

Sentencing Council meeting: 25 January 2019
Paper number: SC(19)JAN04 – Arson & Criminal Damage
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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

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.

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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.

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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:

- 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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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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