

7 June 2019

Dear Members

Meeting of the Sentencing Council – 14 June 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 14 June 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 in order to take photographs of members for our website.

The agenda items for the Council meeting are:

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|-----------------------------------------------|--------------------|
| ▪ Agenda | SC(19)JUN00 |
| ▪ Minutes of meeting held on 10 May | SC(19)MAY01 |
| ▪ Action Log | SC(19)JUN02 |
| ▪ Expanded explanations | SC(19)JUN03 |
| ▪ Race and Gender analysis | SC(19)JUN04 |
| ▪ Future vision for Sentencing Council | SC(19)JUN05 |
| ▪ Drugs | SC(19)JUN06 and 07 |
| ▪ General Guideline and Expanded explanations | SC(19)JUN08 |
| ▪ Business plan and annual report | SC(19)JUN09 and 10 |

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

14 June 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 – 11:15 | Expanded explanations – presented by Ruth Pope (paper 3) |
| 11:15 – 12:15 | Race and Gender analysis – presented by Emma Marshall and Eleanor Nicholls (paper 4) |
| 12:15 – 12:45 | Future vision for the Council post 2020 – presented by Emma Marshall (paper 5) |
| 12:45 – 13:30 | Lunch (extended for photos of members) |
| 13:30 – 14:45 | Drugs – presented by Eleanor Nicholls and Caroline Nauth-Misir (papers 6 and 7) |
| 14:45 – 15:30 | General Guideline and Expanded explanations – presented by Ruth Pope (paper 8) |
| 15:30 – 16:00 | Business plan and annual report – presented by Steve Wade and Phil Hodgson (papers 9 and 10) |

Sentencing Council

COUNCIL MEETING AGENDA

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MEETING OF THE SENTENCING COUNCIL

10 MAY 2019

MINUTES

Members present:

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

Apologies:

Rosina Cottage

Representatives:

Assistant Commission 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)
Lisa Frost
Amber Isaac
Mandy Banks
Ruth Pope
Eleanor Nicholls

1. MINUTES OF LAST MEETING

- 1.1. The minutes from the meeting of 5 April 2019 were agreed.

2. MATTERS ARISING

- 2.1 The Chairman reported on a successful visit he had made to Taiwan to deliver lectures on the work of the Council and on the interest that the Taiwanese judiciary had shown towards developing sentencing guidelines in their jurisdiction.

3. DISCUSSION ON DRUGS – PRESENTED BY ELEANOR NICHOLLS, OFFICE OF THE SENTENCING COUNCIL

- 3.1 The Council considered sentence starting points and ranges for the main Misuse of Drugs Act 1971 and Psychoactive Substances Act 2016 offences, looking at evidence of recent sentence levels and case transcripts.
- 3.2 The Council agreed to retain current sentence levels for most offences, but to give further consideration to sentence levels for Psychoactive Substances Act offences, which have a lower statutory maximum penalty than the equivalent Misuse of Drugs Act offences. As the guidelines are due to be signed off at the Council's meeting in June, some of these changes to sentence levels will be considered out of committee.
- 3.3 The Council also considered evidence from the police concerning increasing levels of purity of ecstasy tablets and decided to consult on revised quantities of tablets in harm tables, and to seek additional evidence from the police experts on changes in potential yield of cannabis plants.

4. DISCUSSION ON ATTEMPTED MURDER – PRESENTED BY LISA FROST, OFFICE OF THE SENTENCING COUNCIL

- 4.1 The Council considered potential options for a revised attempted murder guideline, and agreed to proceed with a model including descriptive culpability factors. It was agreed that the most serious factors would reflect paras 4 and 5 of Schedule 21 of the Criminal Justice Act 2003 for murder offences, and that four categories of culpability would be required to allow for the guideline to be relative to the various minimum term murder categories and sentences.
- 4.2 The Council agreed that a similar harm model to the model agreed for GBH offences should be included, with some revisions to reflect the fact that harm can be broader in range in attempted murder than GBH. The Council considered whether the guideline should include life sentences, and provisionally agreed that life starting points should not

be included but that guidance be provided on when life sentences may be appropriate.

5. DISCUSSION ON FIREARMS – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

- 5.1 The Council considered the content of a step in the relevant guidelines on the five year minimum term provisions and guidance on when exceptional circumstances might apply. The Council was informed that the CPS had changed its charging advice on offences involving the possession of disguised stun guns which would reduce the number of cases coming within the minimum term provisions. The Council agreed to consult on providing additional guidance on the minimum term provisions for under 18s.
- 5.2 The Council confirmed that sentence levels should be developed to reflect broadly current sentencing practice. The Firearms Working Group would meet to discuss sentence levels in detail and these would be considered by the full Council at the July meeting alongside the resource assessment.

6. DISCUSSION ON PUBLIC ORDER – PRESENTED BY LISA FROST, OFFICE OF THE SENTENCING COUNCIL

- 6.1 The Council considered consultation responses to the draft guideline for hate crime offences of stirring up racial hatred or hatred against persons on religious grounds or grounds of sexual orientation. It was agreed that one high culpability factor should be slightly amended to 'offender uses position of trust, authority or influence to stir up hatred'. It was also agreed that the reckless culpability factor should be qualified for clarity that the category applies to reckless offences only as the other offences must be intended.
- 6.2 Extensive discussion took place regarding the harm factor relating to widespread dissemination and a strong likelihood that many would be influenced. Some respondents had raised concerns that this factor would potentially capture a high number of cases in the digital age and potential for material to be shared, and that strong likelihood of influence was difficult to assess and measure.
- 6.3 The Council considered other forms of words, and agreed to rephrase the factor as widespread dissemination agreeing that this would cause more harm in an offence. It was agreed that a mitigating factor of 'Offender took steps to limit dissemination' should be included to provide for balance in considering an offender's role in disseminating material.
- 6.4 Finally the Council agreed to revise the starting point of the lowest category of offence from a custodial sentence to a community order and adjusted the sentence range for the category.

7. DISCUSSION ON IMMIGRATION AND MODERN SLAVERY – PRESENTED BY ELEANOR NICHOLLS, OFFICE OF THE SENTENCING COUNCIL

- 7.1 This was the first time the Council had considered the project to develop guidelines for Immigration and Modern Slavery Offences. The Council discussed which offences should be included, and agreed that the guideline should cover six of the most commonly sentenced Immigration offences, including two identity document offences and the offence of providing immigration advice in contravention of a prohibition or a restraining order, under s91(1) of the Immigration and Asylum Act 1999.
- 7.2 The Council also agree that the guideline would cover eight offences under the Modern Slavery Act 2015, and agreed some questions of evidence gathering and approach.

8. DISCUSSION ON TERRORISM – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

- 8.1 The Council agreed that the Terrorism guidelines should be reviewed to take account of legislative changes in the Counter-Terrorism and Border Security Act 2019. Work on this would be expedited but changes would be subject to consultation. In the meantime the Council agreed to add notes to the existing guidelines to alert users to the legislative changes and the fact that the guidelines had not be updated to take account of these.

ACTION AND ACTIVITY LOG – as at 7 June 2019

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 5 April 2019					
1	Drugs	It was agreed to carry out further work to understand some of the initial findings of the drugs research and consider when would be the appropriate time to aim for publication of the final report.	Amber Isaac / Eleanor Nicholls		ACTION CLOSED- Further analysis undertaken. The results of this and a proposed action plan to be presented to Council at June meeting.
SENTENCING COUNCIL MEETING 10 May 2019					
2	Drugs	Circulate revised sentence level tables for Psychoactive Substances Act offences to Council members for consideration out of committee, by end of May.	Eleanor Nicholls	ACTION ONGOING – circulated instead revised quantities for harm tables for ecstasy, cannabis plants and SCRAs, to which changes had been proposed at May meeting. Psychoactive Substances Act tables to be discussed at June meeting	
3	Drugs	Nick Ephgrave to seek further evidence from police colleagues on changes in potential yield of cannabis plants.	Nick Ephgrave		ACTION CLOSED: Further evidence provided.

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Sentencing Council meeting:
Paper number:

14 June 2019
**SC(19)JUN03 – General Guidelines and
Expanded Explanations (paper 1)**

Lead Council member:
Lead official:

Maura McGowan
Ruth Pope
0207 071 5781

1 ISSUE

1.1 To recap on the history of this project: The Sentencing Council's predecessor body, the Sentencing Guidelines Council (SGC), published its *Overarching Principles: Seriousness* guideline in 2004.¹ It remains in force although parts of it have been superseded.

1.2 The SGC *Seriousness* guideline sets out the statutory provisions governing the five purposes of sentencing and the assessment of culpability and harm as set out in the Criminal Justice Act 2003. It gives guidance on the assessment of harm and culpability and lists factors that indicate an increase or decrease in harm or culpability.

1.3 It also gives guidance on reductions for a guilty plea (superseded by the *Reduction in Sentence for a Guilty Plea Definitive Guideline*), the custody and community sentence thresholds (superseded by the *Imposition of Community and Custodial Sentences Definitive Guideline*) and prevalence (which is still current).

1.4 The SGC *Seriousness* guideline is still relevant in two ways:

1. Providing information when sentencing offences for which there is no offence specific guideline; and
2. Providing context for factors used in sentencing whether or not a guideline is available.

1.5 As outlined above, the *Seriousness* guideline is now out of date in many respects and in June 2017 the Council took the decision to replace it and in the process address some of the issues raised in Professor Bottoms' review of the work of the Council, in particular to provide more guidance on aggravation and mitigation to help sentencers' understanding of the guidelines and to increase transparency.

1.6 In order to make the project manageable the replacement of the *Seriousness* guideline was undertaken in two stages:

¹ https://www.sentencingcouncil.org.uk/wp-content/uploads/web_seriousness_guideline.pdf

1. From June to September 2018 the Council consulted on a *General* guideline for use where there is no offence specific guideline. That guideline included expanded explanations for factors that are commonly found in guidelines.
2. From February to May 2019 the Council consulted on providing expanded explanations in all existing Sentencing Council offence specific guidelines

1.7 The consultation on the expanded explanations closed on 23 May 2019. The aim is to consider all the responses at this meeting to enable publication of the explanations on 24 July, alongside the General guideline, and for both to come into force on 1 October.

1.8 At the same time the SGC Seriousness guideline will be withdrawn.

1.9 This is an ambitious timetable, but there are several other definitive guidelines and consultations scheduled for publication in the autumn, so it is desirable to publish next month. This will enable training to be carried out in conjunction with the Judicial College in September and October when training days are already scheduled.

1.10 This is the first of two papers to consider the responses – it is hoped to consider all of the substantive changes to the expanded explanations in the morning session and for the remaining issues and final sign off to be considered at the afternoon session.

2 RECOMMENDATION

2.1 That the Council considers the suggestions made in consultation responses and agrees revisions to the draft explanations at Annex A. Suggested additions are shown underlined. The question numbers in bold in Annex A relate to the questions in this paper.

3 CONSULTATION RESPONSES

3.1 There were 36 responses to the consultation representing a wide range of guideline users and other interested parties.

3.2 The majority of consultation responses were broadly supportive of the proposals but there were suggestions for changes which will be considered in detail below.

General comments

3.3 Most respondents welcomed the concept of the expanded explanations. Some expressed concern that it would slow down the process of sentencing, but most felt that having all the information readily available would be useful:

Keep this excellent additional material as training and out-of-court guidance, and do not add yet more verbiage to the guidelines used in open court on the bench. Pressure of case turnover will mean that it does not get read in any case, during the course of a hearing. *Magistrate*

I am very much in favour of the development of expanded explanations, along the lines that the Council describes in this consultation document. The concept of providing this additional information strikes me as right in principle, insofar as it

contributes to consistency of approach and to transparency, as well as taking advantage of the online format of the guidelines to improve ease of access. *Andrew Ashworth*

I am supportive of the objectives of this consultation to improve consistency and clarity of sentencing decisions and to improve transparency for victims. *Victims' Commissioner*

We welcome the opportunity to provide input to the Sentencing Council proposal to embed additional information into offence-specific sentencing guidelines to make it easier for users to access relevant information. *West London Bench*

As to the concept, we are supportive of the overall aim of this project, which is to “provide easy access to relevant information without interfering with the ability of the court to sentence appropriately on the facts of the case before it.” While the existing sentencing guidelines already provide a considerable degree of clarity, any increase in the ability of court users and the general public to understand the basis upon which those convicted are sentenced is to be welcomed. The sentencing tribunal will retain an important degree of discretion as to how the guidelines are applied in each individual case - by apportioning weight to relevant aggravating and mitigating factors, after first identifying what they consider to be the appropriate starting point within the applicable range of sentences of the offence under consideration, and thereafter considering any credit resulting from a plea of Guilty. The use of expanded explanations is likely to benefit public understanding of the sentences handed down by the courts following the careful process set out above. *Bar Council*

We support the proposal to embed additional information into offence specific sentencing guidelines, and agree that this will make it easier for sentencers and practitioners alike to access the relevant information. *Law Society*

The extended explanations listed are helpful and will assist sentencers at reaching the appropriate tariff. *Chief Magistrate*

I would like to express my support for the approach suggested, to embed additional information into offence specific guidelines. I agree that the digitisation of the proposed new wording will increase access to the material and will improve transparency related to the factors considered as part of sentencing decisions. *Robert Buckland, Minister of State for Justice.*

The Howard League welcomes the notion of expanded explanations and the encouragement they will be able provide to judges and magistrates to turn their minds to the detail of people’s lives and experiences as part of the sentencing process. *Howard League*

3.4 Notable exceptions to the general approval were the Council of HM Circuit Judges and the Criminal Law Solicitors Association (CLSA):

Inevitably our responses reflect our position as professional sentencers in the Crown Court. We appreciate the proposed expanded explanations are for wider professional and public consumption. There may be tension between those perspectives which is not necessarily easy to reconcile. Nonetheless we take the view that guidelines hitherto have largely succeeded in achieving that. We respectfully question whether these proposed guidelines, with some exceptions, will do the same. *Council of HM Circuit Judges*

The CLSA would be grateful if the Council would consider the need for certainty and clarity as opposed to constantly changing and reviewing best practise. Perhaps more training for the Judiciary as to what is expected of them when sentencing is considered, as opposed to tinkering around the edges, may be more appropriate.

