

Sentencing Council meeting:
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SC(19)JAN05 – Public Order
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1 ISSUE

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

2 RECOMMENDATION

2.1 The Council is asked to;

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

3 CONSIDERATION

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

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

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

3.4 Annex B includes the draft guidelines which were subject to consultation. A summary of decisions made in the development of each guideline is included in this paper to assist members not present during the development stage.

Riot

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

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

Culpability factors

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

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

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

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

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

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

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

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

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

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

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

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

Harm factors

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

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

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

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

Sentence levels

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

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

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

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

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

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

Aggravating and Mitigating factors

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

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

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

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

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

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

Additional guidance – riot related offending

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

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

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

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

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

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

Violent Disorder

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

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

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

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

Culpability factors

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

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

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

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

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

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

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

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

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

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

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

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

Culpability A factors include 'targeting of individual(s) by a group'. We presume this means targeting of a 'specific' individual or group, ie not an individual chosen at random but a specifically targeted individual, so it might be clearer if 'specific' was added.- Magistrates Association

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

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

Harm factors

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

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

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

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

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

Sentence levels

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

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

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

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

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

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

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

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

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

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

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

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

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

Aggravating and Mitigating factors

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

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

4 ISSUES

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

5 RISKS

5.1 The draft resource assessment did not anticipate any inflationary or deflationary impacts of the guideline, although it is more difficult to assess sentencing behaviour in the absence of any existing guidelines for these offences, as pre and post factor application cannot be considered. Any revisions to the draft guidelines will be considered as part of the final resource assessment to assess whether an impact on current sentence practice is anticipated.

Public Order Offences Crown Court Judges Road Testing

Introduction

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

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

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

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

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

Key findings

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

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

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

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

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

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

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

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

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

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

Annex C: Draft guidelines

Riot Public Order Act 1986 (section 1)

Triable only on indictment
Maximum: 10 years' custody

Offence range: 3 years' – 9 years' custody

This is a violent specified offence for the purposes of section 226A of the Criminal Justice Act 2003

STEP ONE**Determining the offence category**

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

Culpability demonstrated by one or more of the following:

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

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

Harm

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

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

STEP TWO**Starting point and category range**

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

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

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

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

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

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

Factors increasing seriousness***Statutory aggravating factors:***

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

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

Offence committed whilst on bail

Other aggravating factors:

Active and persistent participant

Incitement of others

Offender masked or disguised to evade detection

Incident occurred in busy public area

Took steps to prevent emergency services from carrying out their duties

Offender used weapon

Offender threw missiles/objects

Use of significant physical violence

Injury to animal carrying out public duty

Actively recruited other participants

Possession of weapon or article intended to injure

Vulnerable persons or children present during incident

Commission of offence whilst under the influence of alcohol or drugs

Ignored warnings or exclusion notices

Offence committed while on licence or subject to post sentence supervision

History of failing to comply with court orders

Factors reducing seriousness or reflecting personal mitigation

Low level involvement

No previous convictions

Remorse

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

Mental disorder or learning disability where linked to commission of offence

Previous good character

Sole or primary carer for dependent relatives

Other offences committed within incidents of riot

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

STEP THREE

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

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

STEP FOUR

Reduction for guilty pleas

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

STEP FIVE

Dangerousness

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose an extended sentence (section 226A).

STEP SIX

Totality principle

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

STEP SEVEN

Compensation and ancillary orders

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

STEP EIGHT

Reasons

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

STEP NINE

Consideration for time spent on bail

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

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Violent disorder Public Order Act 1986 (section 2)

Triable either way
Maximum: 5 years' custody

Offence range: Community order – 4 years' custody

This is a violent specified offence for the purposes of section 226A of the Criminal Justice Act 2003

STEP ONE**Determining the offence category**

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

Culpability demonstrated by one or more of the following

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

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

Harm

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

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

STEP TWO**Starting point and category range**

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

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

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

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

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

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

Factors increasing seriousness***Statutory aggravating factors:***

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

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

Offence committed whilst on bail

Other aggravating factors:

Active and persistent participant

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

Incitement of others

Offender masked or disguised to evade detection

Incident occurred in busy public area

Offender used weapon

Offender threw missiles/objects

Use of significant physical violence

Injury to animal carrying out public duty

Possession of weapon or article intended to injure

Incident occurred in victim's home

Vulnerable persons or children present during incident

Commission of offence whilst under the influence of alcohol or drugs

History of failing to comply with court orders

Offence committed while on licence or subject to post sentence supervision

Factors reducing seriousness or reflecting personal mitigation

No previous convictions

Evidence of steps initially taken to defuse incident

Low level involvement

Minor/peripheral role

Remorse

Previous good character

Sole or primary carer for dependent relatives

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

Mental disorder or learning disability where linked to commission of offence

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

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

STEP FOUR**Reduction for guilty pleas**

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

STEP FIVE**Dangerousness**

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose an extended sentence (section 226A).

STEP SIX**Totality principle**

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

STEP SEVEN**Compensation and ancillary orders**

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

STEP EIGHT**Reasons**

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

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

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

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