

19 July 2019

Dear Members

Meeting of the Sentencing Council – 26 July 2019

The next Council meeting will be held in the **Queens Building Conference Suite, 2nd Floor Mezzanine at the Royal Courts of Justice**, on Friday 26 July 2019 at 9:45.

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

You will note that we have set aside slightly more time than normal for the lunch break to take photographs of members for our website. Also, the photographer will be taking some photos during the Council meeting directly after lunch.

The agenda items for the Council meeting are:

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| ▪ Agenda | SC(19)JUL00 |
| ▪ Minutes of meeting held on 14 June | SC(19)JUN01 |
| ▪ Action Log | SC(19)JUL02 |
| ▪ Immigration and Modern Slavery | SC(19)JUL03 |
| ▪ Attempted Murder | SC(19)JUL04 |
| ▪ Firearms | SC(19)JUL05 |
| ▪ Terrorism | SC(19)JUL06 |
| ▪ Public Order | SC(19)JUL07 |

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

Best wishes



Steve Wade

Head of the Office of the Sentencing Council

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COUNCIL MEETING AGENDA

**26 July 2019
Royal Courts of Justice
Queen's Building**

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| 09:45 – 10:00 | Minutes of the last meeting and matters arising (papers 1 & 2) |
| 10:00 – 11:00 | Immigration and Modern Slavery - presented by Eleanor Nicholls (paper 3) |
| 11:00 – 12:00 | Attempted murder – presented by Lisa Frost (paper 4) |
| 12:00 – 13:00 | Firearms – presented by Ruth Pope (paper 5) |
| 13:00 – 13:45 | Lunch (extended for photos of members) |
| 13:45 – 15:00 | Terrorism – presented by Vicky Hunt (paper 6) |
| 15:00 – 16:15 | Public Order – presented by Lisa Frost and Pamela Jooman (paper 7) |

Sentencing Council

COUNCIL MEETING AGENDA

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MEETING OF THE SENTENCING COUNCIL

14 JUNE 2019

MINUTES

Members present:

Tim Holroyde (Chairman)
Rob Butler
Diana Fawcett
Rosina Cottage
Rebecca Crane
Rosa Dean
Julian Goose
Heather Hallett
Max Hill
Maura McGowan
Sarah Munro
Alpa Parmar
Beverley Thompson

Representatives:

Assistant Commissioner Nick Ephgrave for the police,
Sophie Marlow for the Lord Chief Justice (Legal and Policy Adviser to Sir Brian Leveson, Head of Criminal Justice)
Phil Douglas for the Lord Chancellor (Director, Offender and Youth Justice Policy)

Members of Office in attendance:

Steve Wade (Head of Office)
Mandy Banks
Phil Hodgson
Emma Marshall
Eleanor Nicholls
Ruth Pope
Caroline Nauth-Misir

1. MINUTES OF LAST MEETING

- 1.1 The minutes from the meeting of 10 May 2019 were agreed.

2. MATTERS ARISING

- 2.1 The Chairman noted that the data collection currently taking place in magistrates' courts was achieving a good response rate which will be invaluable in the evaluation of the guidelines for *Bladed Articles and Offensive Weapons, Intimidatory Offences and Breach Offences*.

3. DISCUSSION ON EXPANDED EXPLANATIONS – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

- 3.1 The Council considered the responses to consultation on the *Expanded Explanations in Sentencing Guidelines* which closed on 23 May 2019.
- 3.2 The Council noted that most of the responses were supportive of the project, and that several helpful suggestions for changes have been made.
- 3.3 The Council considered the points raised by consultees and agreed changes to the explanations including to the mitigating factors relating to age and immaturity, and carers of dependent relatives, and to the aggravating factors relating to abuse of trust, and offence committed as part of a group.

4. DISCUSSION ON RACE AND GENDER ANALYSIS – PRESENTED BY EMMA MARSHALL AND ELEANOR NICHOLLS, OFFICE OF THE SENTENCING COUNCIL

- 4.1 The Council was updated on the progress on work investigating the factors that influence sentences imposed in the Crown Court for drug offences. This discussion drew upon a recent analysis of a small sample of relevant sentencing transcripts. The Council then discussed further work needed in this area and links with the consultation on the revised *Drug Offences* guidelines due to be launched in the autumn.

5. DISCUSSION ON FUTURE VISION – PRESENTED BY EMMA MARSHALL, OFFICE OF THE SENTENCING COUNCIL

- 5.1 The Council was updated on progress for considering a future strategy/vision and priorities for the Council after it reaches its 10-year anniversary in April 2020. It was agreed that the Head of Office and team would meet with individual Council members to seek their views over the summer.

6. DISCUSSION ON DRUGS – PRESENTED BY ELEANOR NICHOLLS AND CAROLINE NAUTH-MISIR, OFFICE OF THE SENTENCING COUNCIL

- 6.1 The Council discussed some of the remaining areas of the revised guidelines on drug offences, including the guideline for the offence of “possessing a psychoactive substance in a custodial institution” for the first time.
- 6.2 Caroline Nauth-Misir then presented the expected resource impact of the guidelines. The Council noted these findings and agreed to sign off the guidelines for consultation in the autumn subject to further work on the resource impact, which would be circulated to Council members over the summer.

7. DISCUSSION ON GENERAL GUIDELINE AND EXPANDED EXPLANATIONS – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

- 7.1 The Council considered the responses to the remaining questions in the consultation. It was noted that there was strong support for the proposal to change the wording of the medium culpability factor in the *Fraud, Theft and Robbery* guidelines, and also for changes to ensure consistency of presentation across guidelines.
- 7.2 There was also strong support among consultees for treating the *General* guideline as an overarching guideline but with some dissenting voices. Following discussion, the Council agreed that as the *General* guideline and *Expanded Explanations* would be replacing the *SGC Seriousness Guideline*, the *General* guideline should be made available as an overarching guideline.
- 7.3 The Council agreed that both the *General* guideline and the *Expanded Explanations* should be published on 24 July and come into force on 1 October 2019.

8. DISCUSSION ON BUSINESS PLAN AND ANNUAL REPORT – PRESENTED BY STEVE WADE AND PHIL HODGSON, OFFICE OF THE SENTENCING COUNCIL

- 8.1 The Council was advised that the budget for 2019-20 has now been agreed and written confirmation of the delegated budget has now been received.
- 8.2 The Council discussed priorities over the coming few months. It was agreed that motoring offences should continue to be held back pending the Government commitment to bring forward legislation in this area. The Council agreed that guidelines relating to cybercrime, perverting the course of justice, and witness intimidation, should be added to the rolling three-year plan.

8.3 The Council also considered the Annual Report for 2018/19 and, with some minor amendments, was content for it to be submitted to the Lord Chancellor for laying before Parliament.

ACTION AND ACTIVITY LOG – as at 19 July 2019

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 14 June 2019					
2	Vision for the Council post 2020	Arrange individual meetings with Council members to discuss issues associated with the Vision for the Council post 2020	Emma Marshall	ACTION ONGOING – a number meetings have been arranged. Remaining meetings to be set up by end of August.	
3	General Guideline and expanded explanations	Ruth to circulate amended versions of the guideline/ explanations for Council members to review wording of certain factors prior to finalising the definitive versions for publication on 24 July	Ruth Pope/ Council members		ACTION CLOSED: draft circulated and responses received.
4	General Guideline and expanded explanations	Resource assessment and consultation response document to be circulated to Council members for comments	Ruth Pope/ Council members		ACTION CLOSED: draft circulated and responses received.
5	Business plan	Draft business plan to be circulated out of committee with a view to publishing over the summer.	Steve Wade	ACTION ONGOING: Draft business plan to be circulated to members over the summer.	

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Sentencing Council meeting:
Paper number:

26 July 2019
**SC(19)JUL03 – Immigration and Modern
Slavery**

Lead Council member:
Lead official:

Rosina Cottage
Eleanor Nicholls
020 7071 5799

1 ISSUE

1.1 This is the first full discussion on draft guidelines for Immigration offences and Modern Slavery Act 2015 (MSA) offences and covers the offences of slavery, servitude and forced labour (MSA s1) and human trafficking (MSA s2). This paper covers the main aspects of the guideline for these offences, including approach to assessment of culpability and harm and aggravating/mitigating factors. Sentence levels will be covered at the meeting in September.

2 RECOMMENDATION

2.1 That the Council:

- agree the use of one guideline covering the s1 and s2 offences;
- agree the approach to assessing culpability and harm and the proposed factors;
- agree the proposed aggravating and mitigating factors; and
- agree to the additional text on cases where victims are unwilling or unable to give evidence.

3 CONSIDERATION

Background and approach

3.1 The MSA s1 and s2 offences each cover a wide range of offending behaviour. The s1 offences (s1(a) covering slavery/servitude and s1(b) covering forced labour) are in large part the same as the repealed offences which they replace – offences under the Coroners and Justice Act 2009 s71, the Asylum and Immigration (Treatment of Claimants) Act 2004 s4 and the Sexual Offences Act 2003 s59A. The most significant change is that the new offences have a statutory maximum penalty of life imprisonment (as opposed to 14 years), but in addition the Act includes additional provision on exploitation and makes explicit in statute (in s1(5)) the principle which had grown up in case law that the offence could be committed even in cases where the victim consents.

3.2 Numbers of offenders sentenced are low. In 2017 and 2018 combined, 10 offenders were sentenced for a s1 offence as a primary offence, and 19 for s2. In many of these cases, however, the offender was sentenced for multiple counts of the same offence, relating to multiple victims, or sentenced for a conspiracy offence, again covering multiple victims. It is interesting to note that all these offenders were sentenced to immediate custody, with the estimated average (mean) custodial sentence length (prior to any reduction for guilty plea) being 6.9 years for a s1 offence and 6.2 years for s2. There were also several cases in which the s2 offence was a secondary offence (the primary offence being a s1 offence, a drug trafficking offence, or a serious sexual offence such as rape).

3.3 In developing the guideline for these offences, I have used three main sources of information: guideline judgements in MSA cases and in cases under the previous legislation, particularly *R v Khan*, *R v Connors*, *R v Rooney*, and *R v Zielinski*¹, transcripts of cases sentenced in 2017 and 2018, and discussions with others involved in prosecuting these offences or supporting victims, including the Home Office, the CPS, Barnardo's and the Salvation Army. We have also carried out some initial research with Crown Court judges to find out their views on key areas of the immigration and modern slavery offences. Finally, I have considered the factors used in the existing sentencing guideline for trafficking for sexual exploitation under s59A of the Sexual Offences Act 2003, one of the offences which has been repealed and replaced by the MSA s2 offence. Several judges in cases relating to other forms of exploitation under the MSA have used these factors, and others I have spoken to agree that they have broader relevance.

3.4 The offences under s1 and s2 are clearly different, but share the same maximum penalty (life imprisonment) and the approach to sentencing them in both the Crown Court and Court of Appeal has been very similar. The factors set out in *R v Khan*, a trafficking case under the Asylum and Immigration (Treatment of Claimants) Act 2004 s4, have been used in several forced labour cases since, under previous and current legislation. In *Khan*, the factors are based not just on the act of trafficking itself but on the offender's culpability for the subsequent forced labour, and the harm caused by it, since the offence encompasses the offender's intention that the victim be exploited. In addition, the offences are fairly often sentenced together, and in these cases judges seem to use the same factors for both offences.

3.5 Given these considerations, I propose to have one guideline covering both the s1 and s2 offences, with the same culpability and harm factors, and the same aggravating and mitigating factors at step 2. It may be that some factors are likely to be more relevant to

¹ [2010] EWCA Crim 2880, [2013] EWCA Crim 324, [2019] EWCA Crim 681, and [2017] EWCA Crim 758

trafficking cases, and some more relevant to s1 offences, but if so, sentencers could use their judgement as to the extent to which any factor applied in the case before them, as of course they must do for all guidelines.

3.6 In developing the approaches to culpability and harm, and the aggravating/mitigating factors, I have worked on the basis that all types of these offences (whether it is domestic servitude, forced labour, trafficking for sexual exploitation, or some other type of case) should be capable of being assessed as high or low culpability, and high or low harm, depending on the facts of the case. It may be that some types of case (such as those involving large-scale trafficking for forced labour or prostitution) are more likely to be put into the top categories, but I have developed the guideline with the intention that in principle any type of case could feature in any category.

Question 1: Does the Council agree that all types of s1 and s2 offences should be capable of being assessed within any category of culpability or harm?

