.

The SGC guideline for street/less sophisticated commercial robbery had three categories of seriousness with associated sentencing starting points and ranges, whereas the Sentencing Council guideline has nine categories (and nine starting points and ranges). The only categories which are completely comparable are the highest level of seriousness (SGC guideline) and culpability A, harm 1 (SC guideline), both of which have starting points of eight years' custody with a range of 7 to 12 years. As shown in figures 3 and 4, the pre-guideline data showed eight per cent of cases were placed in the top category of seriousness by judges, a very similar proportion to the seven per cent of cases which were placed in culpability A and harm 1 under the new guideline. However, further analysis shows that while the adjusted ACSL for offenders categorised at the highest level of seriousness in the SGC guideline was 6 years 2 months, the adjusted ACSL for offenders categorised at culpability A, harm 1 in the new guideline was 8 years 9 months. This suggests that some of the uplift in sentencing may be due to increases in sentencing the top of the sentencing spectrum.

Figures 3 and 4 show the proportion of offenders falling into the harm and culpability levels pre- and post-guideline. If we examine how offenders were categorised post-guideline, we can see that whilst judges placed only 10 per cent of offenders sentenced to street/less sophisticated commercial robbery in the highest category of harm (1), they placed 44 per cent in the highest category of culpability, A (see figure 4). A categorisation of culpability A takes the judge to a starting point of at least four years, and so one reason for the uplift in sentencing may have been the high proportion of cases falling into this relatively high sentencing bracket.

Figure 3: Proportion of cases categorised across the three levels of seriousness in the pre-guideline (under the SGC *Street/Less Sophisticated Commercial* guideline)²⁵

Seriousness	Frequency
1 (most)	294 (8%)
2	2250 (63%)
3 (least)	1031 (29%)
TOTAL	3,575 ²⁶

²⁵ Source: CCSS for 2013 and 2014 combined, n = 3,575. Note there were 408 cases in the dataset where this information was missing.

²⁶ Source: 2016/17 data collection exercise, n = 412.

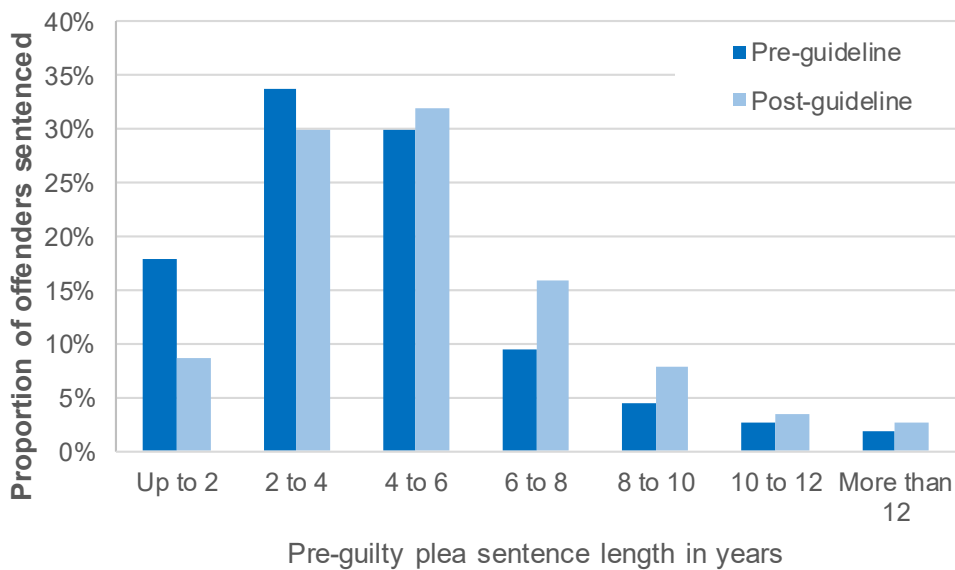
Figure 4: Proportion of cases categorised across the three levels of seriousness post-guideline (with levels as specified in the Sentencing Council *Street/Less Sophisticated Commercial* guideline)²⁷

Category	Culpability A	Culpability B	Culpability C	TOTAL
Harm 1	30 (7%)	8 (2%)	1 (0%)	39 (10%)
Harm 2	116 (28%)	118 (28%)	22 (5%)	256 (62%)
Harm 3	37 (9%)	42 (10%)	38 (9%)	117 (28%)
TOTAL	183 (44%)	168 (40%)	61 (15%)	412 (100%)