CLSA

3.5 Despite their strong reservations both the Council of HM Circuit Judges and the CLSA commented positively on some of the proposed expanded explanations and made suggestions for changes to others.

Question 1: Does the Council agree to continue with the project to add expanded explanations to factors in offence specific guidelines?

Information on fines, community orders and custodial sentences

3.6 In general, the provision of this information was welcomed. There were some suggestions for changes or additions.

3.7 The West London Bench made the following comments and suggestions on the information in the fines dropdown box:

It is particularly important to stress the need to try and get reliable financial means information from defendants to aid in setting the appropriate level of financial penalty. However, in the absence of such information, or where there is sufficient doubt about the reliability of such information, it is important to provide guidance on what the magistrates should do.

- It is important that the court should ask appropriate direct questions to try and ascertain as much financial background information as possible.
- The court should not only draw reasonable inferences (as stated in Annex A) but also should apply common sense and draw on life experiences to set the level of the financial penalty, stating (for the record) any key assumptions made to justify the penalty.
- We note that it is proposed to provide the following advice: *“In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied financial information to the contrary.”* We strongly support this.
- We would suggest that the wording is amended to read *“Where possible, if a financial penalty is imposed, it should remove any economic benefit the offender has derived (if any) through the commission of the offence ...”*

3.8 It is not proposed to make any changes based on these suggestions.

3.9 The CLSA commented:

Whilst it has to be right that no person should gain economically from any criminal activity, this to an extent is dealt with by the Proceeds of Crime Act, and of course, the Courts have made it clear throughout the past 12 years that it is not cheaper to offend than comply. However, it is difficult to assess as to how any benefit can be quantified. Such benefit may be subjective or speculative, and therefore undermines

the purpose of any sentence as proposed. Equally, in adhering to the formula as proposed for assessing a financial penalty, this immediately takes away any fairness, as it does not take into account the relevant expenses per household, merely a straight line fine which may well be hugely disproportionate in dealing with the ability to pay. This seems both arbitrary and unfair in the extreme. Often, those who are perceived to earn the most have pro rata much higher overheads.

The sentencing of Organisations may have a disproportionate impact within the proposals. It appears that the Courts are expected to overlook the true economic impact upon an Organisation and its ability to continue functioning without the loss of employment under these proposals.

3.10 The Justices' Clerks' Society (JCS) suggested:

We propose that the phrase "gain made as a direct result of offence" be amended to "actual gain made as a direct or indirect result of offence". We envisage this would then cover a case where a defendant received the unexpected gain from another after the commission of the offence. We would suggest adding "the court, in calculating the fine, should be mindful that a substantial fine, may force a company into administration resulting in a disproportionate impact to that intended by the sentence"

3.11 Release (a charity with expertise on drugs and drugs law) commented:

In general, the inclusion of additional material on fines, community orders, and custodial sentences in all relevant guidelines is a good idea, as it will allow the public to access all information in one place without the need to refer to other resources. However, in relation to fines 'removal of gain' is described as an objective of sentencing. Whilst it is certainly a matter of consideration - as is already addressed in the MCSG under "Offence committed for 'commercial' purposes" - it is not an objective in the same way as punishment, deterrence, or of course reparation. There is the potential for an excessive financial penalty to be ordered where the amount determined to be applicable for the offence and circumstances of the defendant is then increased to take into account removal of gain. Further clarification should be provided to avoid this occurring. Additionally, where relevant, further information should be given on double recovery. This should not just apply in cases where compensation is awarded, but also those where another financial order may be made. For example, if a confiscation order (or other ancillary order) is applied for or separate Proceeds of Crime proceedings have been instituted or are anticipated, a financial penalty as a substantive sentence would then amount to double recovery.

3.12 It is proposed to add the wording in the first bullet point on page 1 of Annex A, to ensure that the basic principles of setting a fine are not overlooked. The suggestion that reference to 'indirect' gain be added has not been adopted as this is already covered by reference to avoided costs and operating savings. Other gains are not excluded – the explanation refers to 'economic benefit [..] including'. Concerns raised about double recovery in cases of confiscation are not valid as any fine paid is deducted from the available amount for confiscation (s9(2)(a) POCA 2002). In any event, the reference to avoiding double recovery was not supposed to be limited to the consideration of compensation. This

has been made clearer by making this a separate bullet point. Points raised about the impact of high fines on organisations could be addressed by adding the suggested wording (taken from the Health and Safety guideline) in the penultimate bullet point.

3.13 There were also suggestions for amending some of the wording on community and custodial sentences. As this information is all taken directly from the *Imposition* guideline, and we did not consult on making any changes to that guideline (apart from the reference to guidance on ordering PSRs – discussed below), it is not proposed to amend this wording as part of this exercise. The suggestions will be retained and can be considered if and when the *Imposition* guideline is revised.

Question 2: Does the Council agree to make the suggested changes to the fines explanation?

3.14 There was a separate question in the consultation related to the proposal to link to a practice direction on when ordering a PSR may be unnecessary. At present no such practice direction exists, but respondents generally were keen for the provision of a link to any relevant guidance. The Prison Reform Trust (PRT), made the practical suggestion that the link in the community orders section should be moved to immediately under where reference is made to ordering a PSR.

3.15 In addition, some issues of a more general nature were raised by Andrew Ashworth:

I think it will be helpful to provide the additional information on Fines, Community Orders and Custodial Sentences, thereby providing more information from the *Imposition* guideline in particular. However, at this point and elsewhere in the consultation document, I am a little unclear about the link with other sources of guidance such as a Criminal Practice Direction. There are two issues here. One is accessibility: there is reference here to a link “to forthcoming guidance (probably in a Criminal Practice Direction on when a PSR should be obtained”. At M17 later there is direct advice to sentencers to obtain a PSR in cases of steps being taken to addressing addiction or offending behaviour. (There is also a reference to information in the Crown Court Compendium just before Q. 22.) Are there sufficient pointers, or is there sufficient ease of access, to these other sources? Do the Criminal Procedure Rules have a role to play too? How closely will the new guidance fit with the references to PSRs in the *Imposition* guideline, pp. 6 and 8? The second issue is one of authority: do these different sources have the power to lay down guidance to sentencing judges? The Council has the power to lay down definitive guidelines, but what of the other sources?

3.16 There are references to external sources of guidance at various points in existing and proposed guidelines. The Council is not in control of the accessibility of those sources, though we understand that there are plans to fully digitise the Criminal Procedure Rules and Criminal Practice Directions. In the meantime, all the guidelines can do is link to the page where the external sources can be found and provide the necessary information to locate the relevant information.

3.17 As to the authority of these sources: Criminal Procedure Rules and the Criminal Practice Directions have the authority of secondary legislation and therefore courts are obliged to follow them. There is no question of any CPD guidance on PSRs conflicting with that in the Imposition guideline or in the expanded explanations. There is, however, some uncertainty as to if and when a practice direction on PSRs will be issued. It is therefore proposed that the Council takes the decision to provide the link (in the places indicated at Annex A) if and when the guidance becomes available. The consultation response document can make it clear that this will be done and give the rationale for doing so.

3.18 Several respondents commented on the fact that some mitigating factors make specific reference to the desirability of obtaining a PSR:

- M8 – involved through coercion, intimidation or exploitation
- M13 – Age and/or lack of maturity
- M14 – Sole or primary carer
- M15 – Mental disorder or learning disability
- M17 - Determination to address addiction or offending behaviour

3.19 While most respondents were in favour of these reference one (the CLSA) read this as though it meant that in other circumstances the explanations were discouraging the ordering of a PSR. As the CLSA is alone in this misconception, no change is proposed to address it (though the response document can deal with the point).

3.20 The PRT thought that the guidelines should go further:

The guidance should therefore make clear that whenever a woman defendant is before them, sentencers should make enquiries about whether she has experience of domestic abuse and whether this may be an underlying factor in her offending. Some women may be coerced into offending in distinct ways, including trafficked women, foreign nationals and those from minority ethnic and religious groups, as well as women with learning disabilities who are particularly vulnerable to abuse.

3.21 Any such guidance (even if considered desirable) is outside of the scope of this project. Any reconsideration of the guidance on PSRs would necessitate a revision of the Imposition guideline, which would require separate consideration and consultation.

Question 3: Does the Council agree to provide a link when (if) a practice direction is issued, but not to make any other changes to the general approach to PSRs?

4 AGGRAVATING FACTORS

Statutory aggravating factors

4.1 Most respondents agreed with the expanded explanation for previous convictions and any criticism related to whether it was necessary to tell sentencers what they already

know. Some respondents suggested changes or additions to the guidance on previous convictions:

I wonder whether, in relation to SA1, the factors go far enough. Factor 5 refers to cases of previous convictions where there is an “underlying problem (such as addiction) that could be addressed more effectively in the community.” This is rather less vigorous than the passage included in several Council guidelines. In the *Burglary Offences* guideline, for example, at p. 8, there is reference to the possible suitability of a community order with a drug rehabilitation requirement as “a proper alternative to a short or moderate custodial sentence.” Could the wording in [the explanation] be equally specific? Courts are urged in point 12 to take a “rounded view” of the criminal record rather than to add up the previous offences/sentences. This is a gesture towards the “just and proportionate” phraseology of the guideline on *Offences taken into Consideration and Totality* which gives no assistance to sentencers at all. *Andrew Ashworth*

The guidance mentions terms such as “*Where the previous offence is particularly old...*” (bullet point 9) or “*Where there has been a significant gap between ...*” (bullet point 10) – my emphasis. These are rather imprecise terms, capable of various interpretations. For consistency, is it possible to provide some guidance on what might be considered “particularly old” or a “significant gap” in various circumstances?

- What factors / features of the offence and/or the offender should be considered when assessing whether any previous offence is old enough to be ignored or given almost no weight when considering the sentence?
- Do these factors vary depending on factors such as the age of the offender (e.g. should it be different for young adult offenders aged 18 – 22?) or for particular offences (e.g. more serious previous relevant offences should be considered as an aggravating factor for longer than a less serious offence).

Care should be taken when assessing the time period lapsed since previous relevant offences to ensure that there are no factors which reduce the significance for this offender of any apparent period of non-offending, such as a significant period in custody or absence from the UK. Perhaps this could be noted as a bullet point?

West London Magistrates' Bench

The expanded explanations are useful, but could go further in relation to clarifying what might be considered as an 'old conviction'. Whilst it is important to avoid being too proscriptive, to allow for individual circumstances to be taken into account, it would be useful not have some guidance on what passage of time is likely or unlikely to cause a conviction to be classed as old or "particularly old".

The recognition that "numerous and frequent convictions might indicate an underlying problem (for example addiction)" is welcomed but insufficient. It should be highlighted that substance use disorder is a mental health condition (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition). People who use drugs problematically commit a criminal offence - drug possession - as part of their health condition, and are therefore perhaps more likely to numerous and frequent previous convictions of the same type which may be seen as "an indication of persistent offending". This explanation can also be extended to cover acquisitive crimes committed in order to fund the purchase of drugs. *Release*

We would propose adding that “The court should consider that an apparent gap in offending may be due to a defendant remaining in custody whilst serving a custodial sentence, where this is evidenced on an antecedent record”. *JCS*

With the migration of the guidelines online, there is an opportunity to link to supporting evidence to assist sentencers in interpreting the directions and the

reasons behind them. Therefore, we recommend that this section includes a link to the Ministry of Justice research on the effectiveness of community orders and short sentences.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706597/do-offender-characteristics-affect-the-impact-of-short-custodial-sentences.pdf

In considering this factor, it is vital that sentencers are fully informed of any underlying issues which may be contributing to the individual's offending behaviour. Therefore, we recommend that this factor is cross referenced to relevant mitigating factors, including M13 (age and/or lack of maturity) and M16 (mental disorder or learning disability). Specific reference should be made in this section to Liaison and Diversion services and their role in providing the courts with detailed information about a defendant's mental health problems, learning disability, autism, substance abuse and/or communication requirements. In addition, we recommend the following changes to point 5:

5. Numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary **or appropriate**. *PRT*

4.2 In response to Andrew Ashworth's comments (which were not repeated by practitioners), the expanded explanations are in addition to, not in place of, the guidance on suitable alternatives to custody in some offence specific guidelines. It is not proposed that the Council should adopt the various suggestions that the explanations should define terms such as 'particularly old' as any attempt to do so would create more problems than it would solve. The request to include more detail on offenders with drug addiction or mental health conditions, would overcomplicate the explanation particularly as there are mitigating factors that relate to these issues. References to mitigating factors could be included, but as previous convictions apply to every guideline, such references would not be targeted to the case before the court and may serve just to clutter up the explanation. The suggested addition from the JCS appears unnecessary. A link to MOJ research on effectiveness would not be appropriate in practical guidance such as this. The suggested addition by the PRT of the words 'or appropriate' could be made if the Council feels that it adds anything useful.

4.3 The expanded explanations for the other statutory aggravating factors were broadly supported by respondents and no changes are proposed.

Question 4: Does the Council agree not to change the explanations for the statutory aggravating factors (SA1, SA2, SA3, SA4)?