Approach to culpability and culpability factors

3.7 The guideline judgments and transcripts show that different types of culpability are taken into account. Some judges use the language of the Drug Offences guideline and consider role as of primary importance, others take into account a broader range of factors. Many factors could fall under either culpability or harm. In deciding where to put the factors, I have aimed at consistency with other guidelines as well as trying to ensure a focus on the victim in the harm factors. As the offences cover a very wide range of criminal behaviour, I have tried to keep the factors broad and of general applicability. The range of behaviour also means that there is a wide range of culpability and harm, from those who are directing a large organisation, using violence and threats on large numbers of victims over a long period of time, to those who are themselves coerced into the offending, who are only involved over a very short time (in one case involving a driver, a matter of minutes, though most cases are measured in weeks or months), and who perhaps inflict no physical harm and little psychological harm on their victim. Given the range of culpability and harm, I propose to give three levels for each. The proposed culpability factors are as follows:

A	<ul style="list-style-type: none"> • Directing or organising the offending • Expectation of substantial financial gain • High degree of planning/premeditation • Abuse of a significant degree of trust/responsibility • Use of violence • Victim’s movement physically restricted
B	<ul style="list-style-type: none"> • Operational or management role in the offending • Involves others in the offending whether by coercion, intimidation, exploitation, or reward • Expectation of significant financial gain

	<ul style="list-style-type: none"> • Some planning/premeditation • Threats of violence towards victim(s) or their families • Other cases falling between A and C because: <ul style="list-style-type: none"> ○ Factors in both high and lesser categories are present which balance each other out and/or ○ The offender’s culpability falls between the factors as described in A and C
C	<ul style="list-style-type: none"> • Engaged by pressure, coercion or intimidation • Performs limited function under direction • Limited understanding/knowledge of the offending • Expectation of limited financial gain • Little or no planning/premeditation • Absence of violence/threats of violence

3.8 You will see that for several different aspects of culpability there are factors present in categories A, B and C. The first aspect is role, which covers several factors. These include some of the factors used in the drug offences guideline – “directing or organising the offending”, “expectation of substantial/significant/limited financial gain”, “operational or management role in the offending”, “involves others in the operation whether by coercion, intimidation, exploitation or reward”, “involved through coercion/intimidation”, “limited understanding/knowledge of the offending”, and “performs a limited function under direction”. These factors were given in the majority of cases analysed, and are also covered in *Khan*. Some factors are drafted slightly differently from those in other guidelines so as not to exclude those who are operating on their own. The majority of offenders sentenced for these offences to date have been offending in groups, whether or not they were sentenced together, but some offenders, particularly in domestic servitude cases operated alone, and some of these cases could be very serious.

3.9 The next significant factor relates to planning and premeditation, which was cited in a large number of cases analysed. Distinctions were made between differing levels of planning, or (in the case of a conspiracy) involvement in only parts of the planning of the offence, so I have included this at several culpability levels, as we do in some other guidelines (such as Harassment and Stalking). Planning/premeditation in these offences covered a wide range of behaviour, both planning the practical aspects of the offending, and premeditation in terms of how to “groom” or entice a victim. This is a slightly separate feature from role, since an offender could be directing the offending but it may not involve much premeditation, and guideline cases cite this factor separately.

3.10 A third important aspect of culpability is the method used to exert control over the victim, which is such a crucial part of the offence. In *Khan*, “level and methods of control” was cited as a separate factor from “degree of harm” suffered by the victim. In general,

sentencers used a hierarchy of methods of control, with actual, physical violence at the top, threats of violence (made towards the victim or victim's family) in the middle, and other forms of control (such as giving misleading information about the consequences of reporting an offence to the police to make it more difficult for the victim to escape), at the bottom. Although this could be said to overlap with harm, the actual harm caused to the victim could be very great even with what might appear to be a lower level of control. For example, use of control through misleading information over a long period could cause long-term psychological harm to a victim (which was taken into account in the assessment of harm), but was generally viewed by sentencers as less culpable than physically or sexually assaulting a victim.

3.11 Related to this is the feature in category A only, "Victim's movement physically restricted". This aims to capture cases of actual slavery and servitude or forced labour cases in which a victim is locked into a building and is physically unable to escape. The other forms of restriction on movement are types of control included in the lower categories, and placing physical restriction of movement in the highest category fits with this approach of escalating seriousness in types and levels of control.

3.12 The final aspect of culpability which seems worthy of inclusion at step 1 is abuse of trust. This was a factor in cases involving child sexual exploitation (where the offender was the so-called "boyfriend" of the victim) as well as cases of forced labour and sexual exploitation in which the offender was known to the victim and trusted by them, perhaps as a family member or friend. The words "**significant degree** of trust" have been added to ensure that cases of lower culpability are not included in Category 1.

3.13 Several factors suggested themselves for inclusion at step 1, and which are included in other guidelines at this step, but which I have for various reasons included instead at step 2 as aggravating or mitigating factors; see paragraphs 3.21 to 3.28 below.

Question 2: Is the Council content with the structure of the "Culpability" table and the factors therein? Are there any additional factors you would wish to see or factors which should be removed?

3.14 The different types of exploitation covered by the s1 and s2 offences result in a wide range of types and levels of harm, from someone who is kept in servitude over many years, being physically and sexually assaulted, to someone who is a victim of forced labour under which his wages are taken and who feels some compulsion to stay in that position, but who is not otherwise harmed. All the types of exploitation can cover similar types of harm, broadly categorised as physical, psychological or financial. As these three types of harm can occur

in many different combinations and each can occur to varying degrees, I am proposing to include separate factors relating to each in the harm table, as follows:

Category 1	<ul style="list-style-type: none"> • Serious physical harm which has a substantial and/or long-term effect • Serious psychological harm which has a substantial and/or long-term effect
Category 2	<ul style="list-style-type: none"> • Some physical harm • Some psychological harm • Significant financial loss to the victim(s) • Exposure of victim(s) to additional risk of serious physical or psychological harm • Other cases falling between categories 1 and 3 because: <ul style="list-style-type: none"> ○ Factors in both high and lesser categories are present which balance each other out and/or ○ The level of harm falls between the factors as described in categories 1 and 3
Category 3	<ul style="list-style-type: none"> • Limited physical harm • Limited psychological harm • Limited financial loss to the victim(s)

3.15 For physical harm, I propose three levels, similar to those used in some violent offences, including child cruelty. Physical harm encompasses harm caused directly (for example, by assault) and indirectly (for example, through forcing the victim to live in dirty, unheated accommodation). As with violence against the person offences, it is difficult to describe the level of harm both broadly and accurately, but including substantial and long-term effect as an indicator of seriousness, as in other guidelines, was welcomed by those who support victims of modern slavery with whom I have discussed types and levels of harm.

3.16 For psychological harm, which is arguably the most important type of harm for this offence, similar wording is proposed in the three categories. In addition, and following discussion with organisations which support victims and with the CPS, the draft guideline contains the following text (similar to that used in the rape and child cruelty guidelines) above the harm table:

A finding that the psychological harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim (from, for example, a support worker) that serious psychological harm exists. It is important to be clear that the absence of such a finding **does not** imply that the psychological harm suffered by the victim is minor or trivial.

3.17 The third type of harm, financial, encompasses not just lost earnings (in forced labour cases where the offender takes all or most of a victim’s wages, often to pay back supposed “debts”) but also harm caused by the offender’s taking out credit cards and loans in the

victim's name and running up debts on his behalf. Financial loss is only included in the lower two categories of harm, on the basis that, even when the level of financial loss is high, it is not as serious as physical or psychological harm. This appears to be the approach taken in most of the cases analysed. If the level of financial harm, and gain to the offender is high overall, because of a large number of victims or long duration, that will be captured by other factors in culpability or aggravating factors at step 2.

3.18 The final harm feature relates to risk of harm. This can be very wide ranging. Examples from cases include risk of harm in a forced labour case by forcing victims to work on a building site without any protective equipment, risk of contracting sexually transmitted diseases in cases of forced prostitution, and risk of very serious harm/death in a trafficking case in which victims were trafficked over the dangerous Sahara route, to camps in Libya where one was raped and others at risk of rape or other assault, then moved across the Mediterranean in small boats, at risk of very serious harm or death. This was an important feature in several cases, so I have included it in Category 2.

3.19 Duration and number of victims were commonly cited in guideline and Crown Court cases as features of seriousness, and could be considered aspects of both culpability and harm. I had considered including them in harm, but have decided instead to cover them in other ways at step 2 as aggravating features. This is because, firstly, they could be considered as both culpability and harm and, secondly, including them at step one would give undue prominence to a feature which is more common in some types of offending, so would risk certain kinds of cases being considered incapable of inclusion in particular categories. For example, if "Large number of victims" were in Category 1 harm, and "Small number of victims" in category 3, it would risk domestic servitude cases always being considered less serious than large trafficking cases, regardless of other features of a particular case. At step 2, there will be more discretion to place appropriate weight on the factors as necessary.

3.20 In dividing the three main types of harm into serious, some and limited levels, it is probable that there are very few cases which would, with these features alone, be placed in category 3; the level of harm seen in almost all cases is higher than "limited". However, this is a very wide- ranging offence, and a new one for which not many offenders have yet been sentenced, and as there have been some cases with very limited harm, it seems appropriate to include them here for completeness.

Question 3: Is the Council content with the structure of the "Harm" table and the factors therein? Should any factors be added or removed?

Aggravating factors

3.21 When considering aggravating factors, one difficulty is that many factors cited by judges are, at some level, inherent in the offences. These include some sort of deception of the victim (promising them a good job with decent wages, but in fact forcing them to work for very little money), and lack of respect for the victim or his/her welfare. Some of these factors I have chosen to include as aggravating, since there are situations where they apply more than others. But other factors, such as lack of respect for the victim, I have excluded as it is inherent in the offence and would apply in all cases. If there was some way in which such a factor applied particularly forcefully to a case, the judge could of course consider it as the list of aggravating factors is not exhaustive.

3.22 Aside from the statutory aggravating factors of previous convictions and offence committed on bail, the aggravating factors proposed are:

- A1 – Offending took place over a long period of time (in the context of these offences, this is likely to mean months or years)
- A2 – Deliberate isolation of the victim, including steps taken to prevent the victim reporting the offence or obtaining assistance (above that which is inherent in the offence)
- A3 – Deliberate targeting of vulnerable victims
- A4 – Victim’s passport or identity documents removed
- A5 – Gratuitous degradation of victim
- A6 – Large-scale, sophisticated and/or commercial operation (where not taken into account at Step 1)

3.23 This is a relatively short list of factors, shorter, for example, than that given in the current trafficking for sexual exploitation guideline. However, that guideline covers a narrower range of offending so can give more specific factors. Factor A1, relating to duration, is frequently cited by judges as an aggravating feature. It may relate to an element of culpability or harm, as discussed above at 3.18, and the relevance may differ between types of exploitation so I have included it here at step 2. The explanatory text on length time is aimed to remind sentencers of what will normally apply in the context of these offences, but a shorter time is not necessarily a mitigating feature, which is why I have not included the mirrored factor under mitigating factors below.

3.24 Factor A2 could be said to be present in all offences, however, in some offences the offender has taken additional steps to isolate the victim, including physical isolation and moving the victim around so he/she does not develop local friendships or (in some cases) even know where he or she is. Where this feature is present in the offending to a higher than usual degree (short of actual physical restriction of movement, which is at step 1), it is appropriate to include as an aggravating feature. This could also include cases where the victim had been threatened or bribed with the aim of preventing their giving evidence.

3.25 Factor A3 is common to many guidelines, at step 1 or step 2, and victim vulnerability is an important feature of modern slavery offences. I considered including a “victim particularly vulnerable” factor, but as all victims of modern slavery are vulnerable in some way, this could be applied too broadly. Instead, I have included this “deliberate targeting of vulnerable victims” factor, which I have seen in some cases where the offender has made specific efforts to find and entice vulnerable victims, for example, travelling to a village in Romania where there were likely to be people with no employment prospects who would be more susceptible to promises of work in the UK.

3.26 Factor A4 is again cited in many cases. However, I have included it as it is an important feature of offending not present in all offences, and is one which is not explicitly included at step 1.

3.27 Factor A5 is included because although lack of respect for victims is inherent in the offence, there are some cases involving gratuitous degradation (apparently for the offender’s own pleasure) or gross lack of respect, which judges have highlighted as an aggravating feature. The drafting here is taken from that which we use in the assault guideline.

3.28 The last aggravating factor is included to capture some elements relating to the scale and sophistication of the operation which may be very relevant to an offence (including number of victims in cases where there is a single count of, say, conspiracy, rather than one count per victim) and are often cited in guideline and Crown Court cases as aggravating features. They are related to some aspects of role which I have included in the assessment of culpability, but if placed at step 1 these features would risk being applied to offenders involved in such operations even if the individual’s involvement was small and, conversely, would risk excluding from higher culpability/harm those offences which were not large-scale or sophisticated, but which may in other respects involve very high culpability or harm. Placing this factor here allows it to be taken into account, without these risks.

**Question 4: Does the Council agree with the aggravating factors set out above?
Should any factors be added or removed, or moved to step 1?**

Mitigating factors

3.29 In both guideline cases and the more recent trafficking and forced labour cases, judges in general considered the offences so serious that personal mitigation carried little weight, and very few factors were cited other than, in some cases, some standard factors. I therefore propose the following mitigating factors:

M1 – No recent or relevant convictions
M2 – Good character and/or exemplary conduct (where previous good character/exemplary conduct has been used to facilitate or conceal the offence, this should not normally constitute mitigation and such conduct may constitute aggravation)
M3 – Remorse
M4 – Sole/primary carer for dependent relatives
M5 - Age/lack of maturity (where linked to the commission of the offence)
M6 – Mental disorder or learning disability

3.30 Factors M1 and M3 to M6 are standard factors, and were cited in a small number of cases. Factor M2, relating to good character, uses the additional wording we have used in other guidelines for serious offences in which judges have been reluctant to take into account good character, and in which it can sometimes be used to facilitate or conceal an offence (an example of this is an offender's being a successful businessman allowing him to present employment in his business as an enticing prospect to potential victims).

Question 5: Does the Council agree to the proposed mitigating factors? Are there any factors which should be removed/added, or moved to Step 1?

Additional text – cases where the victim is unwilling to give evidence

3.31 Several of those I have spoken to, particularly the CPS and the organisations working with victims, have raised concerns about sentencing in cases where the victim (or one of the victims) is unwilling to give evidence, which may be through fear of reprisals against their family members, or because they are not yet able to talk openly about the harm they have suffered. In several cases, the victim was threatened or bribed with the aim of preventing their giving evidence. There are also cases in which different victims have been treated differently by the offenders, and some victims, who have not been treated as harshly, are willing to speak in defence of the offenders. Those I have spoken to have reminded me of the need to treat these cases no less seriously.

