

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