4.4 Birmingham Law Society made the following comment:

Aggravating factors A1, A2 and A3.

4.5 Dr Carly Lightowlers made detailed observations on the factor 'Commission of offence whilst under the influence of alcohol or drugs' and makes a number of recommendations (edited):

Recommendation 1: Include a clear explanation, to which the guidelines can point, as to why alcohol or drug intoxication constitutes an aggravating factor

There is no clear rationale as to why a person who voluntarily consumes alcohol or drugs (AOD) and commits a (violent) offence is more culpable than a person who commits the same offence absent AOD consumption. The implicit assumption underpinning the guidance is that offenders who voluntarily become intoxicated are more culpable, presumably because they realise (or ought to realise) that this may lead to uninhibited conduct with unpredictable results. Yet such clarity would further assist in indicating how the aggravation of being 'under the influence of alcohol or drugs' is intended to be used across a variety of crime types; given that the strength of association is known to vary between AOD and crime type and by substance used.

Recommendation 2: Provide a clear explanation, to which the guidelines can point, for the lack of distinction between prescribed and recreational substances (both illicit and licit).

Reference to "being under the influence of alcohol or drugs" suggests both alcohol and drugs aggravate similarly in sentencing. Presumably based on the effect they have on decision making and culpability. Yet, there is substantial evidence to suggest alcohol use is significantly associated with violence but less evidence to link other drug use with violence. Sentencers are asked to consider intoxication from both alcohol and drug use similarly notwithstanding their differing legal status. As sentencing is known to be shaped by normative moral and social judgements about blameworthiness (rather than being a neutral practice), in practice this leaves considerable room for confusion and disparity in application (e.g. the relative weight that should be afforded based on aggravation in each instance) given that drug intoxication potentially represents further illicit behaviour. As the factor is currently described it is also potentially problematic for cases in which the interaction between prescribed medications and the consumption of non-prescribed AOD might impact upon offending behaviour.

Recommendation 3: Provide a clear definition or explanation of what is meant by "contributed to the offending" to assist sentencers achieve consistency in interpretation.

It is unclear how intoxication as having "contributed to the offending" will be established in practice. Whilst much of the literature points to an association between AOD (especially alcohol) and violence, this does not mean that intoxication is necessarily the cause of such behaviour or sufficiently explains it. Indeed, it is likely that the association between AOD and violence is a complex interplay of several (biological, psychological and social) factors including the social and environmental context for a particular offence. Whilst the Sentencing Council are careful to avoid causal language in their description (which is to be commended) it is still unclear how it will be established that the intoxication "contributed to the offending". This terminology is thus likely to produce complexity and a lack of coherence in sentencing as sentencers are faced with the task of determining whether a person was relevantly intoxicated based upon the 'lay knowledge' they hold about the effects of alcohol and other drugs. This again is likely to introduce a degree of variability in practice and is not clarified in the expanded definition.

Recommendation 4: Provide a clear definition or explanation of what is meant by "voluntary intoxication" to assist sentencers achieve consistency in interpretation.

It is unclear how the voluntary nature of intoxication (contributing to the offence) will be established in practice. Whilst I am sympathetic to the sentiment of making a distinction between self-induced intoxication and intoxication that is not self-induced. Challenges are presented when considering those with AOD addiction. The Sentencing Council acknowledge that in such instances an individual's intoxication may be considered in-voluntary. However, scientific debate in this field is ongoing and emerging evidence from a study of Magistrates in England and Wales points to

the varied interpretation of the role of intoxication in the case of drug addicted and intoxicated offenders. Establishing voluntary intoxication may also prove problematic for cases in which the interaction between prescribed medications and the consumption of non-prescribed AOD might impact upon offending behaviour.

Recommendation 5a: Clarify how ‘Engagement with assistance in dealing with the addiction’ in A1 and overlap with mitigation on the basis of ‘determination, and/or demonstration of steps taken to address addiction or offending behaviour’ is to be reconciled.

In its currently format, the way in which overlaps in mitigating factors will be dealt with is not clear. The Sentencing Council suggest the “court should have regard to the extent to which the offender has engaged with any assistance in dealing with the addiction”. Precisely what is meant by this is not clear as, it shares considerable overlap with the mitigating factor of “determination, and/or demonstration of steps taken to address addiction or offending behaviour”. As the new expanded explanations emphasise that “care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence”, this introduces a degree of confusion - especially as further elaboration on this mitigating factor is also on offer as part of the new expanded explanations.

Recommendation 5b: Clarify how ‘Applicable even where the offender has acted out of character’ in A1 and overlap with other mitigating factors (detailed below) is to be reconciled.

The Sentencing Council suggests the aggravating factor of being ‘under the influence of alcohol/drugs’ is “applicable even where the offender has acted out of character as a result of being intoxicated”. On the basis that “an offender who has voluntarily consumed drugs and/or alcohol must accept the consequences of the behaviour that results, even if it is out of character”. This clearly signals overlap with two mitigating factors in the assault guidelines; “Good character and/or exemplary conduct” and an offence being an “isolated incident”.

4.6 The PRT were concerned that the explanation failed to take into account the difficulties that offenders may have in accessing the services to address mental health issues and related substance misuse.

These bullet points are misleading and give cause for concern. The relationship between substance misuse and mental ill health is more complex than this statement suggests. There is clear evidence that misuse of drugs and alcohol is often related to poor mental health. The use of the words ‘voluntary’ and ‘voluntarily’ fail to take into account that individuals with mental health problems or learning disabilities can find it hard to access medical advice and maintain contact with mental health services. Access can be particularly problematic for people from black and minority ethnic communities who experience poor mental health, and for women who commonly have histories of abuse and trauma. Consequently, individuals may self-medicate by using drugs and alcohol. Many local areas have a reduced availability of and long waiting lists for drug and alcohol services (due to significant public health funding cuts, for which offenders should not be penalised), especially for people with co-occurring mental health problems and/or learning disabilities. Unless these social realities are recognized, sentencing decisions are bound to have unintended unfair consequences on vulnerable and disadvantaged individuals.

4.7 Release made related points:

We welcome reference to the fact that “in a case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary” but the following

assertion "that the court should have regard to the extent to which the offender has engaged with any assistance in dealing with the addiction in making that assessment" requires further explanation.

It must be recognised that substance use disorder is a chronic, relapsing condition that can exist for a number of years before someone identifies that they even have an issue, let alone feels in a position to seek help. This is exacerbated by the stigma surrounding substance use, which can deter people from accessing assistance.

There is a risk of "assistance in dealing with the addiction" being narrowly interpreted to mean treatment related to the use of drugs and/or alcohol only. We submit that a wider meaning should be attributed to the term to ensure that it also encompasses assistance related to the root causes of a person's substance use. Many people who have a substance use disorder also have mental health conditions. The ease with which someone with such complex needs to access assistance is often limited as those with a dual diagnosis of substance use and mental health are frequently passed back and forth between services, with each disputing whether the drug use is the symptom or cause of the mental health issue(s) and insisting that the other problem must be resolved before help can be provided. Therefore an attempt to access assistance may have been made, but been unsuccessful through no fault of the defendant's.

There are also specific issues faced by women and people of colour, and services are failing to ensure that the treatment provided meets their specific needs.

In light of the above, the fact that someone has not sought or accessed assistance in relation to their substance use, or associated issues, must not be seen as an indicator that they do not have a problem, or that their intoxication is voluntary.

4.8 Most practitioners considered that the proposed explanation was useful. Extending it to cover all of the points raised above could make it less clear rather than more so. The recommendations from Dr Lightowlers that various terms should be clarified do not immediately suggest how this could be done. Some suggested wording has been added to deal with the point that the licit or illicit nature of the intoxicant should not influence this factor.

4.9 It is submitted that the interrelation between this aggravating factor and the mitigating factor relating to addressing offending behaviour is not problematic – in some cases they may fairly balance each other out, in others one will carry more weight than the other depending on the circumstances. Equally an offender may still be able to rely on the 'good character' and 'isolated incident' factors if they apply, which will be balanced against the 'influence of drugs or alcohol' factor.

4.10 The difficulty of accessing help with addiction should not adversely affect offenders, because if they have not had access to assistance, they should not be penalised for not engaging with it. If that was not clear from the explanation, perhaps the wording could be adjusted.

Question 5: Does the Council wish to make any changes to the explanations for A1?

4.11 There were fewer comments on the explanation relating to membership of a group but concerns were raised by PRT that the reference to organised criminal networks could lead to a person named on the London gangs matrix being subject to this factor without further evidence. This concern overlooks the fact that the explanation states that mere membership of a group does not increase the sentence. The PRT also recommended that this factor should be cross referenced to the mitigating factor relating to involvement due to coercion, intimidation or exploitation. The difficulty with that suggestion is that the two factors do not appear in the same guidelines. If the Council felt that more guidance for those in a lesser role should be included, suggested text from the mitigating factor is provided.

4.12 Release suggested that the reference to criminal networks should also be qualified by explicit reference to the possibility of exploitation (they cite the exploitation of young people in criminal gangs). This factor does not currently appear at step two of any drugs offence guidelines, and it is submitted that the reference to role will be clear to all sentencers and it would not be helpful to repeat the same information within this explanation.

4.13 There were few references to the factor relating to the use or threat of a weapon, most respondents who commented agreed with the explanation. The MA, however, said:

Whilst we appreciate the aim of providing further guidance to sentencers, we do not feel the explanation will be that helpful in relation to this factor which is often a difficult one for sentencers to negotiate.

4.14 There were no suggestions for how the explanation could be improved and therefore no changes are proposed.

Question 6: Does the Council wish to make any changes to the explanations for A2 or A3?

Aggravating factors A4, A5 and A6

4.15 In general comments on these explanations were supportive, or felt that they stated the obvious. The exception was the CLSA who felt that the explanations were unhelpful in that they introduce subjectivity and decrease certainty.

4.16 The West London Bench suggested that reference could be made to the role of the offender in A4 'Planning of an offence'. Proposed wording has been added to address this. They also suggest that the explanation could make it clear that the degree of success or failure of the implementation or execution of any planning should not be a consideration. The Insolvency Service asks that reference be made to planning being inferred from the length of time over which the offending was committed. The JCS suggests that planning could be inferred from the commission of more than one offence in a short period. It is not proposed to add any further wording to address these suggestions.

4.17 Several respondents noted the similarity between factors A5 and A6 and queried why both were included. It should be noted that A6 does not appear in any offence specific guidelines and was included in this consultation only because it is in the General guideline. The Insolvency Service which prosecutes offences many of which are not currently covered by offence specific guidelines was supportive of the explanations for both A5 and A6 but asked for guidance as to what would be considered a high level of profit. They suggested this could be related to a percentage of legitimate income/ profit where offending is in a commercial context. It is not proposed to attempt to define this.

Question 7: Does the Council wish to make any changes to the explanations for A4, A5 or A6?

Aggravating factors A7, A8 and A9

4.18 The explanations for these factors were widely welcomed. The Council of HM Circuit Judges considered the explanation of A7 to be useful and made a suggestion:

Abuse of trust may occur in many factual situations. Examples may include relationships such as teacher and pupil, parent and child, professional adviser and client, or carer (whether paid or unpaid) and dependant. It may also include ad hoc situations such as a late-night taxi driver and a lone passenger. These examples are not exhaustive and do not necessarily indicate that abuse of trust is present.

These are obvious examples but nonetheless helpful. The last sentence might be better worded as follows: ... and do not necessarily indicate that the offender had a significant level of responsibility towards the victim on which the victim would be entitled to rely.

4.19 Several respondents suggested adding examples relating to domestic abuse or other instances of coercive behaviour. It is not proposed to adopt these suggestions as these are not excluded by the wording and are specifically covered by other factors.

4.20 The offence specific guidelines and step two factors to which this explanation would be applied are:

Guideline	Factor
Assault occasioning actual bodily harm	Abuse of power and/or position of trust
Causing grievous bodily harm with intent	Abuse of power and/or position of trust
Common assault	Abuse of power and/or position of trust
Inflicting grievous bodily harm / wounding	Abuse of power and/or position of trust
Aggravated burglary	Abuse of power and/or position of trust
Non-domestic burglary	Abuse of a position of trust

Harassment / Stalking (fear of violence)	Using a position of trust to facilitate the offence
Harassment/ Stalking	Using a position of trust to facilitate the offence
Unlawful act manslaughter	Abuse of a position of trust
Possession of indecent photograph of child	Abuse of trust
Communication network offences	Abuse of trust

4.21 The proposed explanation is clearly relevant to the factor as it will apply in most of these guidelines, but perhaps less so where abuse of trust may not relate to the relationship between the offender and the victim. Additional wording is proposed to cover this.

4.22 Suggestions were made by respondents for additional examples of behaviour that would come within A8:

Perhaps a simple example would be where there has been gratuitous destruction and damage to property, as part of a domestic burglary – this might include where there has been significant use of graffiti within the property or soiling / urination / defecation within the property (if not separately charged as Criminal Damage). *West London Bench*

We would add “soiling the victim as an act humiliation, e.g. following or during an assault” *JCS*

Another commonly encountered example is in the context of burglary, namely gratuitous damage of the property beyond the damage caused by the burglary itself. *Law Society*

4.23 The difficulty with these suggestions is that they are less likely to be of general application and/or they are covered by specific step one factors in the relevant guidelines. A slight change of wording is proposed in relation to where such behaviour results in separate charges.