3.32 There are similarities here with domestic abuse cases in which a victim is unwilling, for similar reasons, to give evidence against his/her partner. I therefore propose that we include in this guideline some additional text on victim personal statements, similar to that used in the Overarching Principles on Domestic Abuse guideline:

A sentence imposed for a Modern Slavery Act offence should be determined by the seriousness of the offence, not solely by the expressed wishes of the victim. In particular, the absence of a Victim Personal Statement (VPS) should not be taken to indicate the absence of harm. A court should consider, where available, a VPS which will help it assess the immediate and possible long-term effects of the offence on the victim (and any children, where relevant) as well as the harm caused, whether physical or psychological.

3.33 As this relates to the assessment of seriousness at step 1 I propose to place this text near to the “Harm” table.

Question 6: Is the Council content to add the additional text above, and with its position near the “Harm” table?

3.31 At the beginning of the paper I set out reasons for developing just one guideline covering both the s1 and s2 offences, and have set out factors above which are applicable to both offences.

Question 7: Having reviewed the approach and factors above, is the Council content to develop one guideline to cover both the MSA s1 and s2 offences?

4 IMPACT AND RISKS

4.1 As this is the first full consideration of part of these new guidelines, detailed work on impact and risks is some way off, and will be completed for consultation next spring. By basing the guidelines on the existing cases, including those decided under predecessor legislation, we aim to reduce the risks of misinterpretation and unforeseen impacts on resources.

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Sentencing Council meeting:

Paper number:

Lead Council member:

Lead official:

26 July 2019

SC(19)JUL04 – Attempted Murder

Julian Goose

Lisa Frost

0207 071 5784

1 ISSUE

1.1 This meeting requires consideration of a revised draft guideline for the offence of Attempted Murder.

2 RECOMMENDATION

2.1 That the Council:

- considers culpability and harm factors and;
- agrees sentences and guidance on life and extended sentences to be included in the revised guideline.

3 CONSIDERATION

3.1 At the May meeting the Council agreed a number of points relating to a revised Attempted Murder guideline. These were that culpability factors should be descriptive and not follow the approach in the existing guideline of culpability categorisations specifically referencing schedule 21 paragraphs, that the harm model should reflect the broad potential harm in the offence and that the sentencing table should not include life sentences but should include guidance on when life sentences may be appropriate.

3.2 Approval of a draft which can be tested at the Serious Crime Seminar in September is sought, and feedback from the event will then be available for consideration by the Council at the October meeting.

Culpability factors

3.3 The existing SGC Attempted Murder guideline is included at Annex A. The guideline provides for an offence which, had the charge have been murder falling within para 4 or 5 of Schedule 21, to be assessed at category 1 seriousness. Category 2 then provides for other planned attempts to kill and category 3 other spontaneous attempts to kill. Starting points vary according to the level of harm found. Annex B includes a copy of schedule 21 to illustrate offences falling within category 1. As was noted at the last meeting the existing guideline does not provide for the 25 minimum term for a murder involving a weapon taken to the scene, which was introduced after the guideline was developed.

3.4 At the May meeting the Council agreed the approach to assessing culpability should include descriptive factors rather than following the approach in the existing guideline of categories reflecting schedule 21 offences. Culpability factors have been developed and tested against a range of cases and are included at Annex C for consideration by the Council. Annex D includes a proposed draft guideline.

3.5 Very high culpability factors include factors which reflect schedule 21 offences, such as offences involving firearms or explosives and attempted murder of police or prison officers. As discussed at the last meeting, the factors in this category are broader than the schedule, to provide for an appropriate seriousness assessment. This may also address concerns that existing sentences are too low, given the existing guideline is more restrictive in respect of offence categorisation.

Question 1: Does the Council agree with the very high culpability factors included?

3.6 A high culpability category is included to reflect the addition of minimum terms for knives and other weapons taken to a scene in a murder offence, and this category also provides for offences involving some planning.

Question 2: Does the Council agree with the very high culpability factors included?

3.7 Medium culpability includes offences involving weapons not included in category A or B, and offences where there is a lack of premeditation. In revising the assault guidelines lack of premeditation was not included as a lesser culpability factor, as it was thought a spontaneous offence could be as serious as a planned assault. However, in attempted murder it is thought planning, or a lack of, is highly relevant to the culpability of the offender given the intent to kill present in the offence. The existing guideline distinguishes between planned and spontaneous offences and the distinction has been relevant in analysis of cases.

Question 3: Does the Council agree with the medium culpability factors included?

3.8 At the previous meeting discussion took place as to whether the guideline should reflect the partial defences applicable to murder, given that in an attempt death of the victim was the intended outcome. The Council suggested consideration should be given to whether any academic research has been undertaken in this area. Officials have been unable to identify any published research or papers, but discussion with an academic has confirmed that partial defences and the potential for a lesser sentence to be imposed where a death occurs is an area that has been noted as worthy of consideration in attempted murder offences.

3.9 The Council considered this matter in developing the s18 GBH guideline, and agreed the lesser culpability category should provide for culpability to be balanced against other factors in appropriate cases. Lesser culpability therefore includes the same factors agreed for the s18 GBH guideline, with the exception of 'no weapon used'. This has not been included in the attempted murder guideline to avoid offences involving strangulation or suffocation being captured when this may not be appropriate. A further slight difference is in the wording of the mental disability factor, which has been taken from the manslaughter guideline. However, this does not include maturity as a factor reducing responsibility at step one as this is provided for at step two; the factor is intended to capture diminished responsibility type cases.

Question 4: Does the Council agree with the lesser culpability factors included?

3.10 No specific balancing factor has been included in any category, but the wording at the top of the culpability assessment mirrors the wording included in the manslaughter guideline to avoid overly restricting the discretion of sentencers in applying appropriate weight to factors which may be present in an offence.

Question 5: Does the Council agree with the approach to assessing culpability and that the wording included in Manslaughter on how to undertake the culpability assessment should be included?

3.11 There is a further type of offence to consider which relates to 'mercy killings' and how these should be dealt with in the revised guideline. These cases are likely to involve planning, which if substantial would be assessed as category A. The existing guideline states on page 4 at point 10 that the guideline '*is not intended to provide for an offence found to be based on a genuine belief that the murder would have been an act of mercy.*'

3.12 Mercy killings were also considered in developing the manslaughter guideline, and are provided for by the diminished responsibility guideline by a mitigating factor 'belief by the offender that the killing was an act of mercy'. The diminished responsibility guideline does not include a standard culpability assessment, with step one instead requiring the court to assess the level of responsibility retained by the offender. The difficulty with an attempted murder offence being provided for with a mitigating factor is that the reduction in sentence is not likely to have a significant impact on the sentence, given the planning which may be present in an offence. The effect on the sentence of a factor at step one or as mitigation was considered in GBH in relation to the abused offender factor, and it was agreed the guideline should provide for such an offence at step one to ensure an overall proportionate sentence. The Council are therefore asked to consider if the revised guideline should follow the approach in the existing guideline and specifically exclude attempted mercy killings from its scope, or whether the mitigating factor in the diminished responsibility guideline should be included at step one. This is a controversial issue but is likely to be raised in consultation.

Question 6: How, if at all, does the Council wish to address attempted mercy killings in the revised guideline?

Harm Factors

3.13 The existing guideline provides for three levels of harm within each offence category. These are serious and or long term physical or psychological harm; some physical or psychological harm and; little or no physical or psychological harm.

3.14 It was agreed at the last meeting that the harm model should include the factor agreed for the highest level of harm in GBH offences, as this is descriptive of offences where death almost occurs or a life changing injury is inflicted. It was agreed that the factors in the other categories would need to reflect the broad potential range of harm in an attempted murder. Category 2 harm therefore captures cases involving serious injuries not included in category 1, and category 3 provides for cases involving lower levels of harm.

3.15 Annex C includes the harm factors developed. Consideration was given to including four categories of harm, but as discussed at the May meeting while little or no physical harm may be present in an offence, any victim who has been subject of an attempt on their life suffers some psychological harm, so a little or no harm category would likely be redundant.

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

Sentences

3.16 Statistics illustrating current sentence volumes and the estimated pre-guilty plea distribution of sentences were considered at the May meeting and are included again below. It was noted that considerably fewer indeterminate sentences were imposed post 2012 (with the exception of a 'spike' in 2016), which is likely to be attributable to LASPO¹ and the removal of IPP² provisions, so the indeterminate sentences from 2013 onwards represent life sentences:

Sentence length band	2011	2012	2013	2014	2015	2016	2017
6 years or less	3%	5%	6%	2%	0%	0%	0%
Between 6 and 12 years	10%	3%	13%	11%	5%	6%	13%
Between 12 and 18 years	27%	20%	29%	40%	39%	29%	23%
More than 18 years	16%	32%	37%	18%	34%	26%	37%
Indeterminate	44%	41%	15%	29%	22%	38%	27%
Number of offenders sentenced to immediate custody	79	66	52	55	77	68	70

3.17 The Council were asked to confirm if any principles should be applied to sentence development. Consideration was given to views of attempted murder sentences which were noted when developing the Manslaughter guideline, which gave some indication that attempted murder sentences are currently considered to be too low in comparison to sentences for murder. It was noted in particular that there is considerable disparity between a para 4 or 5 type offence where death results which would attract life and a minimum custodial term of 30 years, whereas a similar facts attempted murder would result in a starting point of a 30 year determinate sentence, with only 15 or 20 years custody served depending on whether the offender is assessed as dangerous.

3.18 It was agreed that attempted murder starting points should be higher to reflect the many cases where death is intended but avoided by sheer luck or skilled medical intervention. It was also agreed that sentences for offences involving lesser culpability should reflect similar circumstances murder offences where a partial defence is available to reduce the charge to manslaughter.

3.19 Sentences have been developed taking all of these factors into account. The very high and high culpability categories include sentences which seek to more properly reflect offence seriousness based on relevant factors. Sentences involving lesser culpability are the

¹ Legal Aid and Punishment of Offenders Act 2012

² Indeterminate sentences for public protection

same as sentences in the lowest category of the Manslaughter loss of control guideline which are as follows;

A	B	C
Starting point 14 years' custody	Starting point 8 years' custody	Starting point 5 years' custody
Category range 10-20 years	Category range 5-12 years	Category range 3-6 years

This is to ensure the sentence for a similar facts loss of control manslaughter case is not lower than a case where death does not occur and the charge is attempted murder.

3.20 A case list has been provided at Annex D to provide context to proposed sentences. A comparison of the imposed sentence and the starting point which would be achieved with the draft guideline is included, although the revised sentence does not take into account aggravating and mitigating factors.

Question 8: Does the Council agree with proposed sentences?

Life and extended sentences guidance

3.21 At the May meeting the Council considered whether life sentences should be included in the sentencing table for attempted murder, as they are in the Terrorism guideline. It was agreed that life sentences should not be included as starting points, but that appropriate guidance should be given on life and extended sentences at step one and step two of the guideline. The Council noted that any guidance should reflect guidance included in the Manslaughter and Terrorism guidelines and Court of Appeal guidance in *Burinskas*³, the guideline judgment which set out the structure of considering life and extended sentences in relevant cases.

3.22 The wording included at step one of the manslaughter guideline has been used to highlight cases where a life or extended sentence may be appropriate. As in Other Council guidelines, consideration of extended and life sentences is presented at Step 5.

3.23 As in manslaughter, any determinate sentence starting point would be used to identify the minimum term if a life or extended sentence is imposed.

Question 9: Is the Council content with the presentation of information relating to extended and life sentences at step one of the guideline?

³ *Attorney General's Reference (No.27 of 2013) (R v Burinskas)* [2014] EWCA Crim 334

3.24 In Terrorism, where life sentences are included in the sentence table, guidance on extended and life sentences is included at step two and reads as follows;

Offenders committing the most serious offences are likely to be found dangerous and so the table below includes options for life sentences. However, the court should consider the dangerousness provisions in *all* cases, having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 to make the appropriate determination, before imposing either a life sentence or an extended sentence. (See STEP FIVE below).

It is not thought this wording is necessary at step two of the attempted murder guideline as life sentences are not included in the sentence table and reference to step 5 has been included at step one as in the manslaughter guideline.

3.25 There is additional wording and an additional step six in Terrorism which is also relevant to attempted murder offences committed in the context of terrorism. This is provided for by s236A CJA 2003, which provides for special custodial sentences to be imposed for offenders of particular concern. While this will apply to a very small proportion of (if any) cases, it is thought the guideline should reference it for the courts attention given the potential for it to be otherwise overlooked. The wording could read as follows;

Where the offence has a terrorist connection and satisfies the criteria in Schedule 18A of the Criminal Justice Act 2003, the court must consider the provisions set out in section 236A Criminal Justice Act 2003 (special custodial sentence for certain offenders of particular concern). (See STEP SIX below).

Step six would read as follows;

Step 6 – Special custodial sentence for certain offenders of particular concern (section 236A)

Where the offence has a terrorist connection and satisfies the criteria in Schedule 18A of the Criminal Justice Act 2003 and the court does not impose a sentence of imprisonment for life or an extended sentence, but does impose a period of imprisonment, the term of the sentence must be equal to the aggregate of the appropriate custodial term and a further period of 1 year for which the offender is to be subject to a licence.

Question 10: Does the Council wish to include the additional wording relating to offenders of particular concern at step two and to include step six in the revised guideline?

