

Sentencing Council meeting:
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Annex C – Public Order Offences
Resource Impact
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Lead Council members:
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1 ISSUE

1.1 This paper details the expected resource impact of the definitive public order guideline, using the guidelines agreed post consultation at January - May Council meetings. This has drawn on analysis of updated sentencing statistics, results from a road testing exercise and analysis of Crown Court sentencing transcripts.

2 RECOMMENDATION

2.1 That the Council:

- considers the resource impact for these offences; and
- confirms it is content to sign off these guidelines bearing in mind the expected resource impact.

3 CONSIDERATION

3.1 A summary of the expected impact of the guidelines is provided below for each offence.

Riot

3.2 Riot is a very low volume offence, with 30 offenders sentenced over the past decade. The sentencing ranges in the guideline have been based on a number of transcripts of sentencing remarks and therefore it is not anticipated that there will be any impact on prison and probation resources.

Violent disorder

3.3 For violent disorder, the road testing found that some judges felt sentences in the draft guideline were too low, and that the guideline should provide more adequately for the most serious offences. Therefore, for the definitive guideline, an additional higher harm category ('category 1') was included, with higher sentences than in the draft guideline (for example, the starting point for a category 1A offence in the draft guideline was three years, while the starting point for a category 1A offence in the definitive guideline is four years).

3.4 The draft guideline was developed using the latest available sentencing statistics at the time (these were for 2016). Since guideline development, statistics have become available for 2017 and 2018. These show that sentences are now higher than they were during the early stages of guideline development. For example, the table below illustrates that an estimated 26% of immediate custodial sentences imposed in 2017 were above 3 years (pre guilty plea), compared to 13% in 2016:

Sentence length band ¹	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%

3.5 A review of transcripts of sentencing remarks, and the latest available sentencing statistics, suggest that the definitive guideline is reflective of current sentencing practice, and therefore it is not expected to have an impact on prison or probation resources.

¹ 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.

Affray

3.6 The sentencing ranges for the affray guideline were set with current sentencing practice in mind, and the road testing found that sentencing was generally similar under the existing guideline and under the draft guideline. Sentence levels in the definitive guideline are the same as in the draft guideline, and therefore it is not expected to have an impact on prison or probation resources.

S4 - Threatening behaviour

3.7 At the April Council meeting, it was agreed that the starting point for the highest level of offending for threatening behaviour would be reduced from 12 weeks (the starting point in the draft guideline and in the existing guideline) to a high level community order. This was changed in view of the relativity of this offence to common assault - the starting point for the highest level of offending in the draft common assault guideline is a high level community order. Some of the other starting points and lower ends of the category ranges are also lower than in the existing guideline.

3.8 The table below illustrates the current sentencing distribution for threatening behaviour; around 30 per cent of offenders received a custodial sentence in 2017:

Threatening behaviour – sentence distribution

Year	Absolute & Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with¹	Total
2013	13%	24%	37%	11%	12%	2%	100%
2014	12%	25%	36%	11%	12%	4%	100%
2015	13%	25%	35%	13%	12%	2%	100%
2016	12%	23%	35%	14%	14%	2%	100%
2017	11%	23%	34%	15%	15%	2%	100%

3.9 It is possible that the decrease to sentence levels in the guideline could lead to a decrease in sentencing severity for threatening behaviour, whereby some individuals who currently receive a custodial sentence may now receive a community order.

3.10 It is difficult to quantify the magnitude of this impact, because there is limited information available about current sentencing practice (as this is a summary only offence it is usually sentenced at magistrates' courts, where transcripts of sentencing

remarks are not available) and therefore it is difficult to estimate how sentences may be impacted by the change.

3.11 If it is assumed that no more than a third of offenders who are currently given immediate custodial sentences will now receive community orders, then there may be a reduction in the requirement for prison places by up to 30 prison places. However, it is expected that many of the offenders who currently receive immediate custodial sentences will continue to receive such sentences given that the upper end of the sentencing range for the highest level of offending is the same as under the existing guideline (at 26 weeks' custody), and it is possible that much of the decrease in sentencing severity could come from offenders who currently receive suspended sentence orders now receiving community orders. Therefore there is an upper estimate that the guideline will not have an impact on the requirement for prison places, and a lower estimate that the guideline could lead to a reduction in the requirement for up to 30 prison places.

S4A - Disorderly behaviour with intent

3.12 Similarly to the offence of threatening behaviour, the starting point for the highest level of offending for the definitive guideline (high level community order) is lower than the starting point under the current guideline (12 weeks' custody). The starting points and most sentence ranges are unchanged compared to the draft guideline.