In support of this interpretation, figure 5 shows that after the new guideline was introduced there was a notable increase in the proportion of offenders who received immediate custodial sentences of *over* four years and a notable decrease in the proportion receiving sentences of *under* four years (prior to any reduction for guilty plea)²⁸. In particular, there was an increase of six percentage points in sentences of six to eight years, and three percentage points in sentences of eight to ten years, suggesting that some of the increase to sentence levels was at the highest levels of offending. Conversely, there was a decrease of nine percentage points in immediate custodial sentences of up to two years, suggesting that some of the increase in sentence levels was at the lowest levels of offending. Interestingly in this context, at interview a significant number of judges expressed the opinion that the new guideline ranges produced starting points that were perceived to be low, especially for a robbery at the lowest level of culpability and harm, which, in the case of street robbery, encompasses a community order. This difference in judges' perceptions compared with sentencing behaviour may suggest that judges are not seeing cases that warrant the lowest starting points in the guideline.

²⁷ Source: CCSS for 2013 and 2014 combined, n = 3,385 and 2016/17 data collection exercise, n = 418.

Figure 5: Pre-guilty plea sentence lengths for offenders sentenced to immediate custody for a street/less sophisticated commercial robbery, comparing pre and post-guideline²⁹



With respect to the pre-guideline data, the regression analysis showed that the use of a weapon had the greatest impact on sentencing, adding 15 months to the ACSL. Two aggravating factors, ‘Wearing a disguise’ and ‘Value of items taken’ were also found to have a statistically significant impact on sentencing, adding 13 and 12 months to the ACSL respectively. After the new guideline had come into force, the regression analysis showed that the new factors in culpability A relating to weapons³⁰ had the greatest impact on sentencing: in particular, production of a firearm and production of a bladed article to threaten violence were associated with an increase of 25 months and 18 months to the ACSL, respectively.³¹ ‘Production of a bladed article’ was ticked on a quarter of all survey forms, which indicates that it was not only an influential factor but also one which was frequently used. This suggests that it is likely to have been a major contributory factor to the uplift in sentencing, both by virtue of the fact that it would take offenders into culpability A, and because the presence of this factor was associated with a significant uplift in sentence in its own right.

The other factors that had a statistically significant impact on sentencing included ‘Use of a weapon to inflict violence’ (in culpability A) and ‘Production of a weapon other than a bladed article or firearm or imitation firearm to threaten violence’ (in

²⁹ Sentence length intervals include the lower bound, but do not include the upper bound sentence length. For example, the category ‘up to 2’ includes sentence lengths less than (but not equal to) 2 years, and ‘2 to 4’ includes sentence lengths of two years, and up to four years (but not including 4 years).

³⁰ In the SGC guideline, use of a weapon placed an offender in the highest category of seriousness, whereas production of a weapon and use to threaten placed it in the middle category. The inclusion of production of a bladed article, firearm or imitation firearm in culpability A was therefore an important change in the Sentencing Council guideline.

³¹ The factor in the guideline is, ‘Production of a bladed article or firearm or imitation firearm to threaten violence’, but the 2016/17 survey split out production of a bladed article from production of a firearm, hence the two weapons are discussed separately.

culpability B) which added 11 months to the ACSL in each case. Furthermore, the use of a weapon was commonly cited by the judges as being central to the sentence: out of approximately 500 cases of street/less sophisticated robbery, factors relating to weapons were spontaneously cited by judges as being the ‘single most important factor’ in their sentencing decision in around 17 per cent of cases.³² Answers to the question made reference to weapons either generically or by specifying the weapon (gun; firearm; knife; hammer, meat cleaver, etc.). These findings are consistent with the expectation that weapons, particularly knives and guns, would result in the toughest sentences being imposed, which was what the new guideline was designed to ensure. However, they also suggest that the inclusion of this specific set of factors relating to weapons may have been a key driver of the unexpected increase in sentencing since the guideline’s implementation.

At interview, judges suggested that the production and use of a weapon had been given appropriate weight in the guideline, and they generally found the guidance relating to weapons clear and useful. As part of the qualitative interviews, judges were asked to sentence a street/less sophisticated commercial robbery, and judges consistently and appropriately categorised the offence as culpability A on the basis of production of bladed article in this scenario. Indeed, all of the judges placed the case within the expected category (A2), which suggests that the guideline was being used consistently.