Aggravating and mitigating factors

3.26 The aggravating and mitigating factors include relevant factors included in the s18 GBH guideline and one aggravating factor from manslaughter; 'actions after the event (including but not limited to attempts to cover up/conceal evidence)'.

Question 11: Does the Council agree with the aggravating and mitigating factors included?

4 IMPACT /RISKS

4.1 It will be important to ensure revisions to the existing guideline ensure sentences achieve relativity with similar fact murder sentences, to reflect the principles in Appleby that offences involving death should attract the highest sentences. However, reflecting the very high level of intent in the offence of attempted murder is also important, and ensuring sentences reflect the gravity and any impact upon victims.

4.2 It is intended that views and feedback from Judges on an early version of the revised guideline will be obtained at the Serious Crime Seminar in September. The Council will then be able to consider any findings prior to sign off of the guideline in the Autumn.

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

26 July 2019
SC(19)JUL05 - Firearms
Maura McGowan
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0207 071 5781

1 ISSUE

1.1 This is the final consideration of the firearms guidelines prior to consultation in late September. Sentence levels were considered by the Firearms Working Group in May and those levels have been used to inform the resource impact analysis.

1.2 The consultation document will be circulated to Council members for comment in early September.

2 RECOMMENDATION

2.1 It is recommended that the Council:

- Agrees the content of each of the eight guidelines
- Agrees the sentence levels in each guideline, taking into account the analysis undertaken to assess the potential resource impact of the guidelines
- Considers whether there are any equality and diversity issues that should be addressed in the consultation.

3 CONSIDERATION

Legislative changes

3.1 The Offensive Weapons Act 2019 received Royal Assent on 16 May 2019. As anticipated the Act prohibits two further items: rapid firing rifles¹ and bump stock devices.² Both items will eventually be subject to the minimum term.

¹ Certain chambered weapons from which cartridge cases are extracted by propellant gas. These fire at a rate that is significantly greater than a conventional bolt-action rifle, making them closer to self-loading rifles, which are already prohibited.

² A bump stock device is an attachment that increases the rate of fire, so that a semi-automatic weapon can fire almost as quickly as an automatic weapon.

3.2 The implementation of the firearms provisions is being phased, to allow time for people to surrender their weapons and claim compensation ahead of the prohibition on possession taking effect. Consequently, the prohibition of rapid-firing rifles and bump stocks came into force on Royal Assent but only to the extent that it prohibits the manufacture, sale, transfer or acquisition of such items. It is expected that when the prohibition on possession comes into force, the section applying the minimum term provisions to the items will also come into force. The draft guidelines will reflect the position at the time of the launch of the consultation and an explanation of expected changes will be included in the consultation document.

3.3 The Council needs to decide how it will categorise the rapid firing rifles and bump stocks in the guideline for possession of a prohibited weapon (at Annex A). It is proposed that rapid firing rifles (s5(1)(ag)) should be a type 1 weapon. There may be an argument for bump stocks (s5(1)(ba)) to go in type 2 (along with air weapons, disguised firearms, and ammunition), given they are an attachment rather than a full weapon, but the Council may consider that these too should be in type 1.

Question 1: How should the new items be categorised once the prohibition on possession is in force?

Drafting changes approved by the Firearms Working Group

3.4 There are changes to the wording in the possession of a prohibited weapon guideline (Annex A):

- The two stages of culpability are no longer referred to as A and B to avoid confusion with the culpability categorisation (this change has also been made to the possession without a certificate guideline, Annex B; possession by person prohibited guideline, Annex C; and carrying in a public place, annex D). They are now titled:
 - Culpability – Type of weapon
 - Culpability – Other culpability factors;
- at Culpability – Type of weapon, the highlighted wording above the table has been added;
- at Culpability – Other culpability factors, the highlighted wording in medium culpability has been added;

- at harm categories 1 and 3, there is additional wording to explicitly include risk of psychological as well as physical harm. The change to the harm wording has been made across all guidelines.

3.5 In Annexes F and G the type of weapon is not considered at step one and so there are aggravating factors relating to the weapon type at step two. The wording in brackets in aggravating factor A4 is designed to avoid double counting – e.g. where the guideline would otherwise have led to a 3 year starting point but this has been increased to 5 years because the minimum term provisions apply, the aggravating factor should not be used to increase it further. However, if the guideline led to a starting point of 6 years, it would be appropriate to increase further for the fact that the weapon was prohibited.

Question 2: Does the Council agree to these drafting changes?

Sentence levels

3.6 The following section of the paper sets out revisions made to sentence levels for guideline 1, and levels for guidelines 2-4 and 8 which have not yet been considered and suggests revisions to guideline 6. In addition, this section includes findings from analysis undertaken to assess the potential resource impact of the guidelines, based on current sentence levels and suggests some further changes. This is followed by an overview of the sentence levels across the eight guidelines.

3.7 Data on sentence levels, including volumes, outcomes, pre-guilty plea average custodial sentence lengths (ACSLs), and pre-guilty plea sentence lengths, updated with 2018 figures, are at **Annex I**.

Sentence levels – possession of prohibited weapon (Guideline 1/Annex A)

3.8 The guideline has two tables, one for cases subject to the 5-year minimum term (table 1) and one for cases not subject to the minimum term (table 2).

3.9 An analysis of transcripts of Crown Court judges' sentencing remarks for cases involving hand guns (5(1A)(aba) offences) to assess the potential impact of the guideline suggested that in some cases the guideline would result in higher sentences than are currently being imposed. These are the highest volume prohibited weapons to which the 5 year minimum term applies and fall into Type 1 in the 'Culpability – Type of weapon' table. All of the (30) cases analysed were assessed as either high or medium culpability and most were either harm category 1 or 2. For those assessed as medium culpability the draft guideline tended to result in higher sentences than that actually imposed.

3.10 As can be seen from the table below, for type 1 weapons high and medium culpability are both categorised as culpability A. This means that the guideline fails to distinguish between these cases.

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

3.11 A suggested way to address this is to change type 1/ medium culpability to category B. This would provide a distinction between the high and medium culpability and reduce the danger of the guideline inflating sentences for medium culpability cases.

3.12 The transcript analysis also drew attention to the fact that very few firearms cases involve just one offence and it is therefore difficult to compare the actual sentences imposed with the theoretical sentence resulting from the guideline. Those offenders who received the highest sentences tended to have been convicted of multiple offences. In those cases the sentences were sometimes above the top of the range for the guideline (9 years).

3.13 Two possible approaches to address this would be to add some wording relating to the need to consider totality and/or increase the top of the range for A1 to 9 years 6 months. The range of sentences available in table 1 is very restricted by the statutory minimum and maximum which could justify the top of the range approaching the statutory maximum. The following wording relating to totality could be added above or below the sentence table:

The sentences in the table are for a single offence. Where another offence or offences arise out of the same incident or facts, concurrent sentences **reflecting the overall criminality** of offending will ordinarily be appropriate: please refer to the Offences Taken into Consideration and Totality guideline and step six of this guideline.

3.14 It should be noted, however, that there are aggravating factors (A5 and A10) relating to multiple offences and therefore the Council may consider further reference to totality to be unnecessary.

3.15 Following recent changes to CPS charging practice, which is likely to lead to more disguised firearms now being charged under section 5(1)(b) rather than section 5(1A)(a), an analysis of Crown Court judges' sentencing remarks was undertaken to assess whether the draft guideline is likely to result in any changes to sentence levels for these offences.

3.16 The analysis of this small sample of cases indicated that if cases involving a disguised stun gun are charged under 5(1)(b) rather than 5(1A)(a), and sentencers follow the current guideline (and sentence levels in Table 2), the guideline will result in substantially lower sentences for disguised stun guns in those cases where exceptional circumstances were found (so that the five year minimum sentence did not apply).

3.17 This is to be expected, to some extent, given that the majority of offenders sentenced for 5(1A)(a) offences are currently sentenced to immediate custody, whereas those cases now charged as 5(1)(b) would be placed within culpability B or C, and most are likely to fall within harm 2 or 3 and only B2 has custody in the range.

3.18 If the Council wishes to align the guideline more closely with current sentencing practice, the culpability category for type 3 weapons and medium culpability could be changed from category C to category B. This would still result in some lower sentences than are currently being imposed, but that is unavoidable if sentence levels for 'normal' 5(1)(b) cases are not to be inflated, given the change in charging practice.

3.19 The working group decided to set the starting points of A3, B2 and C1 in table 2 to 1 year's custody. Compared with other firearms offences, the offences falling under this table have relatively low rates of immediate custody, at 17%, and fairly high rates of suspended sentence (26%) and community orders (30%). A further 18% of offenders received fines and 8% received conditional discharges. The estimated median pre-guilty plea custodial length was 1 year 2 months for these non-minimum term cases.

3.20 It is expected that the vast majority of table 2 cases will fall into culpability B or C as most will be type 3 weapons and there will be very few type 2 weapons that could fall into culpability A. The relevant boxes covering custody are therefore B1, B2 and C1. The ranges across B1, B2 and C1 will cover around 90% of current custodial sentence levels, with the small proportion of cases that are higher expected to be covered by the cases falling into culpability A.

3.21 Currently half of immediate custodial cases fall below 1 year 2 months. An analysis of transcripts of Crown Court judges' sentencing remarks was undertaken for 5(1)(b) offences, to assess the potential impact of the guideline. This analysis indicated that in some cases

the guideline might result in higher sentences than currently, in other cases sentences would be lower, and some sentences would remain the same. In particular, there was no strong evidence that having a 1 year starting point in B2 and C1 would cause an inflationary impact.

Question 3: Does the Council wish to amend the culpability categories as suggested at 3.10 and 3.18 above?

Question 4: Does the Council wish to add a reference to totality and/or increase the top of the range to 9 years 6 months?

Question 5: Is the Council content to consult on the sentence levels in guideline 1?

Sentence levels – possession without certificate (Guideline 2/Annex B)

3.22 The offences covered have a maximum penalty of 5 years' custody. The aggravated form of the offence (possession of a shortened shotgun or a thing converted into a firearm) has a maximum of 7 years. In 2018 there were around 140 offenders sentenced, including 8 for the aggravated form (around 6% of total cases). In 2018 for all cases, immediate custody was the outcome in 43% of cases, with 20% receiving suspended sentences. A further 13% received a community order, while 13% received a fine, and 8% a conditional discharge. For custodial sentences, the estimated median pre-guilty plea length was 2 years 7 months.

3.23 The sentence levels have been drafted on the basis that most cases will fall into culpability B and C. Most cases will involve type 2 weapons and few are expected to involve high culpability factors. In the top box A1, the top of the range has been set at 4 years 6 months as 10% of immediate custody cases in 2018 received 5 years' custody or more. The top of the range could be set at 5 years but it is usual to leave some headroom and there may have been other factors such as concurrent sentences that increased these cases to the maximum sentence.

3.24 While the top of the range in A1 goes to 5 years' custody, there is a separate statement in bold above the table to draw sentencers' attention to the seven year maximum penalty for the aggravated form of the offence. The aggravated weapons (converted firearms or shortened shotguns) are type 1 weapons so most will fall into culpability A.

3.25 Community orders are currently within the range for 5 out of 9 boxes (albeit only at the bottom of the range for A3, B2 and C1). This has the potential to increase rates of community orders, but seems preferable to restricting these boxes to custody only. Discharge has been used as the bottom of the range for both C2 and C3 to reflect the relatively high proportion of discharges for this offence.

3.26 Transcript analysis found that the most common category for the non-aggravated offence was B2, with a 1 year starting point. When using the draft guideline to re-sentence transcripts, all of the B2 cases analysed had sentences which were either the same or broadly similar to the original sentence, indicating that the 1 year starting point is about right.

3.27 The analysis did however find that some cases in A2/B1 (with a 2 year starting point) resulted in a lower sentence using the draft guideline, when compared with the actual sentence given. It is therefore suggested that the starting point in these categories is increased to 2 years 6 months, with a range from 1 year to 3 years 6 months. The starting point for A1 could be increased to 3 years 6 months with a range of 2 years 6 months to 4 years 6 months. In 2018, 50% of custodial sentences for the offences covered by this guideline were 3 years or higher, so the increased sentence levels will better reflect current sentencing practice. If these changes are agreed the sentence table would look like this:

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

3.28 Further transcript analysis will be conducted to look at how the aggravated form of the offence is sentenced and if any problems are identified these will be raised out of committee before the consultation launch in September.

Sentence levels – possession by person prohibited (Guideline 3/Annex C)

3.29 This is quite a low volume offence with around 60 offenders sentenced in 2018. Like the possession without a certificate guideline, the maximum penalty is 5 years' custody. Slightly more offenders received immediate custody, but sentences were shorter: in 2018, immediate custody was the outcome in 52% of cases, with 28% receiving suspended

sentences. A further 11% received a community order, while 5% received a fine, and 2% a discharge. For custodial sentences, the estimated median pre-guilty plea length was 1 year 4 months (compared with 2 years 7 months for possession without a certificate).

3.30 The sentence table is aligned to that of the possession without a certificate guideline. The top of box A1 has been set at 4 years; there were only 2 custodial sentences falling above 4 years in 2018 (6% of custodial sentences), compared with the possession without a certificate guideline which had 16%. The only other difference between the two guidelines is in C2 where the bottom of the range is a band A fine in the possession by a person prohibited guideline, to reflect the lower use of discharges for this offence.

3.31 Although the median sentence length is shorter, this is largely because the weapons involved in possession by person prohibited offending may include air weapons and other less serious weapons, compared with the possession without a certificate guideline.