4.24 Andrew Ashworth commented on the explanation relating to vulnerable victims at A9:

The expanded explanation in Appendix A is helpful, but it relates only to who should be treated as a vulnerable victim, and not to who should not. For example, there are quite a few Court of Appeal cases that have ruled that a particular type of victim does not satisfy the definition of “vulnerable” (e.g. *Sayed* [2014] 2 Cr App R (S) 39). While the Council may not wish to expand the explanations to give full coverage of CA decisions, it ought surely to offer some general guidance as to when a victim may not be considered to be vulnerable. Otherwise, it seems odd when a concept such as “vulnerable victim” requires definition, and the only definitional pointers given in the expanded explanation are positive factors and not negative factors. If the purpose of the expanded explanations is to offer guidance to sentencers and to conduce to greater consistency of approach, surely the text should go further than the present A9?

4.25 The JCS suggested:

We would highlight that a victim, who would otherwise not be vulnerable may become vulnerable. This may include where they are assaulted while trapped in a confined space, whether or not isolated from others, or whilst they have become

temporarily immobile or in state where they are vulnerable to further assault e.g. on the ground.

4.26 It is submitted that the explanation as currently worded does serve to guard against applying vulnerability too widely or giving inappropriate weight to it and that no useful addition suggests itself. The JCS suggestion should already be covered by the fifth and sixth bullet points, unless they are not sufficiently clear.

Question 8: Does the Council wish to make any changes to the explanations for A7, A8 or A9?

Aggravating factors A10, A11 and A12

4.27 The explanations for these factors were widely supported. The CPS and MoJ suggested that A10 should explicitly reference those participating in the democratic process by adding “or was engaging in the democratic process, or was targeted because of that engagement” to the current wording. The West London Bench asked for examples of public facing roles and suggested ‘jobs such as: Public Transport Driver or Conductor (or similar, like Ticket Inspector); Traffic Warden; Taxi Driver; Postman; Bank Clerk / Teller; DWP Administrative Assistant / Clerk; Refuse Disposal Operative; Meter Reader; Airline Employees such as Check-In staff or Cabin Crew’. The JCS suggested ‘that the guideline should highlight that the public facing service is key rather than whether the victim is privately or publicly employed e.g. a security guard.’ Similarly the PRT called for greater clarification as to whether the factor applies to victims in public facing roles more generally (which would include shop staff) or only to those in public sector roles to ensure consistency.

4.28 The provision of examples could be counterproductive but some additional wording is suggested to A10 to clarify the wide application of this factor.

4.29 Release suggested that in the context of drug offences the role of the offender would be relevant to the extent to which A11 would apply. The MA and the West London Bench suggested that examples would be helpful in the explanation for this factor. The provision of examples is likely to be problematic as their relevance would depend on the type of offence. As this factor relates to harm – it is submitted that role is not a relevant consideration. The only change proposed relates to the treatment of separate charges.

4.30 The PRT note that A12 may apply disproportionately to women

We refer you to pp.16-17 of PRT’s response to the Government’s Domestic Abuse Bill where we note the risks involved in creating a statutory aggravating factor regarding the impact on children. The Sentencing Council Overarching Principles: Domestic Abuse does include as an aggravating factor ‘Impact on Children’ and we would be interested in whether there has been any research about what effect this is having on sentencing. The guidance could be improved to alert sentencers to the potential impact of reliance on this aggravating factor in cases involving women with dependent children who are accused of domestic abuse

offences, and who, in the context of a controlling relationship, may be using reactive violence against a primary aggressor. In such instances, sentencers should use their discretion to take into account all the circumstances of the case in order to avoid unjust outcomes, including the imposition of prison sentences in cases which would not otherwise have merited this.

Question 9: Does the Council wish to make any changes to the explanations for A10, A11 or A12?

Aggravating factors A13, A14 and A15

4.31 Again these explanations were generally welcomed. Some respondents suggested that examples would be helpful as part of the explanations.

4.32 In relation to the explanation for A13, Release suggested that 'it should be expressly stated that unsophisticated, isolated incidents may not aggravate the offence'. The JCS suggested adding to the explanation 'that this should include attempts to place blame on others, where others have not suffered'.

4.33 In relation to the explanation for A14 the PRT commented:

We welcome the inclusion of reference to the mitigating factor of age and lack of maturity in the expanded explanation for this aggravating factor. However, a reference to the mitigating factor M16 mental disorder or learning disability should also be included. People with a learning disability or autism may be disproportionately liable to consideration under this aggravating factor. People with a learning disability may be acquiescent and suggestible. When under pressure, they may try to appease people. This can make them vulnerable to coercion and giving false information to authorities. Furthermore, people with autism may have difficulty in recognising and understanding the feelings and emotions of others. This may mean they act in ways which could be seen as inappropriate or even callous. Therefore, we recommend that this explanation is amended to take account of these protected characteristics.

4.34 No changes are proposed arising from these suggestions

Question 10: Does the Council wish to make any changes to the explanations for A13, A14 or A15?

4.35 Several other respondents welcomed the cross reference to the mitigating factor of age and lack of maturity but questioned why it was not mentioned in other aggravating factors:

It is not clear to us the criteria by which those aggravating factors which include the expanded explanation about young adults were chosen. In our view, maturity and age are just as relevant for other factors e.g. planning, committed in presence of others, commission of further offences etc. T2A

We note that a lack of maturity in an offender aged 18-25 is reflected in these explanations. In principle, we welcome the proper and appropriate reflection of immaturity in the sentencing exercise, as indeed paragraph 4.14(d) of the latest version of the Code for Crown Prosecutors does. We question however whether it is appropriate to reflect it in these two particular factors rather than more generally. For

instance, maturity could equally be said to be relevant to the likelihood that an offender would heed warnings from others. *CPS*

Whilst we understand why this expanded explanation [re age and lack of maturity] is included here [A13 and A14] why is it not applicable in many more expanded explanations? *Council of HM Circuit Judges*

4.36 In addition to A13 and A14 the cross reference to the mitigating factor on age and immaturity is also in the explanation for A2 – Offence committed as part to a group. Other factors where the Council may wish to consider adding a cross reference could include:

A3: Use or threat of a weapon – relating to reduced ability to evaluate consequences of actions and susceptibility to peer pressure.

A8: Gratuitous degradation of victim – particularly relating to the likelihood of misusing social media

A11: Others put at risk - relating to reduced ability to evaluate consequences of actions and limit risk taking

A12: Offence committed in the presence of others – relating to likelihood of offending in group situations

A15: Failure to respond to warnings - relating to reduced ability to evaluate consequences of actions and susceptibility to peer pressure

A16: Offence committed on licence PSS or court orders - relating to reduced ability to evaluate consequences of actions limit impulsivity

4.37 There is clearly a danger of diluting the effect of the cross reference by making it ubiquitous – the Council’s intention was to draw particular attention where it seemed most relevant. The evidence we have does not suggest that young adults are disproportionately likely to offend using weapons, and even if there are characteristics of immaturity that might be associated with the use of weapons it would be difficult to justify caveating this factor as sentencing policy has sought to deter the use of weapons. Of the other suggestions above, A15 would have a similar justification to A13 and A14.

Question 11: Does the Council wish to cross reference to the Age or lack of maturity mitigating factor from any other aggravating factors?

Aggravating factors A16, A17 and A18

4.38 The JCS and West London Bench suggested that the explanation for A16 should explicitly refer to the time that has elapsed since the commencement of the order or licence. Suggested wording has been added to cover this point.

4.39 The PRT had significant misgivings about including post-sentence supervision in this factor and its explanation arising from reports citing that PSS ‘has had no discernible impact on reoffending but has led to “an expensive merry-go-round” of people being repeatedly released, breached and recalled to custody. Recall rates have increased significantly since

the introduction of the measures. For men recall rates have increased by 29%, while for women they have risen by 166%. This has occurred without any tangible gains in rehabilitative outcomes, which have remained stubbornly high, with nearly two-thirds (64 per cent) of short-term prisoners going on to reoffend'. They go on to say:

- 'An offender who is subject to licence or post sentence supervision is under a particular obligation to desist from further offending'. There is no corresponding obligation in statute and the logic is unclear. All citizens are under the same obligation to obey the law – you can't be under more or less of an obligation. Furthermore, the wording of the explanation fails to recognise that desistance is a joint venture, and that the probation service or other supervising agencies also have an obligation to assist the person to desist from crime. The wording here places all the responsibility firmly with the person under supervision. No account is taken of the contribution of the failures of rehabilitation services to reduce the likelihood of reoffending – failures which have been well documented in successive inspectorate reports. Relevant factors include a failure to provide housing, lack of training and employment opportunities, missed appointments cancelled by offending managers, or a failure to provide continuity of mental health or social care and treatment for drug or alcohol addictions.
- 'The extent to which the offender has complied with the conditions of a licence or order will be a relevant consideration'. Greater clarity is needed here on how compliance with licence or order conditions should be taken into account. Lack of compliance may suggest that conditions are inappropriate to the circumstances or characteristics of the offender. For instance, childcare responsibilities may mean an individual is unable to meet appointments at certain times. In addition, people with a learning disability may find it difficult to understand the conditions attached to a licence or court order.
- 'Where the offender is dealt with separately for a breach of a licence or order regard should be had to totality'. Here it should be borne in mind that a return to custody is likely often to represent a far more punitive consequence than the behaviour would warrant in any other circumstance. Again, impacts on dependent children of a parent/primary carer being returned to custody can be particularly harsh.

4.40 It is not immediately apparent how these concerns could be taken into account in the explanation. The Council may consider that reference could be made to having regard to the level of support that an offender subject to licence or PSS has received, or to attempts made by the offender to desist from offending.

4.41 The JCS suggested changes to the guidance on A17:

We would propose that the guideline states "significantly" more serious" to mark the significant weight which should be attached to any offence committed in custody. We would highlight that offences, particularly of violence, may lead to the risk of reprisals by other inmates and escalation to others. We would propose that magistrates be reminded to give particular consideration to committing the case to the Crown Court for sentence. This would be due to the likely sentence but also to mark the seriousness of the offence to the defendant and others in the same prison establishment.

4.42 The PRT and Howard League raised a concern about this guidance:

We are concerned that this aggravating factor and the accompanying explanation do not take sufficient account of the mitigating circumstances which may contribute to offending in custody. Offences committed in custody may result in part from poor treatment, from a failure on the prison's part to provide adequate protection for the defendant's personal safety, or from the unique stress inherent in incarceration. Therefore, the wider context of the treatment and conditions in prison which may have contributed to offending by an individual need to be taken into account in mitigation. *PRT*

The proposed expanded explanation describes offences committed in custody as more serious, reasoning that they undermine the need for control and order which is necessary for running prisons and maintaining safety. The expanded definition as it stands fails to take into consideration the dire state of prisons today and how that may adversely impact on people's behaviour. The expanded definition ought to recognise that offences committed in custody may be a product of a stressful environment that causes some people, especially those who are young and vulnerable, to be hypervigilant. *Howard League*

4.43 The expanded explanation relating to offences committed in custody does not prevent relevant mitigating factors (which will vary depending on the details of the offence and offender) being considered.

Question 12: Does the Council wish to make any changes to the explanations for A16, A17 or A18?

Aggravating factors A19, A20, A21 and A22

4.44 There were very few comments on these factors aside from agreeing that the explanations were useful. In particular the guidance on prevalence was welcomed. The JCS suggested adding a reminder to A20 'that terrorism cases may only be dealt with, in the magistrates' court, by DJ(MC)s authorised by the Chief Magistrate or his/her nominated deputy'. This is a procedural point rather than a guideline issue and so it is not proposed to add it.

4.45 The PRT suggested adding a link to the information on domestic abuse in the Chapter on Gender in the Equal Treatment Bench Book to the explanation at A19.

Question 13: Does the Council wish to make any changes to the explanations for A19, A20, A21 or A22?

5 MITIGATING FACTORS

Mitigating factors M1, M2 and M3

5.1 Respondents were generally supportive of these explanations, though there were some suggestions for changes. The CPS queried the relevance of the factors M1 and M2 in some situations:

We invite consideration as to whether a lack of previous convictions or good character should be relevant considerations when considering offences such as fraud by abuse of trust, or misconduct in public office, or corruption or improper exercise of police powers and privileges contrary to section 26 Criminal Justice and Courts Act 2015, where the offender could only have been in the position to commit the offence by virtue of a lack of previous convictions/good character.

5.2 The rationale in the explanation for giving a reduction for no previous convictions is that i) first time offenders represent a lower risk of re-offending and ii) they are normally considered less blameworthy than repeat offenders. Both of these could still apply in the cases mentioned by the CPS. The explanation for good character does include the caveat: 'where an offender has used their good character or status to facilitate or conceal the offending it could be treated as an aggravating factor'. A similar caveat could be added to the explanation of previous convictions if it was felt to be appropriate.

5.3 There were several comments regarding the explanation for M3 – Remorse:

M3: Is there any guidance that can be provided to assist magistrates in determining whether remorse is genuine or not? This is often a point of contention, as a Defence advocate will often state that the offender is "truly sorry" for what they have done, or something similar. Perhaps the guidance could include the following points:

- In determining whether remorse is genuine or not, it is for the offender to convince the court of genuine remorse. Actions taken voluntarily by the offender will carry more weight than mere words.
- The offender should be asked what steps they have taken to date (voluntarily) to make reparation (either to individual victims or to wider society) for their offending.
- Such steps could include, for example: voluntary payment of compensation; writing of a letter of apology; voluntarily offering to participate in mediated counselling between the parties; volunteering to repair any damage done at their own expense.
- Absence of voluntary reparation may not necessarily mean that the remorse is not genuine (for example, the offender may be of very limited means).