However, at interview some discrepancy of opinion emerged with regard to the distinction between the production of a bladed weapon and firearm (including imitation) to threaten violence (which would lead to culpability A) and the production of another type of weapon (which would lead to culpability B). Some judges approved of this distinction due to the level of fear and terror that such weapons instil: “because, more often than not, it’s the threat of what might happen that is the really frightening thing for the victim”. On the other hand, a couple of judges queried whether the elevation of knives and guns was justified, implying that use of any weapon should uniformly lead to a higher classification of culpability compared to mere production:

It feels wrong ... that you should have high culpability whether he’s actually fired the gun, or stabbed someone and caused serious injury; or on the other hand, has brandished a gun, but it’s unloaded, or brandished knife, but not actually struck out with it.

Overall, the quantitative and qualitative data indicate that that the introduction of the culpability factor, ‘Production of a bladed article or firearm or imitation firearm to threaten violence’ is contributing to the increase in sentencing levels, but there may be some disagreement in opinion (if not in practice) as to whether this should be the case.

In the regression, the new step one factor of ‘Serious physical and/or psychological harm’ was associated with an addition of 18 months to the ACSL. This suggests that this new factor, too, may have played some part in the uplift, although the incidence

³² At the end of the survey form, judges were asked to write what they saw as the ‘single most important factor’ affecting their sentence in an open text box. Most judges completed this box for every sentence they passed (464). However, not all identified a single factor, despite the wording of the question, but provided a line recording what they identified the most important factors to be.

of serious psychological harm was far lower in this type of robbery compared to dwelling and professionally planned commercial.

Turning to step two factors, the targeting of a vulnerable victim was identified as an aggravating factor in 30 per cent of street/less sophisticated commercial robbery cases and as such, was the fourth most commonly cited aggravating factor after previous convictions, location and timing of the offence. Furthermore, vulnerability was the second most commonly cited 'single most important factor' overall, after the use of a weapon, being mentioned spontaneously in around 10 per cent of cases. Significantly, however, this was not limited to the aggravating factor of 'Victim is targeted due to a vulnerability (or perceived vulnerability)', but also included the victim's vulnerability more generally, even though the guideline does not contain a factor on general vulnerability. Targeting a vulnerable victim was included at step two of the new guideline because early testing of the draft guideline suggested that the inclusion of this factor at step one held the potential to increase sentence levels. However, in interviews, a few judges considered that targeting a vulnerable victim, or the vulnerability of the victim in more general terms, should be taken into account earlier in the process when determining the level of culpability. Whilst this research suggested that most judges do consider vulnerability at stage two, as the new guideline requires, it also suggested that they place emphasis upon it. This was evident in the sentencing of the scenario, in which most judges identified the taxi-driver victim as vulnerable due to his job:

They're there at all times at night, ... they could be picking up all sorts of customers, they've got money. ... they're on their own. They haven't got anywhere else to go; they have to make a living. ... Even if they're 45 years old, male and fit – I think they're vulnerable.

The application of this aggravating factor ('Victim is targeted due to a vulnerability (or a perceived vulnerability)') to the taxi driving scenario also appeared to result in some inconsistency in approach, with some judges citing it, others not, although there was consistency in the final indicated sentence.

The targeting of goods of high value is an aggravating factor in the *Street and Less Sophisticated Commercial* guideline, and this was present in only 11 per cent of cases. At interview, judges generally felt that robbery is first and foremost a crime of violence, with the value of goods stolen being of secondary importance to other factors, such as production and use of a weapon, which typify violent crime. Judges were therefore generally supportive of the placing of value at step two in this particular guideline:

A street robbery is serious because you are having your stuff taken under threat or actual use of violence, and that is corrosive to our sense of security in society – and that makes it serious, whether it they take £5 or £50.

Lastly, turning to factors lessening the seriousness of street/less sophisticated commercial robbery, the factor associated with the highest decrease in sentence, where present, was age. Age was cited in 31 per cent of 2013/14 cases and was associated with a decrease in sentence of eight months. In the 2016/17 data relating to the new guideline, the mitigating factor of 'Age or lack of maturity where it affects the responsibility of the offender' was cited less often (in 19 per cent of cases) but, where present, was associated with a decrease in sentence of one year.