3.32 In the possession by person prohibited guideline, possession of type 1 weapons (those prohibited under s5) will rarely be charged as this offence. Type 2 weapons could be similar across the two guidelines. Type 3 is relatively common in the possession by person prohibited guideline but less so in the possession without a certificate guideline. The consequence of this is that offending in the possession without a certificate guideline is more likely to fall into A1, A2 and B1 than the offending in guideline 3 which is likely to fall chiefly into B2 or C2.

3.33 Further transcript analysis will be conducted for the offences covered by guideline 2 and 3 before the finalisation of the resource assessment to check whether there are issues with the following:

- The 'firearms discharged' factor in high culpability in guideline 2
- Cases involving a custodian for guideline 2 including whether these cases apply to particular demographics.
- Cases where the person prosecuted has provided the weapon to the person prohibited in guideline 3

3.34 If issues are identified, these will be raised out of committee before the consultation launch in September.

Question 5: Does the Council wish to consult on the revised sentence levels in guideline 2?

Question 6: Is the Council content to consult on the sentence levels in guideline 3?

Sentence levels – carrying in public place (Guideline 4/Annex D)

3.35 This offence covers a person having with them (a) a loaded shotgun; (b) an air weapon (whether loaded or not); (c) any other firearm (whether loaded or not) together with ammunition suitable for use in that firearm; or (d) an imitation firearm. It carries a maximum penalty of 7 years' custody, 12 months' custody for imitation firearms or 6 months' custody for air weapons. There were around 200 offenders sentenced in 2018. This was mainly for imitation firearms (54% of cases) and air weapons (36%).

3.36 This offence had much lower rates of immediate custody, compared with possession without a certificate and possession by person prohibited, and higher levels of community orders. In 2018, 21% of offenders received immediate custody, 17% received suspended sentences, 39% community orders, 17% fines and 3% conditional discharge. The estimated median pre-guilty plea sentence length was 9 months, significantly shorter than that for possession without a certificate (2 years 7 months) and possession by person prohibited (1 year 4 months).

3.37 This offence is subject to the minimum term, so the guideline will carry the usual guidance on this at step three, however it appears that this offence is only very rarely charged for weapons subject to the minimum term. The majority of sentences (95%) were less than 5 years in 2018. Very few of these offences involve firearms or shotguns, and it is likely that cases involving prohibited weapons are charged under other offences such as possession of a prohibited weapon or a possession with intent offence, which have higher maximum penalties. Since the application of the minimum term is expected to be rare, it was considered unnecessary to include separate tables for minimum term and non-minimum term cases.

3.38 As noted above, many of the cases under this offence involve imitation firearms, which have a lower maximum penalty of 12 months or air weapons which have a maximum of 6 months' custody. Imitation firearms and air weapons are type 3 weapons so would fall under culpability B or C. Only box B1 includes a range that goes above 12 months and C1 and B2 include a range that goes above 6 months. The differing maximum penalties have been addressed in the table through an asterisk in boxes B1, C1 and B2, highlighting the shorter maximum for imitation firearms and air weapons.

3.39 Although custody is in the range for six of the nine boxes in the table only three of them have a custodial starting point. This reflects the relatively high use of community orders for this offence (39% of cases).

3.40 The majority of these offences are sentenced in magistrates' courts but we do have some transcripts from the Crown Court which will be analysed to check that the guideline reflects current practice before the finalisation of the resource assessment. We plan to road test this guideline with magistrates during consultation.

Question 7: Is the Council content to consult on the sentence levels in guideline 4?

Sentence levels – possession with intent to endanger life (Guideline 5/Annex E)

3.41 The Council has previously considered and agreed the sentence levels for this offence subject to further testing against transcripts. Only one sentence table is used, because although the offence can be committed with a weapon that is not subject to the statutory minimum sentence, in fact, sentencing data show that sentences infrequently fall below five years (there were 6 such cases in 2018).

3.42 The offence is relatively low volume (around 60 cases in 2018), it has a maximum penalty of life imprisonment. All offenders sentenced received immediate custody. The ACSL for this offence is the highest of all the firearms offences being covered (with the exception of 5(2A) offences), at a median of 12 years pre-guilty plea.

3.43 Transcript analysis was undertaken to look specifically at the effect of the factor 'firearm discharged', in high culpability. This analysis found that in some cases involving group offending, where the offender played a 'significant role' (medium culpability factor) but the firearm was discharged (high culpability), there was a risk that the guideline would result in higher sentences for those offenders, if the case was placed in high culpability. The wording above the culpability table instructs the court to 'balance these characteristics to reach a fair assessment of the offender's culpability'. Views are sought as to whether this is an issue that could lead to inconsistent or inappropriate classification of culpability. If so, it could be explored in road testing.

3.44 Transcript analysis was also undertaken on section 16 offences more generally, and this did not identify any issues with sentence levels.

Question 8: Is the Council content to consult on the sentence levels in guideline 5?

Question 9: Should the balancing of culpability factors be specifically addressed in road testing?

Sentence levels – Possession with intent to cause fear of violence (Guideline 6/Annex F)

3.45 This offence can be committed with an imitation firearm or a genuine firearm. The sentences for imitation firearms are, on average, lower as might be expected. Around 44% of the imitation firearms offences in 2018 received a pre-guilty plea sentence length of 2 years or less, compared with 16% for firearms. The estimated median ACSL for imitations was 2 years 3 months compared with 4 years 6 months for firearms. There appear to be few, if any, cases that would fall into high harm for imitations and the majority would appear to be either medium or low culpability. However, there is significant overlap between the firearm and imitation firearm tables, to recognise that higher-end cases involving imitation firearms can be as serious as offences involving a genuine firearm in some instances. The Firearms Working Group agreed that to achieve proportionate outcomes the sentence levels from category 2 and category 3 in the firearms table should be copied across to category 1 and category 2 respectively in the imitation firearm table.

3.46 This has left a slight anomaly in that the starting point and range for A3 is higher than that for C2 (and B2) – meaning that culpability is weighted more highly than harm, but the starting point for C2 is higher than B3 – meaning that harm is weighted more highly than culpability. As has been noted above, there are very few high harm cases and not many high culpability cases, so it might make sense to change A3 to align with C1 and B2. It might also be sensible to change B3 to align with C2 to maintain the proportionality with table 1.

3.47 Transcript analysis was undertaken to look specifically at the effect of the factor ‘firearm discharged’, in high culpability. This did not identify any particular issues for these offences, however this may be due to the limited information available in these transcripts.

Question 10: Does the Council wish to make the suggested changes to the sentence levels in guideline 6 and consult on these levels?

Sentence levels – Possession with intent to resist arrest/commit indictable or Sch 1 offence (Guideline 7/Annex G)

3.48 These offences all carry a maximum of life imprisonment. The majority of cases (81%) received immediate custody in 2018. The estimated median ACSL (pre-guilty plea) was 8 years for offences involving a firearm, and 5 years for those involving an imitation firearm. As the volumes are relatively low these figures should be treated with caution.

3.49 As with guideline 6, there are separate tables for firearms and imitation firearms, and overlap between the levels for the two tables. Because of low volumes, it is more difficult to identify appropriate sentence levels for the tables, particularly across two tables. Data covering the last five years has been used to increase the data on which to base sentence levels. These levels have been developed with some regard to the sentence table in the [robbery guideline \(street and less sophisticated commercial\)](#) as many s17(1) and s18 offences are sentenced alongside robbery using the robbery guideline. Based on transcripts, courts often impose the same sentence (concurrent) for the robbery and the possession of firearm with intent offence. Broadly, the imitation firearm levels are similar to the robbery guideline and the firearm levels are slightly higher.

3.50 Transcript analysis was undertaken to look specifically at the effect of the factor 'firearm discharged', in high culpability. This analysis did not identify any particular issues for these offences, although it was challenging to sentence these offences using the draft guideline because they were often sentenced alongside other offences.

Question 11: Is the Council content to consult on the sentence levels in guideline 7?

Sentence levels – transfer/manufacture (Guideline 8/Annex H)

3.51 The manufacture and transfer offences carry a maximum penalty of life imprisonment but as the dangerousness provisions do not apply life sentences are unlikely in practice. The offences are very low volume with 10 cases in 2018. All offenders sentenced in 2018 received immediate custody. In 2018 the estimated median pre-guilty plea sentence length was 9 years for sell/transfer offences. For manufacture offences, just five offenders have been sentenced since 2016. The ACSL for these offences was 19 years 7 months (when looking at all offenders sentenced since 2016).

3.52 The sentence levels have been informed by sentencing data and the decision of the Court of Appeal in *Stephenson*:

- For the leader of the enterprise, a starting point of 25 years prior to discount for plea (not to be taken as a maximum), with a materially greater sentence appropriate for previous convictions involving firearms. Those engaged in criminal enterprise under the leader should receive sentences reflecting the sentence for the leader (before any discount for plea), depending on the role they played;
- For the purchasers, sentences in the region of 15 years, with a significantly higher sentence required if any previous convictions for firearms;

- For those who assisted in transactions, sentences of not less than 8 years; sentences materially greater were required in cases where the assistance was significant; in the present case the sentences should have ranged from 8 - 12 years, depending on the role they played and any previous association with guns.

3.53 The Working group considered that the proposed sentence levels were generally in line with the judgment in *Stephenson* but decided that the top of the range should be increased to 28 years to allow for the very serious cases.

3.54 Since purchasers would generally fall into culpability B, the 15 year starting point for purchasers in *Stephenson* is broadly equivalent to B1 (being a large-scale enterprise at harm category 1). B1 has a starting point of 14 years with a range of 12-18 years.

3.55 The range indicated in *Stephenson* of 8-12 years for those providing assistance in the transaction (in a large-scale enterprise at harm 1) broadly corresponds to the C1 box with a starting point of 10 years and a range of 8-14 years. Those providing more significant assistance may instead fall into culpability B (with materially greater assistance) or A (where a key facilitator).

3.56 The Working Group was content that sentence levels for this offence would be higher than for possession with intent to endanger life (guideline 5/ Annex E) as this offence often involves a larger scale of offending and potentially far greater harm.

Question 12: Is the Council content to consult on the sentence levels in guideline 8?

Sentence levels – comparison

3.57 The table below sets out the sentence ranges, selected boxes from the sentence tables and current median sentence lengths for each guideline.

Question 13: Is the Council content with the overall relativity of sentence levels across the guidelines?

GUIDELINE	STAT MAX	RANGE	TOP BOX (A1)	MIDDLE BOX (B2)	BOTTOM BOX (C3)	MEDIAN SENTENCE LENGTH PRE-GP (2018)
1 – Possession of prohibited weapon*	10 years	<u>Table 1 Minimum term cases</u> 5 – 9 years	Starting point 8 years' custody Category range 7 – 9 years' custody	Starting point 6 years' custody Category range 5 – 7 years' custody	Starting point 5 years' custody Category range 5 – 6 years' custody	7 years
		<u>Table 2 Non-minimum term cases</u> Discharge – 5 years	Starting point 3 years' custody Category range 2 – 5 years' custody	Starting point 1 year's custody Category range High level community order – 2 years' custody	Starting point Band C fine Category range Discharge – Low level community order	1 year 2 months
2 – Possession without certificate	5 years (7 years aggravated form)	Discharge – 4 years 6 months	Starting point 3 years' custody Category range 2 – 4 years 6 months' custody	Starting point 1 year's custody Category range High level community order – 2 years' custody	Starting point Band A fine Category range Discharge – Band C Fine	2 years 7 months
3 – Possession by person prohibited	5 years	Discharge – 4 years	Starting point 3 years custody Category range 2 – 4 years' custody	Starting point 1 year's custody Category range High level community order – 2 year's custody	Starting point Band A fine Category range Discharge – Band C Fine	1 year 4 months
4 – Carrying in a public place*	7 years (6 & 12 months air weapons and imitations)	Discharge – 4 years	Starting point 2 years custody Category range 1 – 4 years' custody	Starting point High level community order Category range Low level community order – 1 year's custody	Starting point Band A fine Category range Discharge – Band C Fine	9 months
5 – Possession with intent to endanger life*	Life	4 – 22 years	Starting point 18 years' custody Category range 16 – 22 years' custody	Starting point 10 years' custody Category range 8 – 12 years' custody	Starting point 5 years' custody Category range 4 – 7 years' custody	12 years

6 – Possession with intent to cause fear of violence*	Life	<u>Table 1 Firearms</u> 6 months – 9 years	Starting point 8 years' custody Category range 7 – 9 years' custody	Starting point 4 years' custody Category range 2 – 6 years' custody	Starting point 1 year 6 months' custody Category range 6 months – 2 years' custody	4 years 6 months
		<u>Table 2 Imitation firearms</u> Medium level community order – 8 years	Starting point 6 years' custody Category range 4 – 8 years' custody	Starting point 2 years' custody Category range 1 – 4 years' custody	Starting point 6 months' custody Category range Medium level community order – 1 year's custody	2 years 3 months
7 – Possession with intent* – other offences (intent to resist arrest, intent to commit an indictable/ Schedule 1 offence)	Life	<u>Table 1 Firearms</u> 1 – 16 years	Starting point 12 years' custody Category range 10 – 16 years' custody	Starting point 7 years' custody Category range 5 – 9 years' custody	Starting point 2 years' custody Category range 1 – 3 years' custody	8 years
		<u>Table 2 Imitation firearms</u> High level community order – 12 years	Starting point 9 years' custody Category range 6 – 12 years' custody	Starting point 5 years' custody Category range 3 – 7 years' custody	Starting point 1 year's custody Category range High level community order – 3 years' custody	5 years
8 – Transfer/ Manufacture*	Life	5 – 28 years	Starting point 20 years' custody Category range 16 – 26 years' custody	Starting point 10 years' custody Category range 8 – 14 years' custody	Starting point 6 years' custody Category range 5 – 8 years' custody	9 years (transfer) 19 years 7 months (manufacture) ³

* Minimum term may apply.