West London Bench

This brings into play the consideration of a Court being satisfied that remorse is genuine. It cannot be right that a defendant who pleads guilty to an offence at the first opportunity should have to prove genuine remorse. This is so subjective and likely to be unreliable. It promotes a lack of certainty, subjectivity should never form a part of any sentence. The Court already uses its own discretion. No evidence has been produced to suggest this is an ineffective or inconsistent position. Credit for an early guilty plea and remorse go hand in hand, no plea equates to no remorse. The effect of the proposed changes may be to, in some cases, discourage guilty pleas. *CLSA*

We would add remorse shown prior to conviction will normally carry more weight than after conviction. Remorse may be shown directly to the victim, recorded by a criminal justice or agency e.g. National Probation Service, mental health services. *JCS*

'Lack of remorse should never be treated as an aggravating factor.' We wonder whether this is a rather bald statement which might not be of general application. For

instance, where a defendant is convicted after a trial having run a defence which is designed to heighten the distress of a victim a judge would be entitled to reflect this. The same would be true of a politically motivated crime. *Council of HM Circuit Judges*

We welcome the clear direction included in this explanation that lack of remorse should never be treated as an aggravating factor. However, given the common misunderstandings that arise in relation to this factor, we recommend that additional guidance should be included under this section. In particular:

- a. People with certain disabilities, such as autism, may find it hard to both understand and express remorse.
- b. People with learning disabilities are unlikely to have come across the word before and may not understand what it means. Alternative phrasing should be included in the guidance. For example, during interviews with prison staff concerning prisoners with learning disabilities, one head of healthcare said: “[The prisoner] told me he couldn’t understand why he had come to prison. He said, “when the judge asked me if I was remorseful, I said ‘no’, and then he told me I was coming here.” This young man had not heard that word before. He also said that he didn’t have much idea about what was going on in court and didn’t understand what people were saying, although he knew they were talking about him. These sorts of conversations are not uncommon here.” *PRT*

Greater clarity is needed regarding how the assessment of genuineness is carried out, and what is taken into consideration for this. There is a risk that this will be based solely on how the defendant presents to court, which may be affected by a number of factors including: general demeanour and personality; health conditions (especially mental health); nervousness because of the circumstances and/or environment. We welcome confirmation that "lack of remorse should never be treated as an aggravating factor." *Release*

5.4 The Council previously decided that any attempt to define or give further guidance on remorse was likely to be counterproductive. The assessment of remorse and the weight to be given to it are inevitably highly subjective. The concerns about some offenders having difficulty in articulating remorse could be allayed by the statement that lack of remorse does not aggravate. If the Council felt it would be helpful, some wording could be added to the effect that regard should be had to the difficulty some offenders may have in articulating remorse.

Question 14: Does the Council wish to make any changes to the explanations for M1, M2 and M3?

Mitigating factors M4 and M5

5.5 These explanations were widely supported. The only dissenting voice being the CLSA who were concerned that: ‘Self-reporting may be an inducement to acknowledge behaviour which does not constitute a criminal offence’. They went on to say:

Co-operation with the investigation and early admissions have, in the experience of those practising within the CLSA, always been factors to be taken into account. It

has to be right that reducing stress on victims and witnesses should be taken into account, but the CLSA is of the view that such credit already exists. If this heading is intended to give additional credit, the concerns that those practising in the criminal justice system is as to how this should be applied.

5.6 In contrast the CBA commented:

The proposed inclusion of M4 and M5 is appropriate. Both accurately and adequately reflect what is the content of certain present offence-specific guidelines (if not the invariable common practice of sentencing courts, in cases where one or both of these issues arise, to take such a structured approach).

5.7 No changes are proposed.

Question 15: Does the Council wish to make any changes to the explanations for M4 and M5?

Mitigating factors M6, M7, M8 and M9

5.8 Most respondents were content with the explanations for these factors.

5.9 There were a few comments or suggestions relating to M8: Involved through coercion, intimidated or exploitation:

M8 all but identifies a defence. For example, under the slavery and drugs trafficking regulations, this situation is covered. If duress is raised, then that is a defence, as is exploitation. It appears to the CLSA that there is a tendency to rewrite potential defences and turn them into mitigation. This is not the correct approach and shows a misunderstanding of the law, the burden and standard of proof, defences, and mitigation. Where the matters raised of this type fall short of a defence in law, the courts have traditionally taken them into account where appropriate when considering sentence in any event. *CLSA*

We believe these [the 2nd 3rd and 4th bullets of M8] are useful expanded explanations.
Council of HM Circuit Judges

M8 (coercion) and M9 (lack of awareness) could both usefully refer to the guidance on young offenders (as these factors may be particularly common in children, young people, and young adults). *Law Society*

We support the inclusion of the expanded explanation of this factor, and suggest this would benefit from a link to the relevant sections of the Equal Treatment Bench Book on domestic abuse and coercion, and trafficking and modern slavery. In relation to people with learning disabilities, additional guidance should be included under this section:

- People with learning disabilities may be suggestible – ready to accept and act on suggestions by others. Many people with learning disabilities experience social isolation and loneliness and, as a result, may be coerced, intimidated or exploited by so-called friends. Mate crime is when a perpetrator befriends a vulnerable person with the intention of then exploiting the person financially, physically, sexually or by asking them to carry out certain acts on their behalf, which may be criminal. For example, ‘looking after’ illegal drugs and stolen goods, shoplifting and acts of violence. *PRT*

We welcome reference to "trafficking or modern slavery" as being relevant for this factor, and that "an offender may have been the subject of coercion, intimidation or exploitation which the offender may find difficult to articulate", though we would hope that this would have been identified and addressed at an earlier stage in proceedings. This is particularly relevant to those who are brought to this country from abroad and forced to work cultivating cannabis. However, the explanation should be expanded to include situations which are not specifically related to this, but where a reluctance to provide information regarding the perpetrator of any coercion, intimidation, or violence is understandable in the circumstances. Release frequently deals with cases where vulnerable people are taken advantage of and their homes used as a base to produce and supply drugs, known as cuckooing. These people may be prosecuted for permitting their premises to be used in this way, or even for the substantive offences (including anti-social behaviour offences), but through fear of reprisal are not able to provide information about the perpetrators. It should be made clear that lack of evidence of this sort does not mean that the mitigating factor cannot be taken into account. *Release*

The second bullet point could also include the circumstance where the offender was part of a gang. The third bullet point states "*Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation ...*". It would be helpful if some examples could be provided here to indicate what factors are important to be looked for, which might indicate coercion, intimidation or exploitation, particularly where the offender is unable or unwilling to articulate these themselves. *West London Bench*

5.10 It is not clear from the PRT's suggestion exactly which sections of the Equal Treatment Bench Book they consider would be relevant – although there is much that is of general relevance to these issues there do not appear to be sections that we could usefully link to for specific information.

5.11 The explanation in M8 states that the 'factor may be of particular relevance where the offender has been the victim of domestic abuse, trafficking or modern slavery, but may also apply in other contexts.' Some of the points made by PRT and Release could be addressed by expanding on these 'other contexts'. However, the Council may feel that it is better to leave this open rather than to give further examples. We would hope that defence advocates would be identifying such situations to the court, which makes the CLSA response particularly disappointing (although other practitioners who have responded have been much more positive).

5.12 The request for examples of factors indicating coercion, intimidation or exploitation is understandable, but the Council may feel there is a risk that examples might serve to limit the range of situations that a court would consider.

Question 16: Does the Council wish to make any changes to the explanations for M6, M7, M8 and M9?

Mitigating factors M10, M11 and M12

5.13 These were generally welcomed. There was a suggestion for a change in emphasis in the explanation for M11:

In relation to delay I would suggest that the reason for giving a reduced sentence should be clarified by re-wording the explanation. It could say:

Where there has been an unreasonable delay in proceedings since apprehension which is not the fault of the offender, the court may take this into account by reducing the sentence [bold] if the delay has had a detrimental effect on the offender [end bold]. *Mr Justice Warby*

5.14 Other comments do not immediately suggest any amendment to the wording:

We note that unreasonable delays are often quite hard to define. Usually the defence advocate point this out, however this means that unrepresented offenders may be at a disadvantage, and sentencers may need to consider asking appropriate questions of the offender to determine whether this factor is relevant. *MA*

Given the increasing use of 'released under investigation' by police instead of bail, especially in relation to drug offences, we submit that the duration of time must be considered in relation to the applicability of this factor. Release frequently get inquiries from people who have heard nothing more from police many months after their initial apprehension, which causes a great deal of anxiety and distress. *Release*

Question 17: Does the Council wish to make any changes to the explanations for M10, M11 and M12?

Mitigating factors M13 and M14

5.15 The explanation relating to young adults was widely welcomed with three respondents making substantive suggestions:

We welcome the inclusion of age and / or lack of maturity at step two and the detailed information about this factor. The detail as to what age and/or lack of maturity may mean for young adults is especially welcome. In relation to PSRs, the guidance should be strengthened so that a PSR including an assessment of maturity is always required for any offender aged 18-25 when considering a custodial or community sentence. An assessment of maturity is relevant both to the tailoring of the sentence to the particular individual and, in "cusp" cases an absence of maturity should be considered a relevant vulnerability militating against custody. *PRT*

In relation to M13 [] the Council has clearly taken on board some of the principles outlined by the Howard League in its recent report with T2A, [Sentencing Young Adults](#), which we welcome. We are especially pleased to see that the Council has sought to explain the implications of the research evidence on maturity for sentencing practice.

Nevertheless, we consider that there is further opportunity to tighten up the wording to ensure utmost clarity. In response to the General guideline, the Justice Select Committee proposed that in its explanation the Council make clearer the distinction between young adults who are immature by virtue of their age (i.e. stage of maturational development) and other forms of immaturity due to impaired development, such as a learning disability. We are not convinced that the new wording makes this distinction sufficiently clear. In particular, the sentence "The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater)" is followed by a statement referring to typical

characteristics of young adults aged 18-25 i.e. in which chronological age is of importance. Given the importance of ensuring that the guidance is comprehensive, concise and practical and the Council's expectation that the guidance will have a positive impact on sentencing practice, we suggest that different iterations of the wording are tested empirically, with outcomes compared, prior to finalising the text for the guideline.

There is evidence of disproportionate levels of neurodisabilities among young adults in custody when compared to the general population, including higher rates of learning disability, traumatic brain injury and communication impairment. We propose that M13 is cross-referenced with M16 to further reinforce this distinction. T2A

There is significant research to show that young adults are at a time of desistance and change, often preceded by extensive criminal activity as a child. Given the relevance of the pattern of desistance in respect of age and the extensive research supporting it, we urge the Council to briefly refer to this in the age and/or lack of maturity expanded explanation. *Howard League*

5.16 As to the suggestion from the PRT that the guidance on PSRs should be strengthened – it is not immediately apparent what is lacking strength in the current wording. T2A had misgivings about reference to a particular age group '(typically aged 18-25)'; this was inserted at the suggestion of the Howard League to provide guidance without being prescriptive. Realistically it will not be possible to conduct meaningful research into different iterations of the wording before finalising the guidance without causing substantial delay. The Howard League's suggestion that reference should be made to young adult's capacity for desistance and change is already included in the explanation: 'There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct'. The Howard League have suggested that this could be strengthened by adding: 'Research shows that the vast majority of young people begin the process of desistance in their later teens. Therefore young adults' previous convictions may not be as indicative of a tendency for further offending by comparison with older adults'.

5.17 The explanation for M14: Sole or Primary Carer provoked several very detailed responses. Several of these comprehensively addressed issues relating to the sentencing of women which went beyond the scope of sentencing guidelines and certainly beyond the scope of this project. One response (from the authors of the Families and Imprisonment Study) also argued that 'both parents can have equally important parenting roles in families and that this should be taken into account when considering whether or not to impose a custodial sentence'.

5.18 In summary, respondents felt that the proposed wording did not go far enough to ensure that the human rights of children are taken into account by courts in sentencing carers. One issue that was raised by several respondents is that courts are not always aware of the existence of dependent children.

5.19 Lucy Baldwin, an academic with an interest in maternal imprisonment made recommendations including:

Sentencing guidelines should be strengthened by the addition of an “overarching principle” setting out the court’s duty to investigate sole or primary caring responsibilities of defendants and to take these responsibilities into account in sentencing. This would reflect the Court of Appeal decision in *R v Petherick*.

Courts should establish mechanisms to ensure the provision of sufficient information to Sentencers where the offender has primary caring responsibilities, including a requirement for a full written pre-sentence report and a local directory of women’s services and interventions.

When imposing non-custodial sentences, sentencers must inquire about and consider a woman’s family responsibilities and ensure ‘rehabilitation activity requirements’ are achievable within those constraints.

Sentencers should be obliged to consider non-custodial sentences for offenders with primary care responsibilities, and in cases when imprisonment is an option should consider a community order, deferred or suspended sentence. If an immediate term of imprisonment is imposed, written reasons should be given for their decision.

5.20 The PRT stated:

We strongly support the inclusion of an expanded explanation for this mitigating factor. We suggest a change to the wording so that it starts with a reminder that where the offender is known or suspected to have sole or primary care responsibilities the court *must* request a PSR; where the offender is a woman the court should be aware that it is particularly likely she has primary care responsibilities, and that there may be barriers to her disclosing this. We also suggest amending the third sentence to say “Where a custodial sentence is unavoidable, consideration of the impact on dependants may result in suspending the sentence, and/or be relevant to the length imposed...”

It would be helpful to provide a link here to the information resource on *Safeguarding children when sentencing mothers*, produced by Dr Shona Minson with the support and guidance of a number of legal and judicial bodies. It is available through the Judicial College website

5.21 Dr Shona Minson stated:

It is positive that the Sentencing Council are considering adding more detail to the factor ‘sole or primary carer of dependent relatives’ *however, it will not ensure consistent and best practice sentencing for two reasons*. Firstly, there is insufficient information in the proposed expanded explanation, and secondly, the information should not be contained in an expanded explanation but as a formal step in the sentencing process, or as a separate Guideline. I provide detailed comment on each of these reasons below: [summarised]

- The wording suggested at M14 does not include any reference to a suspended sentence, which is included in the Imposition of Community and Custodial Sentences Definitive Guideline, where it states that if ‘immediate custody will result in significant harmful impact upon others’ it ‘may be appropriate to suspend a custodial sentence’. This guidance should be included in the expanded explanation.