Robbery of a dwelling

Quantitative analysis showed that the adjusted ACSL for dwelling robberies increased substantially following implementation of the new guideline, from 7 years in 2013/14 to 8 years and 9 months in 2016/17.³³

Pre-guideline, the regression analysis showed that 'Use of a weapon' had the greatest impact on sentencing of dwelling cases, adding 19 months to the ACSL. Other statistically significant factors which had the greatest impact on sentencing were 'Degree of force or violence' and 'Wearing a disguise', which added 15 months and 14 months respectively, and are similar to the findings for street/less sophisticated commercial robbery, as detailed above. The number of cases of dwelling robbery in the post-guideline data was too small to conduct a reliable regression analysis. However, the results from the 'street' analysis may suggest that use of and production of a weapon, including a bladed article, may have pushed up sentencing for this offence too. Indeed, the production of a bladed article to threaten violence was ticked as present in 40 per cent of the 90 cases in the data, and 'Use of a weapon to inflict violence' was present in 23 per cent of cases.

It is also interesting to note that the new factor relating to psychological harm was identified in the quantitative data as being 'serious' in over a third of cases (34 per cent), with only 22 per cent of cases indicated as minimal psychological harm and 42 per cent falling between serious and minimal.³⁴ In contrast, physical harm was only cited as serious in 11 per cent of cases. This perhaps reflects the view expressed by a small number of judges during interviews that harm is inherent in a dwelling robbery because of the expectation of safety inside the home which is seriously undermined by an offence committed there:

I think being robbed in your home is more serious than being robbed in the street, where at least there is an acceptance that you might be subject to a degree of vulnerability – but in your home, you expect to be safe.

Given the frequency with which psychological harm was observed, the explicit recognition of psychological harm as a discrete factor in the new guideline may therefore have contributed to the increase in sentencing for this offence.

The outcome of the sentencing exercise in interview demonstrated that judges applied the guideline for dwelling robbery fairly consistently, with over half categorising the scenario as falling within category 2A of the guideline, as expected, and all judges reaching end sentences of between 4 and 6 years. Most judges, although not all, considered that the level of force used by the offender amounted to 'very significant force', and identified this factor (amongst others) as requiring the offence to be categorised as high culpability. It might be expected that 'Very

³³ While the finding that the ACSL has increased is supported by the courts data, these estimated ACSL figures should be treated with caution, because sentence lengths from the CCSS and data collection were found to be higher than sentence lengths in the courts data (on average by two months for the CCSS data and by 6 months for the 2016/17 data collection), and therefore the analysis may be biased towards higher values.

³⁴ Although in the robbery guideline both psychological and physical harm are integrated into one factor, on the data collection form the two types of harm were split out, enabling us to separate the two for the purpose of analysis.

significant' force would usually result in significant physical harm, but this was not viewed as the case in either this scenario or the street/less sophisticated commercial one. This, however, suggests that the guideline is working as intended as high culpability was not highly interlinked to the existence of significant harm, so that the one was not seen as necessitating the other, but rather the dimensions of harm and culpability were fully separate. In contrast to the 'street' scenario, where there was variability over whether the taxi driver was seen as targeted because of his vulnerability, all judges who reviewed the 'dwelling' scenario identified 'Victim is targeted due to a vulnerability (or perceived vulnerability)' (a man in his 50s with mobility problems as a result of a stroke) as being an aggravating factor. Many identified the victim's vulnerability as being the 'single most important factor'. Indeed, a few judges explicitly commented that the vulnerability of the victim was a factor (among others)³⁵ in their decision to categorise the case as culpability level A, even though victim vulnerability is not a factor at step one. One judge said: "it's not an aggravating factor, it's the thing that should set the standard for the sentence".

Overall, in interview, judges noted that it was important to have specific guidance on dwelling robbery. Some judges noted that previously, in lieu of guidance, they would often consult the guideline on aggravated burglary.³⁶ It was perceived that the new dwelling robbery guideline produced outcomes that were broadly in line with sentences for aggravated burglary: "there's much more consistency between aggravated burglary and robbery in the home [under the new guideline]. I think that was helpful as there was a bit of a dichotomy there. I think they've brought greater consistency ...". However, a few judges thought that the starting point for some robberies of a dwelling involving 'gangs' remained a little low.

Professionally planned commercial robbery

It is not possible to compare estimates of ACSL for professionally planned commercial robbery pre and post the introduction of the Sentencing Council guideline, or to conduct regression analysis, because there were too few cases of this type in the 2016/17 data to produce an accurate post-guideline estimate. However, from the survey data it is possible to compare how frequently factors were taken into account by judges in sentencing. For professionally planned commercial robbery, the most frequently cited factors by judges before the guideline were: 'Use of a weapon' (51 per cent), 'Targeting of a vulnerable victim' (42 per cent), 'Member of a group or gang' (40 per cent) and 'Wearing a disguise' (36 per cent). The factors which were associated with the greatest impact on sentencing, pre-guideline were 'Use of a weapon', which added 31 months to ACSL, as well as 'Wearing a disguise', adding 24 months.