³ The ACSL for manufacture offences covers the period 2016-2018 (due to very low volumes), and may therefore include cases sentenced prior to the Stephenson judgment.

4 RISKS AND IMPACT

4.1 As noted in the section above, there are various aspects of the guidelines which are being examined using transcript analysis over the coming weeks. If this analysis indicates any potential issues with the guidelines, these will be circulated to Council members outside of Council meetings.

4.2 Once any issues are resolved the resource assessment and consultation document will be drafted and circulated for comment before the consultation launch at the end of September.

4.3 The consultation document will contain information on demographic makeup (specifically age, race and sex) of offenders for firearms offences.

4.4 Broadly speaking convictions for firearms offences are most likely to be committed by white males under the age of 40. However, when compared with the demographics of the population as a whole, there is a significant over-representation of BAME offenders. The proportion of BAME offenders is also higher for firearms offences than for all offences. There is a large over-representation of young adults compared to the population as a whole and to a lesser extent compared to offenders across all offences.

4.5 In 2018, for possession offences to which the mandatory minimum applies, 41% of offenders were BAME and 53% were under 30. Females were much less likely to be convicted of these offences (only about 1 in 20 offenders sentenced were female) and about 50% of females who were convicted received a sentence less than the minimum term.

4.6 What this means is that if the guidelines increase sentences for these offences generally, there is a risk that the increase may fall disproportionately on young offenders and BAME offenders.

4.7 Looking at offenders who received sentences below the minimum term for possession offences reveals that 38% of White offenders received a sentence less than the minimum term whereas the figures for Black and Asian offenders were 18% and 21% respectively.

4.8 The Council is already committed to taking steps to address concerns around equality and diversity across all guidelines. As this consultation will be published before the drug offences consultation which will include the analysis on race and gender and the plan of action to be taken as a result, it will allude to that plan but will not give details.

4.9 Road testing will be conducted with Crown Court judges, district judges and magistrates alongside testing of the drugs guideline, over the summer and early autumn, the finding from which will be reported back to the Council when the consultation responses are considered in early 2020.

Question 14: Are there any particular equality and diversity issues that should be addressed in the consultation?

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Paper number: 26 July 2019
Lead official: SC(19)JUL06 – Terrorism
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1 ISSUE

1.1 In May the Council was informed of the changes made to Terrorism legislation by the Counter-Terrorism and Border Security Act 2019. The main changes that affect our guidelines include;

- a new subsection 1A to section 12 TACT 2000 (Proscribed Organisations – Support) to cover offenders who express supportive views for a proscribed organisation, reckless as to whether others will be encouraged to support it;
- two new subsections to section 58 TACT 2000 (Collection of Terrorist Information) – to cover those offenders who view/ stream terrorist information over the internet rather than download it;
- changes to sections 1 and 2 TACT 2006 (Encouragement of Terrorism) to refer to a ‘reasonable person’ rather than ‘some or all members of the public’;
- changes to bring more offences into scope for extended determinate sentences and sentences for offenders of particular concern; and
- an increase to the maximum sentences for s38B TACT 2000 Failure to Disclose Information About Acts of Terrorism (from five to ten years), s58 TACT 2000 Collection of Terrorist Information (from ten to 15 years) and ss1 and 2 TACT 2006 Encouragement of Terrorism (from seven to 15 years).

1.2 The Council is invited to consider amendments to the guidelines to reflect these legislative changes.

1.3 It is hoped that the Council might agree these changes this month and sign off the guidelines ready for consultation. If the guidelines are signed off a draft of the consultation will be prepared over the summer and circulated with an aim to publish it in September.

2 RECOMMENDATION

2.1 That the Council should:

- Agree the proposed changes to the culpability factors in the Support guideline (s12 TACT 00)
- Agree the proposed changes to the culpability factors in the Collection guideline (s58 TACT 00)
- Agree the proposed changes to the sentence levels in the Collection, Encouragement (ss1 and 2 TACT 06), and Failure to Disclose Information (s38B TACT 00) guidelines.

3 CONSIDERATION

- ***Amendments to section 12 Terrorism Act 2000***

3.1 The Counter-Terrorism and Border Security Act 2019 amended section 12 TACT 2000, introducing a new section 12A. The full section is set out below, with the new section in bold:

Section 12 TACT 2000 (Proscribed Organisations – Support)

(1) A person commits an offence if—

- (a) he invites support for a proscribed organisation, and
- (b) the support is not, or is not restricted to, the provision of money or other property (within the meaning of section 15).

(1A) A person commits an offence if the person—

- (a) expresses an opinion or belief that is supportive of a proscribed organisation, and**
- (b) in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.**

(2) A person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is—

- (a) to support a proscribed organisation,
- (b) to further the activities of a proscribed organisation, or
- (c) to be addressed by a person who belongs or professes to belong to a proscribed organisation.

(3) A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities.

(4) Where a person is charged with an offence under subsection (2)(c) in respect of a private meeting it is a defence for him to prove that he had no reasonable cause to believe that the address mentioned in subsection (2)(c) would support a proscribed organisation or further its activities.

(5) In subsections (2) to (4)–

(a) “*meeting*” means a meeting of three or more persons, whether or not the public are admitted, and

(b) a meeting is private if the public are not admitted.

(6) A person guilty of an offence under this section shall be liable–

(a) on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

3.2 Prior to the introduction of section 12(1A) a person was guilty of the offence only if they *directly* invited support for a proscribed organisation. Section 12(1A) has broadened the offence. It appears that the purpose of the new provision is to capture those offenders (such as Anjem Choudary) who avoid inviting support directly but instead garner support through methods of radicalisation such as through the use of rousing speeches, expressing their own support for a proscribed organisation and, through their charismatic, energetic performances inspire others to believe and support too.

3.3 Throughout the passage of the Bill there was considerable debate about whether such an amendment was appropriate or whether it strayed into the territory of freedom of expression. For some, such as Lord Anderson (a former independent reviewer of terrorism legislation), this issue is particularly heightened due to his concern that ...” *substantial numbers of proscribed organisations - 14 by the Home Office’s own admission, and no doubt more in Northern Ireland - are proscribed despite failing to satisfy the statutory condition for proscription, which is being concerned in terrorism.*”

3.4 Prior to the introduction of s12(1A), the section 12 offence concerned only intentional acts to gain support. Section 12(1A) involves an offence of recklessness.

3.5 The current guideline culpability factors are set out below:

A

- Offender in position of trust, authority or influence and abuses their position
- Persistent efforts to gain widespread or significant support for organisation
- Encourages activities intended to cause endangerment to life

B

- Arranged or played a significant part in the arrangement of a meeting/event aimed at gaining significant support for organisation
- Intended to gain widespread or significant support for organisation
- Encourages activities intended to cause widespread or serious damage to property, or economic interests or substantial impact upon civic infrastructure

C

- Lesser cases where characteristics for categories A or B are not present

3.6 The majority of the culpability factors involve intentional acts and therefore most s12(1A) cases would likely fall into culpability C. However, the top culpability factor in culpability A does not distinguish between an intentional or reckless act and so could apply to either s12(1) or s12(1A) offences.

3.7 For example, a university lecturer who directly invites his class to support a proscribed organisation would fall into the top culpability factor in category A; *offender in position of trust, authority or influence and abuses their position*. However, the same category would apply to a lecturer who gave a speech to his class which included comments that he agreed with and supported some of the less offensive beliefs or actions of a certain proscribed organisation (perhaps even an organisation that should not be proscribed).

Question 1: Does the Council consider that the top culpability factor in category A requires amendment to distinguish between intentional and reckless acts, perhaps moving reckless behaviour to culpability B?

- **Amendments to section 58 Terrorism Act 2000**

3.8 There are new subsections (1)(c), (1A) and (3A) to section 58 TACT 2000 (Collection of terrorist information) as seen below:

(1) A person commits an offence if–
 (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or
 (b) he possesses a document or record containing information of that kind or
(c) the person views, or otherwise accesses, by means of the internet a document or record containing information of that kind.

(1A) The cases in which a person collects or makes a record for the purposes of subsection (1)(a) include (but are not limited to) those in which the person does so by means of the internet (whether by downloading the record or

otherwise).

(2) In this section “record” includes a photographic or electronic record.

(3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession.

(3A) The cases in which a person has a reasonable excuse for the purposes of subsection (3) include (but are not limited to) those in which—
(a) at the time of the person’s action or possession the person did not know, and had no reason to believe, that the document or record in question contained, or was likely to contain, information of a kind likely to be useful to a person committing or preparing an act of terrorism, or
(b) the person’s action or possession was for the purposes of—
(i) carrying out work as a journalist, or
(ii) academic research.

3.9 The purpose of these amendments is to reflect changes in technology. When this legislation was first drafted offenders were more likely to collect physical documents or records and even if they obtained materials from the internet they would most likely have downloaded them. Now people more commonly view materials over the internet by streaming them, and it was felt that this should be reflected.

3.10 The current guideline culpability factors are:

A	<ul style="list-style-type: none">Offender collected, made a record of, or was in possession of information for use in a specific terrorist act
B	<ul style="list-style-type: none">Offender collected, made a record of, or was in possession of information likely to be useful to a person committing or preparing an act of terrorism and the offender had terrorist connections or motivationsOffender repeatedly accessed extremist material (where not falling within A)
C	<ul style="list-style-type: none">Offender collected, made a record of, or was in possession of information likely to be useful to a person committing or preparing an act of terrorism but had no terrorist connections or motivations

3.11 Changes could be made to the above culpability factors to include the phrase ‘or viewed over the internet’. For example, ‘Offender collected, made a record of, was in possession of, or viewed over the internet information for use in a specific terrorist act’.

3.12 The requirement within culpability factors A and B that the offender must either be ‘using the material for use in a specific terrorist act’, or have had ‘terrorist connections or motivations’ would seem to protect against a very high sentence being received by a simply curious person who could now, in theory, be captured by the legislation simply by clicking onto a terrorist article.

3.13 The only factor that may be of concern is the second factor in culpability B 'Offender repeatedly accessed extremist material (where not falling within A)'. This may mean that a curious person with no terrorist motivations who clicks on a terrorist article a couple of times could receive a very high sentence (especially so once the sentencing table is amended to reflect the higher statutory maximum).

3.14 The original amendment made to the legislation by the Counter-Terrorism and Border Security Bill provided that a person commits the offence if they accessed such material on three or more different occasions. The Home Secretary said during the second reading in the House of Commons:

The objective is to allow for the fact that it is quite possible for someone to accidentally come across such a video, be curious and watch it one time and perhaps a second time. I am not pretending that there is something magical about the number three. This is an attempt to capture repeated viewing, which may suggest that the intent is not innocent. Of course, should the Bill become an Act of Parliament and someone is prosecuted under this law, that decision would be made by the police, based on evidence and working with the Crown Prosecution Service. As with other criminal offences of this type, the CPS would use its judgment to decide whether it is in the public interest to prosecute.

3.15 There was significant criticism of this provision; many queried the number three, others questioned whether the three occasions needed to be close in time, or could they be separated by several years. Many questioned the provision in its entirety because it would likely capture non- terrorists:

Rachel Robinson, of Liberty,

"Blurring the boundary between thought and action by locking people up simply for exploring ideas undermines the foundations of our criminal justice system. Terrorists' primary goal is to undermine our freedom. With proposals like this, the government risks giving them exactly what they want."

3.16 In response to the criticism changes were made to the amendment so it no longer referred to three occasions, but the Act still provides for a streaming offence (as set out above). However, a new section was introduced (section 3A- which can also be seen above) to deal with concerns that journalists or academics who legitimately view terrorist material could be caught out. The defence does not, however, protect a whole host of other parties who choose to look at such material simply out of curiosity.

3.17 The issues raised during debate are similar to the ones we might have with regard to the factor 'Offender repeatedly accessed extremist material (where not falling within A)'.

Given the issues raised might the Council consider removing this factor altogether? The factor now simply provides for the new offence but would place any offender caught by it into culpability B whether they have terrorist motivations or not. Without this factor a simply curious person who has had the misfortune to be prosecuted would fall into category C; one with a terrorist interest or motivation would fall into category B, and one accessing the material to use it in a terrorist action would fall into A. This seems to be the most appropriate distribution.

Question 2: Does the Council want to remove the factor 'Offender repeatedly accessed extremist material (where not falling within A) from the guideline?

- ***Amendments to section 1 and 2 Terrorism Act 2006***

3.18 There are changes to the wording of sections 1 and 2 of TACT 2006 (encouragement of terrorism) to include references to a 'reasonable person' rather than 'some or all members of the public'.

Original Section 1(1) TACT 2006

This section applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.

3.19 The requirement that the statement must be 'likely to be understood' by some or all members of the public as an encouragement or inducement to them to commission, prepare or instigate an act of terrorism, meant that the encouragement offence would not be made out if the statement was directed at children or vulnerable adults who do not understand the statement to be an encouragement to engage in acts of terrorism. In order to correct that, the section has been amended:

New Section 1(1) TACT 2006

(1) This section applies to a statement that is likely to be understood by a reasonable person as a direct or indirect encouragement or other inducement to some or all of the members of the public to whom it is published to the commission, preparation or instigation of acts of terrorism or Convention offences.