3.13 The table below illustrates the current sentencing distribution for disorderly behaviour with intent; around 18 per cent of offenders received a custodial sentence in 2017:

Disorderly behaviour with intent – sentence distribution

Year	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹
2013	0%	17%	38%	26%	6%	9%	4%
2014	0%	18%	40%	23%	6%	8%	4%
2015	0%	18%	38%	25%	7%	9%	3%
2016	0%	15%	39%	25%	7%	10%	3%
2017	0%	15%	40%	24%	7%	11%	3%

3.14 Again, it is possible that the reduction in the starting point for this offence could lead to a reduction in the proportion of offenders receiving a custodial sentence, and an increase in the proportion receiving a community order.

3.15 Again, if it is assumed that no more than a third of offenders who are currently given immediate custodial sentences will now receive community orders, then there may be a reduction in the requirement for prison places by up to 10 places. However, as with the offence of threatening behaviour, it is expected that many of the offenders who currently receive immediate custodial sentences will continue to receive such sentences given that the upper end of the sentencing range for the highest level of offending is the same as under the existing guideline (at 26 weeks' custody), so much of the decrease in sentencing severity could come from offenders who currently receive suspended sentence orders now receiving community orders. Therefore there is an upper estimate that the guideline will not have an impact on the requirement for prison places, and a lower estimate that the guideline could lead to a reduction in the requirement for up to 10 prison places.

Racially or religiously aggravated threatening behaviour and racially or religiously aggravated disorderly behaviour with intent

3.16 For these offences, the road testing found that a large majority of magistrates felt that the sentences arrived at under the draft guideline were too high. It was decided instead to use the less prescriptive uplift approach that was agreed for the Arson and Criminal Damage guideline.

3.17 The uplift approach has previously been road tested for Arson and Criminal Damage, and the research found that there remains a risk that the guideline could result in slightly higher sentences.

3.18 It is therefore anticipated that the guideline could cause an increase to sentencing severity. As a higher estimate, if the number of offenders sentenced to immediate custody increased by around 50 per cent, then there would be a requirement for up to 30 additional prison places. However, as noted above, the starting point for the highest level of offending under the definitive guideline is lower than the starting point under the current guideline. It is possible that this change may offset the potential increases to sentencing due to the uplift approach, and therefore there is a lower estimate that the guideline will not have an impact on the

requirement for prison places, and an upper estimate that the guideline could lead to a requirement for up to 30 additional prison places.

S5 - Disorderly behaviour and racially or religiously aggravated disorderly behaviour

3.19 The maximum sentence for these offences is a fine, and therefore the guideline will not have an impact on prison and probation resources.

3.20 For the offence of disorderly behaviour, the definitive guideline introduces a new higher category of offending with a higher level of fine than in the existing MCSG guidance (a Band C fine). The guideline may therefore increase fine values for this offence. Also, because a fine is included for all levels of offending for racially or religiously aggravated disorderly behaviour - whereas data suggests that around 14 per cent of offenders sentenced for this offence received an absolute or conditional discharge in 2017 (after any reduction for guilty plea) – it is also possible that the draft guideline could increase the number of offenders sentenced to a fine for this offence.

Stirring up racial or religious hatred, or hatred towards sexual orientation

3.21 Fewer than 10 offenders per year were sentenced for this offence over the period 2008-2017, however in the latest year has been an increase, with 23 offenders sentenced in 2018:

Number of offenders sentenced for stirring up racial or religious hatred, or hatred towards sexual orientation, 2008-2018²

2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
11	8	9	5	3	4	6	10	3	7	23

3.22 The sentencing ranges in the guideline have been based on a number of transcripts of sentencing remarks for these offences, and therefore the guideline is not expected to have an impact on prison or probation resources.

Question 1: Does the Council have any comments on these findings?

² These figures should be treated with caution due to potential data quality issues for this offence.

4 RISKS

4.1 Two main risks have been identified:

Risk 1: The Council's assessment of current sentencing practice is inaccurate

4.2 Inaccuracies in the Council's assessment of the impact of the guideline could cause unintended changes in sentencing practice when the new guideline comes into effect.

4.3 This risk has been mitigated by testing the guideline with sentencers during the consultation phase, inviting views on the guideline, and the collection and analysis of sentencing information. By comparing sentence outcomes to those that may have resulted from the draft guideline, it has been possible to detect and amend problematic areas of the guideline. However, there were limitations on the extent of the testing and analysis, so the risk cannot be fully eliminated.

Risk 2: Sentencers do not interpret the new guidelines as intended

4.4 If sentencers do not interpret the guidelines as intended, this could cause a change in the average (mean) severity of sentencing, with associated resource effects.

4.5 The Council takes a number of precautions in issuing new guidelines to try to ensure that judges interpret them as intended. Sentencing ranges are agreed on by considering sentencing data in conjunction with Council members' experience of sentencing. Transcripts of Crown Court sentencing remarks have also been studied to ensure that the guidelines are developed with current sentencing practice in mind. Research with sentencers carried out during the consultation period have also enabled issues with implementation to be identified and addressed prior to the publication of the definitive guideline.

4.6 The Council also uses data from the Ministry of Justice to monitor the effects of its guidelines to ensure any divergence from its aims is identified as quickly as possible.

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