- The Child Cruelty Definitive Guideline provides for situations where the parent has committed the offence against the child, and yet, even in that situation where the child is directly the victim, it is brought to the sentencers' attention that the offender may have 'otherwise been a loving and capable parent/ carer.' The phrase 'otherwise been a loving and capable parent/ carer' is not included in the extended explanation and I contend that it should be. Research with Crown Court judges found that sentencers may presume that a parent's criminal behaviour is proof of their inadequacy of their parent, and this is not routinely the case.
- The Child Cruelty Definitive Guideline also states that what is to be considered is 'the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence.' This articulates what is being considered (the child's Article 8 right to family life) more effectively than the phrase 'impact on dependents' which is used in the expanded explanation.
- The expanded explanation should include the requirement for a sentencer to request a Pre-Sentence Report in all cases where a primary or sole carer of dependents is sentenced. It should not be limited only to instances when the defendant is pregnant.
- The inclusion of 'primary or sole carer for dependents' as a factor which can be considered in mitigation, has been evidenced to be insufficient to ensure that sentencers fulfil their duties to uphold children's rights and follow the authorities on this point.

5.22 It was not the Council's intention that the reference to obtaining a PSR should be read as relating only to pregnant offenders. It is proposed to change the wording to clarify this. It is also proposed to adopt the suggestion that reference is made to the information in the Imposition guideline regarding the relevance of dependants to the decision whether to suspend a sentence. It is also proposed to include a link to the Imposition guideline within this explanation for completeness.

5.23 Sentencers have access (through the Judicial College) to the document 'Safeguarding Children When Sentencing Parents – Information for Sentencers'. The document is not published publicly so a link cannot be provided from guidelines. It includes a summary of relevant case law and contains the following paragraphs:

The case of *R v Bishop* [2011] WL 84407 above, established that it is the duty of the court to ensure that it has all relevant information about dependent children before deciding on sentence. To sentence a parent to custody without having ascertained the whereabouts of and plans for the care of that child is a safeguarding issue, and denies a child their right not to be discriminated against because of the status or activities of their parents under Article 2 of the United Nations Convention on the Rights of the Child (1989)

Even when a custodial sentence is necessary, sentencers must consider whether proper arrangements have been made for the care of any dependent children. If a defendant mother is at court with no provision for her children's care, the harm to children can be minimised if sentence is deferred to allow proper arrangements to be made. Research has found that many women in that position do not have anyone who could take on the care of their children, and even if they do, arrangements may not have been made because they have not been able to face the reality of the likely

court outcome. In such situations the probation staff can help women work through those issues to ensure that their children's welfare is protected.

5.24 It is proposed that additional guidance extracted from this information (which is already approved and available to sentencers) could be added (as shown underlined in Annex A).

5.25 The other matters put forward by respondents, such as providing a separate step or separate guideline for sentencing carers in general or women in particular, would go beyond the scope of this project.

Question 18: Does the Council wish to make any changes to the explanations for M13 and M14?

Mitigating factors M15, M16 and M17

5.26 The explanation for M15 – serious medical conditions etc. was welcomed by all respondents who expressed a view. M16 – Mental disorder or learning disability, was generally welcomed although there were some suggestions for changes. In light of the forthcoming overarching guideline for this factor, it is not proposed to make any changes.

5.27 M17 – Determination to address offending behaviour etc was also generally welcomed. The JCS suggested that reference should be made to the 'need for an evidenced commitment to address offending or steps to address an addiction including co-operation with relevant agencies'. Conversely Release suggested 'that it should be explicitly stated that there may not be evidence of "a commitment to address the underlying issue", because of the current environment, and that lack of such evidence must not be considered as an indication of lack or willingness or commitment.'

Question 19: Does the Council wish to make any changes to the explanations for M13 and M14?

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Annex A

Draft expanded explanations for factors in offence specific guidelines

STEP TWO

Band Ranges

	Starting point	Range
Fine Band A	50% of relevant weekly income	25 – 75% of relevant weekly income
Fine Band B	100% of relevant weekly income	75 – 125% of relevant weekly income
Fine Band C	150% of relevant weekly income	125 – 175% of relevant weekly income
Fine Band D	250% of relevant weekly income	200 – 300% of relevant weekly income
Fine Band E	400% of relevant weekly income	300 – 500% of relevant weekly income
Fine Band F	600% of relevant weekly income	500 – 700% of relevant weekly income

- The court should determine the appropriate level of fine in accordance with this guideline and section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and that the court must take into account the financial circumstances of the offender.

Question 2

- Where possible, if a financial penalty is imposed, it should remove any economic benefit the offender has derived through the commission of the offence including:
 - avoided costs;
 - operating savings;
 - any gain made as a direct result of the offence.
- The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; **it should not be cheaper to offend than to comply with the law.**
- In considering economic benefit, the court should avoid double recovery.

Question 2

2 Consultation on Expanded Explanations - Annex A

- Where the means of the offender are limited, priority should be given to compensation (where applicable) over payment of any other financial penalty (see further step eight below).
- Where it is not possible to calculate or estimate the economic benefit, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.
- When sentencing **organisations** the fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law. Whether the fine will have the effect of putting the offender out of business will be a relevant consideration; in some bad cases this may be an acceptable consequence.

Question 2

- Obtaining financial information: It is for the offender to disclose to the court such data relevant to their financial position as will enable it to assess what they can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender's financial circumstances pursuant to section 162 of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case. In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied financial information to the contrary.

Community orders table

For further information see the [Imposition of Community and Custodial Sentences guideline](#)

- The seriousness of the offence should be the **initial** factor in determining which requirements to include in a community order. Offence specific guidelines refer to three sentencing levels within the community order band based on offence seriousness (low, medium and high). The culpability and harm present in the offence(s) should be considered to identify which of the three sentencing levels within the community order band is appropriate. See below for **non-exhaustive** examples of requirements that might be appropriate in each.
- At least one requirement **MUST** be imposed for the purpose of punishment and/or a fine imposed in addition to the community order unless there are exceptional circumstances which relate to the offence or the offender that would make it unjust in all the circumstances to do so.
- A suspended sentence **MUST NOT** be imposed as a more severe form of community order. A suspended sentence is a custodial sentence.
- Community orders can fulfil all of the purposes of sentencing. In particular, they can have the effect of restricting the offender's liberty while providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities.

- A community order must not be imposed unless the offence is 'serious enough to warrant such a sentence'. Where an offender is being sentenced for a non-imprisonable offence, there is no power to make a community order.
- Sentencers must consider all available disposals at the time of sentence; even where the threshold for a community sentence has been passed, a fine or discharge may be an appropriate penalty. In particular, a Band D fine may be an appropriate alternative to a community order.
- The court must ensure that the restriction on the offender's liberty is commensurate with the seriousness of the offence and that the requirements imposed are the most suitable for the offender.
- Sentences should not necessarily escalate from one community order range to the next on each sentencing occasion. The decision as to the appropriate range of community order should be based upon the seriousness of the new offence(s) (which will take into account any previous convictions).
- In many cases, a pre-sentence report will be pivotal in helping the court decide whether to impose a community order and, if so, whether particular requirements or combinations of requirements are suitable for an individual offender. Whenever the court reaches the provisional view that a community order may be appropriate, it should request a pre-sentence report (whether written or verbal) unless the court is of the opinion that a report is unnecessary in all the circumstances of the case.
- For further guidance on when a PSR may be unnecessary see [Criminal Practice Direction]

Question 3

- It may be helpful to indicate to the National Probation Service the court's preliminary opinion as to which of the three sentencing ranges is relevant and the purpose(s) of sentencing that the package of requirements is expected to fulfil. Ideally a pre-sentence report should be completed on the same day to avoid adjourning the case. If an adjournment cannot be avoided, the information should be provided to the National Probation Service in written form and a copy retained on the court file for the benefit of the sentencing court. However, the court must make clear to the offender that all sentencing options remain open including, in appropriate cases, committal for sentence to the Crown Court.
- ~~For further guidance on when a PSR may be unnecessary see [Criminal Practice Direction]~~

Low	Medium	High
<p>Offences only just cross community order threshold, where the seriousness of the offence or the nature of the offender's record means that a discharge or fine is inappropriate</p> <p>In general, only one requirement will be</p>	<p>Offences that obviously fall within the community order band</p>	<p>Offences only just fall below the custody threshold or the custody threshold is crossed but a community order is more appropriate in the circumstances</p>

appropriate and the length may be curtailed if additional requirements are necessary

- Suitable requirements might include:
- Any appropriate rehabilitative requirement(s)
- 40 – 80 hours of unpaid work
- Curfew requirement for example up to 16 hours per day for a few weeks
- Exclusion requirement, for a few months
- Prohibited activity requirement
- Attendance centre requirement (where available)

- Suitable requirements might include:
- Any appropriate rehabilitative requirement(s)
- 80 – 150 hours of unpaid work
- Curfew requirement for example up to 16 hours for 2 – 3 months
- Exclusion requirement lasting in the region of 6 months
- Prohibited activity requirement

More intensive sentences which combine two or more requirements may be appropriate

- Suitable requirements might include:
- Any appropriate rehabilitative requirement(s)
- 150 – 300 hours of unpaid work
- Curfew requirement for example up to 16 hours per day for 4 – 12 months
- Exclusion requirement lasting in the region of 12 months

If order does not contain a punitive requirement, suggested fine levels are indicated below:

BAND A FINE

BAND B FINE

BAND C FINE

Custodial sentences

Sentencing flowcharts are available at [Imposition of Community and Custodial Sentences guideline](#)

The approach to the imposition of a custodial sentence should be as follows:

1) Has the custody threshold been passed?

- A custodial sentence must not be imposed unless the offence or the combination of the offence and one or more offences associated with it was so serious that neither a fine alone nor a community sentence can be justified for the offence.
- There is no general definition of where the custody threshold lies. The circumstances of the individual offence and the factors assessed by offence-specific guidelines will determine whether an offence is so serious that neither a fine alone nor a community sentence can be justified. Where no offence specific guideline is available to determine seriousness, the harm caused by the offence, the culpability of the offender and any previous convictions will be relevant to the assessment.

- The clear intention of the threshold test is to reserve prison as a punishment for the most serious offences.

2) Is it unavoidable that a sentence of imprisonment be imposed?

- Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable. Custody should not be imposed where a community order could provide sufficient restriction on an offender’s liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime.
- For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.

3) What is the shortest term commensurate with the seriousness of the offence?

- In considering this the court must NOT consider any licence or post sentence supervision requirements which may subsequently be imposed upon the offender’s release.

4) Can the sentence be suspended?

- A suspended sentence **MUST NOT** be imposed as a more severe form of community order. A suspended sentence is a custodial sentence. **Sentencers should be clear that they would impose an immediate custodial sentence if the power to suspend were not available.** If not, a non-custodial sentence should be imposed.
- The following factors should be weighed in considering whether it is possible to suspend the sentence:

Factors indicating that it would not be appropriate to suspend a custodial sentence

- Offender presents a risk/danger to the public
- Appropriate punishment can only be achieved by immediate custody
- History of poor compliance with court orders

Factors indicating that it may be appropriate to suspend a custodial sentence

- Realistic prospect of rehabilitation
- Strong personal mitigation
- Immediate custody will result in significant harmful impact upon others

The imposition of a custodial sentence is both punishment and a deterrent. To ensure that the overall terms of the suspended sentence are commensurate with offence seriousness, care must be taken to ensure requirements imposed are not excessive. A court wishing to impose onerous or intensive requirements should reconsider whether a community sentence might be more appropriate.

Pre-sentence report

Whenever the court reaches the provisional view that:

- the custody threshold has been passed; and, if so

- the length of imprisonment which represents the shortest term commensurate with the seriousness of the offence;

the court should obtain a pre-sentence report, whether verbal or written, **unless** the court considers a report to be unnecessary. Ideally a pre-sentence report should be completed on the same day to avoid adjourning the case.

For further guidance on when a PSR may be unnecessary see [Criminal Practice Direction]

Question 3

Magistrates: Consult your legal adviser before deciding to sentence to custody without a pre-sentence report.

Suspended Sentences: General Guidance

- i) The guidance regarding pre-sentence reports applies if suspending custody.
- ii) If the court imposes a term of imprisonment of between 14 days and 2 years (subject to magistrates' courts sentencing powers), it may suspend the sentence for between 6 months and 2 years (the 'operational period'). The time for which a sentence is suspended should reflect the length of the sentence; up to 12 months might normally be appropriate for a suspended sentence of up to 6 months.
- iii) Where the court imposes two or more sentences to be served consecutively, the court may suspend the sentence where the aggregate of the terms is between 14 days and 2 years (subject to magistrates' courts sentencing powers).
- iv) When the court suspends a sentence, it may impose one or more requirements for the offender to undertake in the community. The requirements are identical to those available for community orders, see the guideline on [Imposition of Community and Custodial Sentences](#).
- v) A custodial sentence that is suspended should be for the same term that would have applied if the sentence was to be served immediately.

For sentencing flowcharts see the guideline on [Imposition of Community and Custodial Sentences](#).