3.20 The factors in the guideline do not require amendment to provide for this change.

- ***Amendments to bring more offences into scope for extended determinate sentences and sentences for offenders of particular concern.***

3.21 The new legislation also brings further offences in scope for extended determinate sentences and sentences for offenders of particular concern. Ruth brought these changes to the attention of the Council in May and proposed changes to the wording at the front of the affected guidelines to make it clear that these provisions apply from 12 April 2019 (the date that the amendments came into force). No further changes are needed.

- ***An increase to the maximum sentences***

3.22 The government provided the following rationale for increasing the statutory maximum for the Collection of Terrorist Information (section 58 TACT 00) and Encouragement (sections 1 and 2 TACT 06) offences. The failure to disclose information offence (s38B TACT) is discussed separately:

The maximum penalties for a number of terrorism offences were established in the Terrorism Acts of 2000 and 2006. The terrorist threat has since changed, with individuals engaging in such conduct now likely to pose an increased risk of moving quickly on to attack planning, given the rapid trajectory of radicalisation now being observed. Increased maximum penalties better reflect the increased risk and the seriousness of these offences.

3.23 The Joint Committee on Human Rights, in their scrutiny of the legislation, made the following recommendation:

In our view, the increase in sentences does not appear to be supported by evidence to suggest why it is justified or proportionate. We recommend that the Home Office provide further evidence (if they have such evidence) as to why they consider the current maximum sentences to be insufficient and how this increase is necessary and proportionate. We are particularly concerned that a sentence of 15 years could be imposed for a precursor offence of viewing terrorist material online three times or more. This would put viewing material online (without intent to cause harm) on the same level of culpability as possession of an article (e.g. materials for bomb-making) for terrorist purposes. As such, we recommend that clause 6(2) [the clause introducing the increases to statutory maximum across four offences] be deleted.

3.24 The Government provided the following response:

It is important to remember that for all four offences [sections 58 and 58A of the 2000 Act, and sections 1 and 2 of the Terrorism Act 2006], 15 years' imprisonment will be the maximum penalty provided by clause 6, and a sentence of that length will only be appropriate in cases of the utmost seriousness. In the normal way, it will be for the sentencing judge to determine the appropriate sentence to be imposed, taking into account the circumstances of each individual case, in line with applicable sentencing guidelines.

Since Parliament set the current maximum penalties for the offences at sections 58 and 58A of the 2000 Act, and sections 1 and 2 of the Terrorism Act 2006, the threat landscape has changed significantly. In the modern digital age, individuals who view or disseminate terrorist

material, or who encourage terrorism, pose an increased risk of quickly moving to attack planning themselves or of radicalising others to do so. We have seen an increase in low sophistication terrorist plots which are inspired rather than directed, and in attack operatives who are self-radicalised and self-trained without necessarily having had significant direct contact with terrorist organisations. The division between preliminary terrorist activity and attack planning is increasingly blurred, and the move from the type of activity covered by these offences to planning or launching an attack can happen quickly and unpredictably, with little or no warning, particularly in the case of spontaneous or volatile individuals. An increased maximum penalty does not mean that we consider every case is going to be of equivalent seriousness.

If the police and intelligence agencies are going to keep the public safe they need the powers to effectively disrupt terrorists involved in this type of activity at an earlier stage, before the risk of them carrying out an attack has progressed. The increased maximum penalties will properly reflect the seriousness of these offences and the risk arising from this activity, and will help to protect our communities.

3.25 Having read through the debates it is not clear whether the will of parliament was that all sentences should attract a higher sentence, or whether there should be an increase just to the most serious cases. It seems that the Government's aim is to disrupt terrorists earlier on, before a major terrorist incident occurs. This would tend to suggest that the aim is to disrupt offenders by prosecuting them for less serious offences for which they receive more significant sentences than they would have previously.

3.26 It must, however, be remembered that the Council expressed a similar rationale in drafting the guidelines that were published last year. The consultation stated:

[Kahar] has worked effectively for sentencing preparation cases up until now, but the changing nature of offending requires that the guidance be reconsidered, and that a comprehensive package of guidelines be produced to cover a wider number of offences.

The Council considered the sentences as set out in the guideline case Kahar alongside the details of recent cases, and agreed that sentencing practice should be increased for these offences. In Kahar the lowest level offence will fall into Level 6 which has a sentencing range of 21 months to 5 years, whereas the lowest sentence range within the proposed guideline is 3 years to 6 years. The cases that will fall into the lower categories of the new guideline are ones where preparations might not be as well developed or an offender may be offering a small amount of assistance to others.

The Council determined that, when considering these actions in the current climate, where a terrorist act can be planned in a very short time, using readily available items as weapons, combined with online extremist material on websites which normalise terrorist activity, and creates a climate where acts of terrorism can be committed by many rather than a few highly-organised individuals, these offences are more serious than they have previously

been perceived. The Council believes that its proposals take account of the need to punish, incapacitate and deter.

3.27 Whilst the comments relate primarily to preparation offences (s5 TACT 06), the same considerations about the changing nature of offending was applied to the other guidelines, ensuring that significant sentences were available for lower level offending.

3.28 The Council may, therefore, wish to be cautious about further increasing sentences across all levels of the guidelines to reflect the increased statutory maxima. The issue now might be to increase sentences only for the top levels of seriousness were there was no room to increase prior to the change to the statutory maxima.

s58 TACT 2000 Collection of Terrorist Information (from ten to 15 years)

3.29 The current guideline can be seen here: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Terrorism-offences-definitive-guideline-Web.pdf>

3.30 Prior to the public consultation of this guideline the Government announced its proposal to increase the statutory maximum for this offence from ten to 15 years. For that reason, at consultation, the Council included a second sentencing table with higher sentences in it to seek people’s views. At that time the guideline looked quite different to how it ended up at publication, and had just two levels of culpability. The higher sentences table looked like this:

	A	B	C
1	Starting point* 10 years’ custody Category range 8-14 years custody	Starting point* 7 years’ custody Category range 5-9 years custody	Starting point 4 years’ custody Category range 2 -6 years custody
2	Starting point* 6 years’ custody Category range 4-8 years custody	Starting point 4 years’ custody Category range 2-6 years custody	Starting point 2 years custody Category range 1-3 years custody

3.31 The changes made above represented an increase across the board. Not many of the consultees commented on the second sentencing table but a couple agreed, including

the CPS and Attorney General’s Office. The London Criminal Courts Solicitors Association was the only respondent to provide any detailed feedback and they commented that an increase across the board does not necessarily reflect the will of parliament and that we should have awaited the debate to see what the intention was.

3.32 Over the last ten years there have been 20 offenders sentenced for this offence.¹ Three received a suspended sentence and 17 received an immediate custodial sentence. The mean average custodial sentence length (ACSL) was 3.7 years, after any reduction for guilty plea. The maximum sentence, received by two offenders, was seven years.

3.33 At **Annex A** there are some descriptions of cases taken from transcripts. In the pre-guideline cases 4 of the 6 cases sentenced would have received a higher sentence had the guideline been published and followed. From statistics it is too soon to say whether our guideline has had an inflationary effect as there are too few cases, but the transcripts suggest that is a possibility.

3.34 It is therefore proposed that the Council take a more nuanced approach to reflect the increased statutory maximum, and instead of increasing sentences across the board, focus on the most serious offending:

	A	B	C
1	Starting point* 10 years’ custody Category range 8 - 14 years custody	Starting point* 7 years’ custody Category range 5-9 years custody	Starting point* 3 years’ custody Category range 1-5 years custody
2	Starting point* 7 years’ custody Category range 5-9 years custody	Starting point 4 years’ custody Category range 3 - 5 years custody	Starting point 1 year 6 months custody Category range 6 months - 3 years custody
3	Starting point 5 years’ custody Category range 3-6 years custody	Starting point 3 years’ custody Category range 2 - 5 years custody	Starting point 1 years’ custody Category range High level community order – 2 years custody

*indicates a change to the sentence

¹ All statistics include adult offenders only, and only the principal offence for which the offender was sentenced.

3.35 As this offence now carries a statutory maximum of 15 years, comparisons could be made with the section 57 offence of Possession for Terrorist Purposes which also has a statutory maximum of 15 years. However, the Possession offence is arguably more serious than the Collection offence. Very few Possession cases are prosecuted as, for the most part, section 5 TACT 06 is more commonly used. The Possession offence is committed where a person possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

3.36 Given the different and more serious nature of the Possession offence it is not proposed that the Council simply replicate that sentencing table into this offence. However, the proposed sentences above would ensure that offending of a similar level of seriousness is met by similar sentences.

3.37 **Annex B** includes a table setting out the current and proposed sentences for the Collection (section 58 tact 00) and Encouragement (ss1 and 2 TACT 06) offences alongside the existing sentences for Possession (s57 TACT 00), as all three of these offences now have the same statutory maximum sentence of 15 years.

Question 3: Does the Council agree with the changes made to the sentencing table for the Collection (section 58 TACT 00) offence?

ss1 and 2 TACT 2006 Encouragement of Terrorism (from seven to 15 years)

3.38 The current guideline can be seen here: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Terrorism-offences-definitive-guideline-Web.pdf>

3.39 Over the last ten years there have been 57 offenders sentenced for this offence. Four received a suspended sentence and 52 received an immediate custodial sentence². The mean ACSL was 2.9 years, after any reduction for guilty plea. The maximum sentence, received by one offender was six years. 12 offenders received a sentence of four and a half to six years.

3.40 Sentencing data is available up to December 2018, by which point the guideline had been in force for 8 months. During this time the mean ACSL was 3 years 6 months and the median length was 3 years 11 months. In the 8 months immediately prior to the guideline coming into force the mean ACSL was 3 years 2 months, and the median was 3 years. The data indicates that sentences have increased following the guideline's introduction, however this finding should be treated with caution due to the very low volumes.

² One offender received a non-custodial sentence

3.41 At **Annex A** there are some descriptions of cases taken from transcripts. In the pre-guideline cases 4 of the 8 cases sentenced would have received a higher sentence had the guideline been published and followed.

3.42 The proposed changes can be seen below:

	A	B	C
1	Starting point* 10 years' custody Category range 8 - 14 years custody	Starting point* 7 years' custody Category range 5-9 years custody	Starting point 3 years' custody Category range 2-4 years custody
2	Starting point* 7 years' custody Category range 5-9 years custody	Starting point* 4 years' custody Category range 3-5 years custody	Starting point 2 years' custody Category range 1-3 years custody
3	Starting point* 4 years' custody Category range 3-5 years custody	Starting point 2 years' custody Category range 1-3 years custody	Starting point 1 years' custody Category range High level community order – 2years custody

*indicates a change to the sentence

Question 4: Does the Council agree with the changes made to the sentencing table for the Encouragement (section 1 and 2 TACT 06) offences?

s38B TACT 2000 Failure to Disclose Information About Acts of Terrorism (from five to ten years)

3.43 The current guideline can be seen here: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Terrorism-offences-definitive-guideline-Web.pdf>.

3.44 The government did not originally propose an increase to the sentences for these offences however Max Hill QC, as the then independent reviewer of terrorism legislation, gave oral evidence during the Public Bill Committee stage and commented that the maximum penalty for this offence was too low and should be increased. The Government agreed and thus the statutory maximum has now been increased.

3.45 Between 2008 – 2018 there were ten offenders sentenced for this offence³. One offender received a suspended sentence and nine received an immediate custodial sentence. The mean ACSL was 2.8 years, however three offenders (a third of those receiving custody) received the statutory maximum of five years.

3.46 Whilst there are few offenders sentenced for these offences it is clear that the courts are, in certain circumstances, willing to go to the statutory maximum which is quite unusual and evidences the need to increase the statutory maximum for these offences.

3.47 The offence under s38B can be committed in one of two ways:

38B Information about acts of terrorism

(1) This section applies where a person has information which he knows or believes might be of material assistance—
 (a) in preventing the commission by another person of an act of terrorism, or
 (b) in securing the apprehension, prosecution or conviction of another person, in the United Kingdom, for an offence involving the commission, preparation or instigation of an act of terrorism.

3.48 Looking at some cases (**annex A**), the offenders who receive the highest sentences are those guilty of the section 38B (1a) offence, i.e. where the offender had information before the incident that could have prevented it. These cases would most likely fall into A1 of the current guideline. In several of the cases the offenders receive final sentences that are significantly higher than the statutory maximum of 5 years because more than one charge was brought and consecutive sentences were imposed. This indicates that Judges consider the gravity of the overall offending merits a much more significant sentence.

3.49 It is proposed that the sentencing table is amended as follows:

	A	B	C
1	Starting point* 7 years' custody Category range 6-9 years custody	Starting point* 5 years' custody Category range 4-6 years custody	Starting point 2 years' custody Category range 6 months - 3 years custody
2	Starting point* 4 years' custody Category range 3-5 years custody	Starting point 2 years' custody Category range 6 months - 3 years custody	Starting point 1 year 6 months custody Category range High level community order – 2years custody

³ This only includes cases where this was the principal offence.

*indicates a change to the sentence

3.50 The changes proposed only relate to the upper levels. There are no examples in the transcripts of the lowest type of offending but under the current guideline it would involve a person having information of low significance, or having information of some significance about a terrorist act not endangering life or causing widespread damage. Currently the starting points for these cases are 2 years or 1 year 6 months which seem adequate.

3.51 The biggest proposed increase is to the sentence starting point and range in A1 as this involves a case where the information known was very significant (it could have prevented an act of terrorism) and relates to a terrorist activity endangering life. B1 has also been increased, this would involve a case where the information could be of some significance and relates to activity endangering life. Finally, an increase to A2 is recommended. An A2 case involves one where the information is very significant but does not relate to loss of life or widespread damage etc.