³⁵ Other factors included: 'Production of a bladed article or firearm or imitation firearm to threaten violence', 'Use of a weapon to inflict violence' and 'Use of very significant force in the commission of the offence'.

³⁶ Aggravated burglary is committed when an offender enters a building as a trespasser (i.e. without permission) and steals or attempts to steal (or commits grievous bodily harm) and has with them a weapon or explosive(s). Dwelling robbery is committed when an offender steals and uses force or threats of force to do so in a dwelling.

Similar factors were cited as important after the guideline: Production of bladed article to threaten violence³⁷ (48 per cent), 'Use of very significant force in the commission of the offence' (27 per cent), 'Attempt to conceal identity (for example, wearing a balaclava or hood' (79 per cent) and 'Attempts to conceal/dispose of evidence' (41 per cent). Psychological harm was ticked as 'serious' in a third of cases (33 per cent), with only 17 per cent of cases indicated as minimal psychological harm. However, physical harm was cited as serious in 27 per cent of cases and minimal in 42 per cent. As with dwelling robberies, it may be that there is an inherent assumption that psychological harm is caused because of the nature of the offence, hence a lower threshold may be required to push this type of case into 'serious' psychological harm.

The sentencing scenarios discussed by the judges did not include an example of a professionally planned commercial robbery but some judges who had experience of sentencing such offences, which was uncommon since these offences are low in volume, drew on cases and emphasised the weapons and the terror caused. Concern was expressed that the previous guidance led to sentences which were too low, particularly in cases which did *not* involve the use of a firearm. They felt this omission had now been rectified in the new guideline. It was also recognised that in professionally planned robberies, high value of the goods targeted or obtained could and should increase the sentence. At the same time, it was noted that "high value robberies are quite rare". However, as discussed earlier, many judges noted that robbery was first and foremost a crime of violence. As such, violence would tend to be the key determinative factor, as opposed to the value of the goods.³⁸

Conclusion

This assessment of the impact and implementation of the Sentencing Council's *Robbery Definitive Guideline* indicated that the guideline led to an unanticipated increase in sentence severity, with sentence levels increasing above the upper boundary of our estimate of what the sentencing trend would have looked like, had the guideline not been introduced. Analysis of survey data suggests that a key reason for this increase may have been the fact that a high proportion of cases fell into culpability A in the new guideline, most commonly as a result of a bladed article being produced to threaten violence. This factor had a statistically significant impact on sentencing, its presence adding 18 months to the ACSL for street/less sophisticated commercial cases. Other new culpability factors relating to weapons, though less prevalent, were also shown to increase sentence severity. The presence of the new factor relating to psychological harm may also have had a role in increasing sentencing, particularly for the less common types of robbery, dwelling

³⁷ The factor in the guideline is, '*Production of a bladed article or firearm or imitation firearm to threaten violence*', but the 2016/17 survey split out production of a bladed article from production of a firearm, hence the two weapons are discussed separately.

and professionally planned commercial, in which psychological harm was often deemed serious.

Qualitative research suggested that the guideline has met with approval from judges, who generally agreed with key features of the guideline, including the treatment of weapons and value of the goods targeted or obtained. Judges were asked to carry out a scenario based sentencing exercise at interview and the results of this showed consistency in how the guideline was interpreted and used. There therefore appear to be no significant implementation issues with the guideline. Some judges felt that the guideline had increased sentences, but they were supportive of this increase, which implies a slight divergence from the perspective of the Council, since the guideline had the stated aim of not changing sentencing severity, albeit that this prediction was based on limited data. In the light of this analysis, the Council will revisit the guideline and consider making changes to it in due course.