Statutory aggravating factors

SA1. Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

Guidance on the Use of Previous Convictions

The following guidance should be considered when seeking to determine the degree to which previous convictions should aggravate sentence:

Section 143 of the Criminal Justice Act states that:

In considering the seriousness of an offence (“the current offence”) committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to—

(a) the nature of the offence to which the conviction relates and its relevance to the current offence, and

(b) the time that has elapsed since the conviction.

1. Previous convictions are considered at step two in the Council’s offence specific guidelines.
2. The primary significance of previous convictions (including convictions in other jurisdictions) is the extent to which they indicate trends in offending behaviour and possibly the offender’s response to earlier sentences;
3. Previous convictions are normally **relevant** to the current offence when they are of a similar type;
4. Previous convictions of a type different from the current offence **may** be relevant where they are an indication of persistent offending or escalation and/or a failure to comply with previous court orders;
5. Numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary;
6. If the offender received a non-custodial disposal for the previous offence, a court should not necessarily move to a custodial sentence for the fresh offence;
7. In cases involving significant persistent offending, the community and custody thresholds may be crossed even though the current offence normally warrants a lesser sentence. If a custodial sentence is it should be proportionate and kept to the necessary minimum.
8. The aggravating effect of relevant previous convictions reduces with the passage of time; **older convictions are less relevant** to the offender’s culpability for the current offence and less likely to be predictive of future offending.
9. Where the previous offence is particularly old it will normally have little relevance for the current sentencing exercise;
10. The court should consider the time gap since the previous conviction and the reason for it. Where there has been a significant gap between previous and current convictions or a reduction in the frequency of offending this may indicate that the offender has made attempts to desist from offending in which case the aggravating effect of the previous offending will diminish.
11. Where the current offence is significantly less serious than the previous conviction (suggesting a decline in the gravity of offending), the previous conviction may carry less weight.
12. When considering the totality of previous offending a court should take a rounded view of the previous crimes and not simply aggregate the individual offences.
13. Where information is available on the context of previous offending this may assist the court in assessing the relevance of that prior offending to the current offence.

SA2. Offence committed whilst on bail

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

S143 (3) Criminal Justice Act 2003 states:

In considering the seriousness of any offence committed while the offender was on bail, the court must treat the fact that it was committed in those circumstances as an aggravating factor.

SA3. Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity.

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

See below for the statutory provisions.

- **Note the requirement for the court to state that the offence has been aggravated by the relevant hostility.**
- **Where the element of hostility is core to the offending, the aggravation will be higher than where it plays a lesser role.**

Increase in sentences for racial or religious aggravation

s145(2) of the Criminal Justice Act 2003 states:

If the offence was racially or religiously aggravated, the court—

- (a) must treat that fact as an aggravating factor, and*
- (b) must state in open court that the offence was so aggravated.*

An offence is racially or religiously aggravated for these purposes if—

- at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence, hostility based on the victim's membership (or presumed membership) of a racial or religious group; **or**
- the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

“membership”, in relation to a racial or religious group, includes association with members of that group;

“presumed” means presumed by the offender.

It is immaterial whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned above.

“racial group” means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

“religious group” means a group of persons defined by reference to religious belief or lack of religious belief.

Increase in sentences for aggravation related to disability, sexual orientation or transgender identity

s146 of the Criminal Justice Act 2003 states:

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are—

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—

- (i) the sexual orientation (or presumed sexual orientation) of the victim,
- (ii) a disability (or presumed disability) of the victim, or
- (iii) the victim being (or being presumed to be) transgender, or

(b) that the offence is motivated (wholly or partly)—

- (i) by hostility towards persons who are of a particular sexual orientation,
- (ii) by hostility towards persons who have a disability or a particular disability or
- (iii) by hostility towards persons who are transgender.

(3) The court—

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and

(b) must state in open court that the offence was committed in such circumstances.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(5) In this section “disability” means any physical or mental impairment.

(6) In this section references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.

SA4. Offence was committed against an emergency worker acting in the exercise of functions as such a worker.

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

See below for the statutory provisions.

- **Note the requirement for the court to state that the offence has been so aggravated.**

- **Note this statutory factor only applies to certain violent or sexual offences as listed below which were committed on or after 13 November 2018.**
- **For other offences the factor ‘Victim was providing a public service or performing a public duty at the time of the offence’ can be applied where relevant.**

The Assaults on Emergency Worker (Offences) Act 2018 states:

2 Aggravating factor

(1) This section applies where—

- (a) the court is considering for the purposes of sentencing the seriousness of an offence listed in subsection (3), and
- (b) the offence was committed against an emergency worker acting in the exercise of functions as such a worker.

(2) The court—

- (a) must treat the fact mentioned in subsection (1)(b) as an aggravating factor (that is to say, a factor that increases the seriousness of the offence), and
- (b) must state in open court that the offence is so aggravated.

(3) The offences referred to in subsection (1)(a) are—

- (a) an offence under any of the following provisions of the Offences against the Person Act 1861—
 - (i) section 16 (threats to kill);
 - (ii) section 18 (wounding with intent to cause grievous bodily harm);
 - (iii) section 20 (malicious wounding);
 - (iv) section 23 (administering poison etc);
 - (v) section 28 (causing bodily injury by gunpowder etc);
 - (vi) section 29 (using explosive substances etc with intent to cause grievous bodily harm);
 - (vii) section 47 (assault occasioning actual bodily harm);
- (b) an offence under section 3 of the Sexual Offences Act 2003 (sexual assault);
- (c) manslaughter;
- (d) kidnapping;
- (e) an ancillary offence in relation to any of the preceding offences.

(4) For the purposes of subsection (1)(b), the circumstances in which an offence is to be taken as committed against a person acting in the exercise of functions as an emergency worker include circumstances where the offence takes place at a time when the person is not at work but is carrying out functions which, if done in work time, would have been in the exercise of functions as an emergency worker.

(5) In this section—

- “ancillary offence”, in relation to an offence, means any of the following—
 - (a) aiding, abetting, counselling or procuring the commission of the offence;
 - (b) an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) in relation to the offence;
 - (c) attempting or conspiring to commit the offence;
- “emergency worker” has the meaning given by section 3.

(6) Nothing in this section prevents a court from treating the fact mentioned in subsection (1)(b) as an aggravating factor in relation to offences not listed in subsection (3).

(7) This section applies only in relation to offences committed on or after the day it comes into force.

3 Meaning of “emergency worker”

(1) In sections 1 and 2, “emergency worker” means—

- (a) a constable;
- (b) a person (other than a constable) who has the powers of a constable or is otherwise employed for police purposes or is engaged to provide services for police purposes;
- (c) a National Crime Agency officer;
- (d) a prison officer;
- (e) a person (other than a prison officer) employed or engaged to carry out functions in a custodial institution of a corresponding kind to those carried out by a prison officer;
- (f) a prisoner custody officer, so far as relating to the exercise of escort functions;
- (g) a custody officer, so far as relating to the exercise of escort functions;
- (h) a person employed for the purposes of providing, or engaged to provide, fire services or fire and rescue services;
- (i) a person employed for the purposes of providing, or engaged to provide, search services or rescue services (or both);
- (j) a person employed for the purposes of providing, or engaged to provide—
 - (i) NHS health services, or
 - (ii) services in the support of the provision of NHS health services, and whose general activities in doing so involve face to face interaction with individuals receiving the services or with other members of the public.

(2) It is immaterial for the purposes of subsection (1) whether the employment or engagement is paid or unpaid.

(3) In this section—

“custodial institution” means any of the following—

- (a) a prison;
- (b) a young offender institution, secure training centre, secure college or remand centre;
- (c) a removal centre, a short-term holding facility or pre-departure accommodation, as defined by section 147 of the Immigration and Asylum Act 1999;
- (d) services custody premises, as defined by section 300(7) of the Armed Forces Act 2006;

“custody officer” has the meaning given by section 12(3) of the Criminal Justice and Public Order Act 1994;

“escort functions”—

- (a) in the case of a prisoner custody officer, means the functions specified in section 80(1) of the Criminal Justice Act 1991;
- (b) in the case of a custody officer, means the functions specified in paragraph 1 of Schedule 1 to the Criminal Justice and Public Order Act 1994;

“NHS health services” means any kind of health services provided as part of the health service continued under section 1(1) of the National Health Service Act 2006 and under section 1(1) of the National Health Service (Wales) Act 2006;

“prisoner custody officer” has the meaning given by section 89(1) of the Criminal Justice Act 1991.

Other aggravating factors:

A1. Commission of offence whilst under the influence of alcohol or drugs

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- The fact that an offender is **voluntarily** intoxicated at the time of the offence will tend to increase the seriousness of the offence provided that the intoxication has **contributed to the offending**.
- This applies regardless of whether the offender is under the influence of legal or illegal substance(s).
- In the case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary, but the court should have regard to the extent to which the offender has engaged with any assistance they have been given in dealing with the addiction in making that assessment.
- An offender who has voluntarily consumed drugs and/or alcohol must accept the consequences of the behaviour that results, even if it is out of character.

Question 5

A2. Offence was committed as part of a group

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

The mere membership of a group (two or more persons) should not be used to increase the sentence, but where the **offence was committed as part** of a group this will normally make it more serious because:

- the **harm** caused (both physical or psychological) or the potential for harm may be greater and/or
- the **culpability** of the offender may be higher (the role of the offender within the group will be a relevant consideration).

Culpability based on role in group offending could range from:

Higher culpability indicated by a leading role in the group and/or the involvement by the offender of others through coercion, intimidation or exploitation, to

Lower culpability indicated by a lesser or subordinate role under direction and/or involvement of the offender through coercion, intimidation or exploitation.

Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation (including as a result of domestic abuse, trafficking or modern slavery) which the offender may find difficult to articulate, and where appropriate ask for this to be addressed in a PSR.

Question 6

Where the offending is part of an organised criminal network, this will make it more serious, and the role of the offender in the organisation will also be relevant.

When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and/or lack of maturity when considering the significance of group offending.

A3. Offence involved use or threat of use of a weapon

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- A 'weapon' can take many forms and may include a shod foot
- The use or production of a weapon has relevance
 - to the **culpability** of the offender where it indicates planning or intention to cause harm; and
 - to the **harm** caused (both physical or psychological) or the potential for harm.
- Relevant considerations will include:
 - the dangerousness of the weapon;
 - whether the offender brought the weapon to the scene, or just used what was available on impulse;
 - whether the offender made or adapted something for use as a weapon;
 - the context in which the weapon was threatened, used or produced.

Question 11

A4. Planning of an offence

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- Evidence of planning normally indicates a higher level of intention and pre-meditation which increases the level of culpability.
- Planning may be inferred from the scale and sophistication of the offending and the role of the offender in the offending.
- The greater the degree of planning the greater the culpability

Question 7

A5. Commission of the offence for financial gain

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- Where an offence (which is not one which by its nature is an acquisitive offence) has been committed wholly or in part for financial gain or the avoidance of cost, this will increase the seriousness.
- Where the offending is committed in a commercial context for financial gain or the avoidance of costs, this will normally indicate a higher level of culpability.
 - examples would include, but are not limited to, dealing in unlawful goods, failing to disclose relevant matters to an authority or regulator, failing to comply with a regulation or failing to obtain the necessary licence or permission in order to avoid costs.
 - offending of this type can undermine legitimate businesses.
- See the guidance on fines if considering a financial penalty

A6. High level of profit from the offence

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- A high level of profit is likely to indicate:
 - high culpability in terms of planning and
 - a high level of harm in terms of loss caused to victims or the undermining of legitimate businesses
- In most situations a high level of gain will be a factor taken in to account at step one – care should be taken to avoid double counting.
- See the guidance on fines if considering a financial penalty

A7. Abuse of trust or dominant position

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- In order for an abuse of trust to make an offence more serious the relationship between the offender and victim(s) must be one that would give rise to the offender having a significant level of responsibility towards the victim(s) on which the victim(s) would be entitled to rely.
 - Abuse of trust may occur in many factual situations. Examples may include relationships such as teacher and pupil, parent and child, professional adviser and client, or carer (whether paid or unpaid) and dependant. It may also include ad hoc situations such as a late-night taxi driver and a lone passenger. These examples are not exhaustive and do not necessarily indicate that abuse of trust is present.
 - Additionally an offence may be made more serious where an offender has used a position of power or trust to facilitate and/or conceal offending. Examples may include a public servant using access to confidential information or an employee using access to company communication systems in their offending.
- Question 8**
- Where an offender has been given an inappropriate level of responsibility, abuse of trust is unlikely to apply.
 - A close examination of the facts is necessary and a clear justification should be given if abuse of trust is to be found.

A8. Gratuitous degradation of victim / maximising distress to victim

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

Where an offender deliberately causes **additional** harm to a victim over and above that which is an essential element of the offence - this will increase seriousness. Examples may include, but are not limited to, posts of images on social media designed to cause additional distress to the victim (~~where not separately charged~~).

Where any such actions are the subject of separate charges, this should be taken into account when assessing totality.

Question 8

A9. Vulnerable victim

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- An offence is more serious if the victim is vulnerable because of personal circumstances such as (but not limited to) age, illness or disability (unless the vulnerability of the victim is an element of the offence).
- Other factors such as the victim being isolated, incapacitated through drink or being in an unfamiliar situation **may** lead to a court considering that the offence is more serious.
- The extent to which any vulnerability may impact on the sentence is a matter for the court to weigh up in each case.
- Culpability will be increased if the offender **targeted** a victim because of an actual or perceived vulnerability.
- Culpability will be increased if the victim is made vulnerable by the actions of the offender (such as a victim who has been intimidated or isolated by the offender).
- Culpability is increased if an offender persisted in the offending once it was obvious that the victim was vulnerable (for example continuing to attack an injured victim).
- The level of harm (physical, psychological or financial) is likely to be increased if the victim is vulnerable.