Question 5: Does the Council agree with the proposed increases to the sentences for the offence of failing to disclose information?

Question 6: Does the Council agree to sign off these guidelines?

4 IMPACT

4.1 The changes made to the guidelines to reflect the increased statutory maxima for the Collection, Encouragement and Failure to Disclose Information offences will inevitably result in an increase in sentencing practice. The Analysis and Research team will be completing work on a resource assessment after this Council meeting and, if these guidelines are signed off today, the resource assessment will be circulated to Council members in due course, before the consultation is published.

5 RISKS

5.1 There are risks associated with the assessment of the impact of these guidelines. Most terrorist offences are low volume which makes assessing current sentencing practice difficult.

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

26 July 2019
SC(19)JUL07 – Public Order
Sarah Munro & Rebecca Crane
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1 ISSUE

1.1 This meeting requires sign off of the definitive guidelines for Public Order offences and consideration and approval of the final resource assessment.

2 RECOMMENDATION

2.1 The Council is asked to;

- consider revisions agreed to the draft Public Order guidelines;
- sign off the definitive versions of the guidelines and;
- note the resource impacts which will inform the final resource assessment.

3 CONSIDERATION

3.1 The Council have been considering responses to the consultation on the draft Public order guidelines since January 2019. This meeting requires sign off of the definitive versions of the guidelines.

3.2 Annex A 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 as well as a summary of changes made to each guideline based on responses. Annex B includes the definitive guidelines illustrating post consultation changes. Annex C includes the expected resource impact for the guidelines.

Riot

3.3 The draft guideline which was subject to consultation is included at Annex A.

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.

Riot – summary of changes to draft guideline

Culpability factors

3.4 Respondents were 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, and the factor was amended to 'any incident of riot not including category A factors'. Based on road testing findings and some issues with interpretation of the word 'ringleader' in a category A culpability factor this was amended to 'instigator'.

Harm factors

3.5 Based on a number of responses questioning whether any offence of riot would fall outside of the factors included in the draft category 1 harm factors, and road testing findings supporting this concern, the harm model was amended. A proposed alternative model suggested listing harm factors in category 2, with category 1 providing for cases where

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

multiple or extreme category 2 factors are present to reduce the likelihood of all cases being categorised at the highest level. However, the Council preferred a model which retained listed factors in category 1 headed with 'multiple or extreme examples of', with category 2 providing for all other cases.

Sentence levels

3.6 There was broad approval from consultation respondents of sentence levels, with very few dissenting views. No changes were therefore made to sentences.

Aggravating and Mitigating factors

3.15 Based on a number of respondents raising concerns that the aggravating factors included led to a high risk of double counting, the following wording was included at step two of the guideline; *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.*

Additional guidance – riot related offending

3.16 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, although the Law Society suggested that the guidance should go further and explicitly reference how the sentence may be impacted. The Council did not wish to include the suggested wording, preferring the guidance to remain as originally drafted.

Question 1: Does the Council agree to sign off the definitive guideline for Riot?

Violent Disorder - summary of changes to draft guideline

3.17 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'.

Violent Disorder - summary of changes to draft guideline

Culpability factors

3.18 While there was similarity with the draft riot guideline factors and approach in assessing culpability in the highest categories of violent disorder, the changes made to the riot guideline were not made to violent disorder as the model provides for a broader range of offending. However, as road testing of violent disorder illustrated the point regarding interpretation of the factor specifying 'ringleader' this was also changed to instigator in the violent disorder guideline.

Harm factors

3.19 The draft guideline included two categories of harm. Following road testing findings which identified that nearly all cases achieved a high harm categorisation an additional harm category was included to provide for the most serious cases. The format initially proposed for Riot was agreed, and the lower harm category retained to provide for cases involving lower level violence or threats only.

Sentence levels

3.20 Draft guideline sentences were amended to reflect the additional harm category and an additional tier of sentences were included. This assisted in addressing concerns

highlighted in road testing and by some consultation respondents that sentences in the draft guideline were too low and did not adequately provide for the more serious offences. The resource assessment which accompanies the definitive guideline will confirm that the revised sentences are more in line with current sentencing practice.

Aggravating and Mitigating factors

3.21 In the draft guideline it was anticipated that use of an animal in an offence would be captured by the highly dangerous weapons factor. Based on responses that thought this was unlikely, an additional aggravating factor 'attack by animal used or threatened in commission of offence' was included.

3.22 Other factors remained unchanged but the Council agreed to include the additional wording agreed for the definitive riot guideline to remind sentencers to be alert to the risk of double counting any aggravating factors relevant to the culpability assessment.

Question 2: Does the Council agree to sign off the definitive guideline for violent disorder?

Affray

3.23 Broad principles which informed the development of the guideline were as follows;

- The principle that the sentence should relate to the overall incident and not the offender's individual role in an incident does not apply to the offence of affray as it does for riot and some cases of violent disorder. As the offence requires the use or threatening of unlawful violence, the factors agreed reflect gradations of this type of conduct.
- It was agreed in developing the guideline that harm in these offences will be fear/distress or physical injury, or both to varying degrees, which is reflected in factors.

Culpability factors

3.24 While a number of changes to factors were debated by the Council in considering responses to the draft guidelines, no changes to factors were made.

Harm

3.25 A change was made to the low level harm factor 'little or no fear/distress caused' as one respondent pointed out that it is unlikely affray would be charged in cases where minimal fear or distress is caused and little or no physical injury eventuates. The Council considered this and substituted 'little or no' with 'some' to qualify the fear/distress factor.

Aggravating and Mitigating factors

3.26 An additional mitigating factor 'significant degree of provocation' was included as one of the road testing scenarios identified this as a factor sentencers would wish to take into account. It was also agreed that the aggravating factor in violent disorder and riot 'injury to animal carrying out public duty' should be included in affray.

Sentences

3.27 No amendments were made to sentences.

Question 3: Does the Council agree to sign off the definitive guideline for affray?

S4, 4A & 5

3.28 These offences provide for a range of disorderly behaviour which vary in seriousness, although there is significant overlap between offences. Responses and changes to these guidelines were therefore considered simultaneously to ensure relativity of factors and sentences.

Culpability factors

3.29 An additional high culpability factor of 'substantial disturbance' was included for the s4A and s5 guidelines, as the MA highlighted that the factor is currently included in the existing MCSG s5 guideline and such offences may not be captured by the factor 'sustained incident'. No other changes were made to culpability factors.

Harm factors

3.30 A harm factor in the s4 draft guideline was 'fear of immediate violence to multiple persons present.' This factor was amended to remove the word 'immediate' as this is within

the statutory definition of the offence and it was agreed is therefore superfluous. No other changes were made to harm factors in the s4, s4A and s5 guidelines.

Sentences

3.31 The most significant changes to the draft guidelines were to sentences. In the draft guideline the highest s4A starting point had been decreased from the existing MCSG starting point of a 12 week custodial sentence to a high level community order, to provide for relativity with more serious s4 offences. In developing s4 sentences for the draft guideline, it was noted that relativity to common assault offences should be considered at the point the assault guideline was revised, as common assault is considered more serious as it will often involve use of violence rather than the threat or provocation of violence. The revised common assault guideline was developed after the draft s4 sentences were developed, and the existing non-custodial starting point of a high level community order for the most serious common assault offences was maintained. The Council therefore reconsidered the starting point for s4 offences, and agreed that these should not be higher than for common assault and should be the same and attract a high level community order starting point. A2 and B1 starting points were revised down to a medium level community order. The starting point of a s4A offence was not revised down further and both the s4 and s4A offence now include a high level community order starting point at the highest category of seriousness.

3.32 This could be a contentious point with some stakeholders, particularly sentencers, when the definitive guideline is published. In particular there is a risk that the Council may appear to have been influenced by the current political consideration of short term custodial sentences. To mitigate this risk the consultation response document will note the relativity required with common assault sentences, and will be clear that the Council has had its own policy for some time regarding avoiding including very short term custodial sentences as starting points in guidelines. It will also highlight that the category range ensures that custodial sentences are available for the court to impose where appropriate.

Racially aggravated approach in s4, s4A and s5

3.33 The approach to assessing racial aggravation was significantly revised in the definitive versions of the guideline for s4 and s4A offences. This was largely due to road testing findings that the inclusion of sentence tables and relative starting points resulted in much higher sentences than many sentencers felt comfortable with. Some respondents also thought the approach was overly complex.

3.34 The Council therefore agreed to use the uplift approach in the definitive guidelines which sentencers are familiar with and which was tested in development of the arson and criminal damage guidelines. A slightly adapted uplift approach was already included for the s5 offence as the limited statutory maximum sentence of a fine meant that the additional sentencing table approach was not suitable for this offence. The uplift model agreed for s5 offences is also slightly different given the limited penalties available for basic and aggravated offences². The consultation response document will clarify that two racially and religiously aggravated approaches were tested at the same time, and sentencers were found to prefer the less complex uplift approach with which they are already familiar.

Question 4: Does the Council agree to sign off the definitive guidelines for s4, s4A and s5 offences?

Stirring up hatred

3.35 The Council considered responses to the stirring up hatred offences at the May 2019 meeting, and a number of changes were made.

Culpability factors

3.36 The wording of the first high culpability factor was slightly amended to read 'offender uses position of trust, authority or influence to stir up hatred' instead of the draft version of 'offender in position of trust, authority or influence and abuses their position to stir up hatred'.

3.37 The lesser culpability factor 'reckless as to whether hatred would be stirred up' was qualified with (racial hatred offences only), as the other offences must be intended and cannot be committed recklessly.

Harm factors

3.38 Extensive debate took place regarding the second high harm factor relating to 'widespread dissemination'. In the draft guideline the factor was worded as 'Widespread dissemination of statement/publication/performance or broadcast and/or strong likelihood that many would be influenced'. The difficulty with proving the second limb of the factor was raised by some respondents and discussed, and it was agreed the factor should be limited to reading 'widespread dissemination'. Some respondents had also objected to this factor

² As only a fine can be imposed for a s5 Public Order offence, the sentence uplift guidance includes how the penalty should be calculated as it is not possible to impose another sentence type as in the other aggravated offences which are not limited to a financial disposal.

being included citing the potential for this to capture social media posts which unintentionally 'go viral'. The Council debated this point and other potential wording but ultimately decided that given the nature of the offences harm would be greater where dissemination was widespread.

Sentences

3.39 The lowest category of offence starting point was revised from a 6 month custodial sentence to a high level community order, to reflect the fact that these will be reckless offences where a low level of harm is present.

3.40 The other category ranges have been reviewed in light of this amendment and it is proposed that the bottom of the B2 and C1 ranges should be reduced to 6 months custody, as currently all but the highest and lowest category ranges start with 1 years' custody.

Question 5: Does the Council agree to revise the bottom of the B2 and C1 category ranges to 6 months custody?

Aggravating and mitigating factors

3.41 A mitigating factor of 'offender took steps to limit dissemination' was included.

Question 6: Does the Council agree to sign off the definitive guideline for stirring up hatred offences?

3.42 One final point was not raised as a consultation response, but in email correspondence with the Home Office football policing unit. They asked whether it would be possible for the guidelines to ensure courts comply with their legislative obligation to consider imposing football banning orders in appropriate cases, as there is a view that these are underutilised. Section 14A of the Football Spectators Act 1989 provides;

(1) This section applies where a person (the "offender") is convicted of a relevant offence.

(2) If the court is satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches, it must make such an order in respect of the offender.

(3) If the court is not so satisfied, it must in open court state that fact and give its reasons.

Given that the legislation compels the court to consider these orders in appropriate cases, it is thought it may be helpful for step seven of the violent disorder and affray guidelines and step six of the disorderly behaviour guidelines to read as follows;

STEP SIX/SEVEN

Compensation and ancillary orders

In all cases the court should consider whether to make compensation and/or other ancillary orders. In particular, where the offender is convicted of a relevant offence within Schedule 1 of the Football Spectators Act 1989, the court must consider whether a Football Banning Order should be made pursuant to s14A Football Spectators Act 1989.

- [Ancillary orders – Magistrates' Court](#)
- [Ancillary orders – Crown Court Compendium, Part II Sentencing, s7](#)

3.43 Information on what constitutes a 'relevant offence' are provided in the links to the Magistrates' Courts Explanatory Materials and the Crown Court Compendium

Question 7: Does the Council wish to include specific reference to Football Banning Orders in the step relating to compensation and ancillary orders of all relevant guidelines?

Equality and Diversity issues

3.44 No specific issues were raised relating to equality and diversity in the draft guidelines, other than a high number of responses already considered by the Council which thought the guidelines were intended to restrict free speech and undermine the rights of specific groups to express views. The consultation document will be clear that the guidelines apply to specific criminal offences created by Parliament and do not undermine principles of lawful free speech.

4 ISSUES

4.1 There is currently no existing guidance available for some offences within these draft guidelines, although there is guidance contained within MCSG for the offence of affray and for s4, s4A and s5 offences. Consultation responses broadly welcomed the development of guidelines for the range of public order offences.

5 RISKS

5.1 The definitive guideline resource impact does not anticipate any substantial inflationary or deflationary impacts of the guideline.

As noted earlier in this paper there are some reputational risks associated with decisions to reduce starting points for some offences, and with misunderstanding by a number of respondents as to the basis of some of the guidelines. The consultation response document will provide clear and robust rationales to potential areas of criticism. This will be circulated to the Council for comments and views.