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Annexes

A. Quantitative method: technical annex

Analysis of trends in outcomes and ACSLs do not take account of 'normal' fluctuations in the average severity of sentencing over time due to changes in sentencing practice which are unrelated to guidelines – e.g. the changing number and seriousness of cases coming before the courts, changes in charging practice, etc. The data was therefore also used to conduct a time series analysis using data from the CPD from 2005 to 2017. Time series analysis allowed us to distinguish between these 'normal' fluctuations in sentencing and changes that could reasonably be attributed to the guideline, by taking historic trends into account and using these to predict what future values might have been in the absence of the guideline. These time series models allowed us to forecast likely sentencing outcomes in the absence of the guideline and then compare this to what did happen, by seeing if the actual trend in sentence severity was within the 'forecasted severity region' in the model. If average severity stayed within the 'forecasted severity region' when the guideline came into force, then this suggests that the guideline did not have an impact on average sentences, whereas if average severity went outside of this region, then the guideline may have caused changes to average sentences. Statistical software was used to determine the best fitting time series model for the dependent variable of sentencing severity. These models were then used to produce forecasts for sentencing severity. The time series model produced for robbery shows a forecast which becomes more uncertain over time, due to the previous volatility in the data (average sentencing severity for robbery both increased and decreased during certain points in the decade before the new guideline came into force). The model shows that, in the absence of the guideline, average severity might have increased or decreased within the confidence limits.

The regressions were conducted with simultaneous entry of predictors. Due to the large number of aggravating, mitigating, harm and culpability factors, it was decided to enter only those factors that reached a 5 per cent frequency threshold for each offence. Where there were smaller samples, this cut-off was raised to a frequency of 10 cases in which the factor was cited as being relevant to sentencing, regardless of percentage. Doing this also ensured that the analyses would detect at least a medium effect in terms of the ratio of number of predictors/number of cases.

B. Comparison of categorisation pre and post Sentencing Council guideline for dwelling and professionally planned commercial robbery

Dwelling

Seriousness (2013/14)	Frequency
1 (most)	90 (30.3%)
2	164 (55.2%)
3 (least)	43 (14.5%)
TOTAL	297

Category (2016/17)	Culpability A	Culpability B	Culpability C	TOTAL
Harm 1	22	2	0	24 (30.0%)
Harm 2	17	21	3	41 (51.2%)
Harm 3	4	7	4	15 (18.8%)
TOTAL	43 (53.8%)	30 (37.5%)	7 (8.8%)	80 (100%)

Professionally planned commercial

Seriousness (2013/14)	Frequency
1 (most)	14 (20.9%)
2	37 (55.2%)
3 (least)	16 (23.9%)
TOTAL	67 (100%)

Category (2016/17)	Culpability A	Culpability B	Culpability C	TOTAL
Harm 1	18	4	1	23 (56.1%)
Harm 2	12	5	0	17 (41.5%)
Harm 3	0	1	0	1 (2.4%)
TOTAL	30 (73.2%)	10 (24.4%)	1 (2.4%)	41 (100%)

Annex C: Sentencing exercises

Street/less sophisticated commercial scenario

The offender, H aged 25, was on bail for an offence of ABH. At 6am he picked up a taxi and asked the driver to take him to a shop where he could buy cigarettes. He bought the cigarettes and then continued the journey in the taxi. At the end of the journey he was charged £10, but instead of paying the fare he pulled a knife, grabbed the taxi driver around the neck, pushed the knife under his chin, and demanded money. The driver instinctively put his hand up and suffered a cut to his thumb and his finger. The injury was not serious but was painful. H then head butted the driver three times, causing a swelling to the nose, pain, but no permanent bony injury. H took £70 in cash and the PDA (a device used for guiding the driver to his next job) and searched the taxi before leaving.

He was subsequently identified through the phone he used to book the taxi and CCTV from the shop, which was confirmed by the victim picking him out at an identity parade. He pleaded guilty.

Dwelling scenario

The victim was a man in his fifties who had suffered a stroke and had mobility difficulties. He had previously met S, the offender. The victim was at home and heard a knock on his window. S was outside and asked to come in to use the toilet. He let her in through the front door. She went into the bathroom and when she came out, the victim asked her to leave. She did not leave and when the victim remonstrated with her, she picked up a knife from the kitchen. She said that she wanted his money and when he put up some resistance the knife was put to his throat so as to reinforce the threat. She dragged him to the bedroom and made threats to kill him unless he complied with the request for money. The victim had taken £50 out of his bank account earlier that day and he gave that to S. She then left.

The injuries he sustained were minor but he speaks in a victim personal statement of feeling depressed since the incident, having trouble sleeping and suffering nightmares about the incident.

S has no previous convictions. A pre-sentence report stated that the offences were committed whilst S was under the influence of class A drugs. The report indicated that adverse personal events, including a close bereavement and miscarriage, led to her reverting to the use of drugs at the time of the offence. Whilst in custody she had become drug-free through detoxing. She has a young child, now aged six.