A10. Victim was providing a public service or performing a public duty at the time of the offence

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

This reflects:

- the fact that people in public facing roles are more exposed to the possibility of harm and consequently more vulnerable and/or
- the fact that someone is working for the public good merits the additional protection of the courts.

This applies whether the victim is a public or private employee or acting in a voluntary capacity.

Question 9

Care should be taken to avoid double counting where the statutory aggravating factor relating to emergency workers applies.

A11. Other(s) put at risk of harm by the offending

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- Where there is risk of harm to other(s) not taken in account at step one ~~and not subject to a separate charge~~, this makes the offence more serious.
- Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.

Where any such risk of harm is the subject of separate charges, this should be taken into account when assessing totality

Question 9

A12. Offence committed in the presence of other(s) (especially children)

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- This reflects the psychological harm that may be caused to those who witnessed the offence.
- The presence of one or more children may in some situations make the primary victim more vulnerable – for example an adult may be less able to resist the offender if concerned about the safety or welfare of children present.

A13. Actions after the event including but not limited to attempts to cover up/ conceal evidence

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

The more sophisticated, extensive or persistent the actions after the event, the more likely they are to increase the seriousness of the offence.

When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and lack of maturity when considering the significance of such conduct.

Where any such actions are the subject of separate charges, they should be taken into account when assessing totality at step seven.

A14. Blame wrongly placed on other(s)

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- Where the investigation has been hindered and/or other(s) have suffered as a result of being wrongly blamed by the offender, this will make the offence more serious.
- This factor will **not** be engaged where an offender has simply exercised his or her right not to assist the investigation or accept responsibility for the offending.
- When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and lack of maturity when considering the significance of such conduct.

Question 11

A15. Failure to respond to warnings or concerns expressed by others about the offender's behaviour

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

Where an offender has had the benefit of warnings or advice about their conduct but has failed to heed it, this would make the offender more blameworthy.

This may particularly be the case when:

- such warning(s) or advice were of an official nature or from a professional source and/or
- the warning(s) were made at the time of or shortly before the commission of the offence.

Question 10

A16. Offence committed on licence or post sentence supervision or while subject to court order(s)

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- An offender who is subject to licence or post sentence supervision is under a particular obligation to desist from further offending.
- Commission of an offence while subject to a **relevant** court order makes the offence more serious.
- The extent to which the offender has complied with the conditions of a licence or order (including the time that has elapsed since its commencement) will be a relevant consideration.
- Where the offender is dealt with separately for a breach of a licence or order regard should be had to totality (see step seven)
- Care should be taken to avoid double counting matters taken into account when considering previous convictions.

Question 12

A17. Offence committed in custody

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- Offences committed in custody are more serious because they undermine the fundamental need for control and order which is necessary for the running of prisons and maintaining safety.
- Generally the sentence for the new offence will be consecutive to the sentence being served as it will have arisen out of an unrelated incident. The court must have regard to the totality of the offender's criminality when passing the second sentence, to ensure that the total sentence to be served is just and proportionate. Refer to the [Totality guideline](#) for detailed guidance.
- Care should be taken to avoid double counting matters taken into account when considering previous convictions.

A18. Offences taken into consideration

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

Taken from the [Offences Taken into Consideration Definitive Guideline](#):

General principles

When sentencing an offender who requests offences to be taken into consideration (TICs), courts should pass a total sentence which reflects all the offending behaviour. The sentence must be just and proportionate and must not exceed the statutory maximum for the conviction offence.

Offences to be Taken into Consideration

The court has discretion as to whether or not to take TICs into account. In exercising its discretion the court should take into account that TICs are capable of reflecting the offender's overall criminality. The court is likely to consider that the fact that the offender has assisted the police (particularly if the offences would not otherwise have been detected) and avoided the need for further proceedings demonstrates a genuine determination by the offender to 'wipe the slate clean'.

It is generally **undesirable** for TICs to be accepted in the following circumstances:

- where the TIC is likely to attract a greater sentence than the conviction offence;
- where it is in the public interest that the TIC should be the subject of a separate charge;
- where the offender would avoid a prohibition, ancillary order or similar consequence which it would have been desirable to impose on conviction. For example:
 - where the TIC attracts mandatory disqualification or endorsement and the offence(s) for which the defendant is to be sentenced do not;
- where the TIC constitutes a breach of an earlier sentence;
- where the TIC is a specified offence for the purposes of section 224 of the Criminal Justice Act 2003, but the conviction offence is non-specified; or
- where the TIC is not founded on the same facts or evidence or part of a series of offences of the same or similar character (unless the court is satisfied that it is in the interests of justice to do so).

Jurisdiction

The magistrates' court cannot take into consideration an indictable only offence. The Crown Court can take into account summary only offences provided the TICs are founded on the same facts or evidence as the indictable charge, or are part of a series of offences of the same or similar character as the indictable conviction offence

Procedural safeguards

A court should generally only take offences into consideration if the following procedural provisions have been satisfied:

- the police or prosecuting authorities have prepared a schedule of offences (TIC schedule) that they consider suitable to be taken into consideration. The TIC schedule should set out the nature of each offence, the date of the offence(s), relevant detail about the offence(s) (including, for example, monetary values of items) and any other brief details that the court should be aware of;

- a copy of the TIC schedule must be provided to the defendant and his representative (if he has one) before the sentence hearing. The defendant should sign the TIC schedule to provisionally admit the offences;
- at the sentence hearing, the court should ask the defendant in open court whether he admits each of the offences on the TIC schedule and whether he wishes to have them taken into consideration;
- if there is any doubt about the admission of a particular offence, it should not be accepted as a TIC. Special care should be taken with vulnerable and/or unrepresented defendants;
- if the defendant is committed to the Crown Court for sentence, this procedure must take place again at the Crown Court even if the defendant has agreed to the schedule in the magistrates' court.

Application

The sentence imposed on an offender should, in most circumstances, be increased to reflect the fact that other offences have been taken into consideration. The court should:

1. Determine the sentencing starting point for the conviction offence, referring to the relevant definitive sentencing guidelines. No regard should be had to the presence of TICs at this stage.
2. Consider whether there are any aggravating or mitigating factors that justify an upward or downward adjustment from the starting point.

The presence of TICs should generally be treated as an aggravating feature that justifies an adjustment from the starting point. Where there is a large number of TICs, it may be appropriate to move outside the category range, although this must be considered in the context of the case and subject to the principle of totality. The court is limited to the statutory maximum for the conviction offence.

3. Continue through the sentencing process including:
 - consider whether the frank admission of a number of offences is an indication of a defendant's remorse or determination and/ or demonstration of steps taken to address addiction or offending behaviour;
 - any reduction for a guilty plea should be applied to the overall sentence;
 - the principle of totality;
 - when considering ancillary orders these can be considered in relation to any or all of the TICs, specifically:
 - compensation orders;
 - restitution orders

A19. Offence committed in a domestic context

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

Refer to the [Overarching Principles: Domestic Abuse Definitive Guideline](#)

Question 13

A20. Offence committed in a terrorist context

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

Where there is a terrorist element to the offence, refer also to the [Terrorism Offences Definitive Guideline](#)

Question 13

A21. Location and/or timing of offence

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- In general, an offence is not made more serious by the location and/or timing of the offence except in ways taken into account by other factors in this guideline (such as planning, vulnerable victim, offence committed in a domestic context, maximising distress to victim, others put at risk of harm by the offending, offence committed in the presence of others). Care should be taken to avoid double counting.
- Courts should be cautious about aggravating an offence by reason of it being committed for example at night, or in broad daylight, in a crowded place or in an isolated place unless it also indicates increased harm or culpability not already accounted for.
- An offence may be more serious when it is committed in places in which there is a particular need for discipline or safety such as prisons, courts, schools or hospitals.

A22. Established evidence of community/ wider impact

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- This factor should increase the sentence only where there is clear evidence of wider harm not already taken into account elsewhere. A community impact statement will assist the court in assessing the level of impact.
- For issues of prevalence see the separate guidance.

Prevalence

- Sentencing levels in offence specific guidelines take account of collective social harm. Accordingly offenders should normally be sentenced by straightforward application of the guidelines without aggravation for the fact that their activity contributed to a harmful social effect upon a neighbourhood or community.
- It is not open to a sentencer to increase a sentence for prevalence in ordinary circumstances or in response to a personal view that there is 'too much of this sort of thing going on in this area'.
- First, there must be evidence provided to the court by a responsible body or by a senior police officer.
- Secondly, that evidence must be before the court in the specific case being considered with the relevant statements or reports having been made available to the Crown and defence in good time so that meaningful representations about that material can be made.
- Even if such material is provided, a sentencer will only be entitled to treat prevalence as an aggravating factor if satisfied

- that the level of harm caused in a particular locality is significantly higher than that caused elsewhere (and thus already inherent in the guideline levels);
- that the circumstances can properly be described as exceptional; **and**
- that it is just and proportionate to increase the sentence for such a factor in the particular case being sentenced.

Factors reducing seriousness or reflecting personal mitigation (factors are not listed in any particular order and are not exhaustive)

M1. No previous convictions or no relevant/recent convictions

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

- First time offenders usually represent a lower risk of re-offending. Re-offending rates for first offenders are significantly lower than rates for repeat offenders. In addition, first offenders are normally regarded as less blameworthy than offenders who have committed the same crime several times already. For these reasons first offenders receive a mitigated sentence.
- Where there are previous offences but these are old and /or are for offending of a different nature, the sentence will normally be reduced to reflect that the new offence is not part of a pattern of offending and there is therefore a lower likelihood of reoffending.
- When assessing whether a previous conviction is 'recent' the court should consider the time gap since the previous conviction and the reason for it.
- Previous convictions are likely to be 'relevant' when they share characteristics with the current offence (examples of such characteristics include, but are not limited to: dishonesty, violence, abuse of position or trust, use or possession of weapons, disobedience of court orders). In general the more serious the previous offending the longer it will retain relevance.

M2. Good character and/or exemplary conduct

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

This factor may apply whether or not the offender has previous convictions. Evidence that an offender has demonstrated positive good character through, for example, charitable works may reduce the sentence.

However, this factor is less likely to be relevant where the offending is very serious. Where an offender has used their good character or status to facilitate or conceal the offending it could be treated as an aggravating factor.

M3. Remorse

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction at step four).

Lack of remorse should never be treated as an aggravating factor.

Question 14

M4. Self-reporting

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where an offender has self-reported to the authorities, particularly in circumstances where the offence may otherwise have gone undetected, this should reduce the sentence (separate from any guilty plea reduction at step four).

M5. Cooperation with the investigation/ early admissions

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Assisting or cooperating with the investigation and /or making pre-court admissions may ease the effect on victims and witnesses and save valuable police time justifying a reduction in sentence (separate from any guilty plea reduction at step four).

Question 15

M6. Little or no planning

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where an offender has committed the offence with little or no prior thought, this is likely to indicate a lower level of culpability and therefore justify a reduction in sentence.

However, impulsive acts of unprovoked violence or other types of offending may indicate a propensity to behave in a manner that would not normally justify a reduction in sentence.

M7. The offender was in a lesser or subordinate role if acting with others / performed limited role under direction

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Whereas acting as part of a group may make an offence more serious, if the offender's role was minor this may indicate lower culpability and justify a reduction in sentence.

M8. Involved through coercion, intimidation or exploitation

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

- Where this applies it will reduce the culpability of the offender.
- This factor may be of particular relevance where the offender has been the victim of domestic abuse, trafficking or modern slavery, but may also apply in other contexts.
- Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation which the offender may find difficult to articulate, and where appropriate ask for this to be addressed in a PSR.
- This factor **may** indicate that the offender is vulnerable and would find it more difficult to cope with custody or to complete a community order.

Question 16

M9. Limited awareness or understanding of the offence

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

The factor may apply to reduce the culpability of an offender

- acting alone who has not appreciated the seriousness of the offence **or**
- where an offender is acting with others and does not appreciate the extent of the overall offending.

If the offender had genuinely failed to understand or appreciate the seriousness of the offence, the sentence may be reduced from that which would have applied if the offender had understood the full extent of the offence and the likely harm that would be caused.

Where an offender lacks capacity to understand the full extent of the offending see the guidance under 'Mental disorder or learning disability' below.

M10. Little or no financial gain

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where an offence (which is not one which by its nature is an acquisitive offence) is committed in a context where financial gain could arise, the culpability of the offender may be reduced where it can be shown that the offender **did not seek to gain financially** from the conduct and did not in fact do so.

M11. Delay since apprehension

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where there has been an **unreasonable** delay in proceedings since apprehension which **is not the fault of the offender**, and which has had a detrimental effect on the offender, the court may take this into account by reducing the sentence.

Note: No fault should attach to an offender for not admitting an offence and/or putting the prosecution to proof of its case.

Question 17

M12. Activity originally legitimate

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where the offending arose from an activity which was originally legitimate, but became unlawful (for example because of a change in the offender's circumstances or a change in regulations), this **may** indicate lower culpability and thereby a reduction in sentence.

This factor will not apply where the offender has used a legitimate activity to mask a criminal activity.

M13. Age and/or lack of maturity

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Age and/or lack of maturity can affect:

- the offender's responsibility for the offence and
- the effect of the sentence on the offender.

Either or both of these considerations may justify a reduction in the sentence.

The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).

In particular young adults (typically aged 18-25) are still developing neurologically and consequently may be less able to:

- evaluate the consequences of their actions
- limit impulsivity
- limit risk taking

Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.

Environment plays a role in neurological development and factors such as childhood adversity including deprivation and/or abuse will affect development.

An immature offender may find it particularly difficult to cope with custody and therefore may be more susceptible to self-harm in custody.

An immature offender may find it particularly difficult to cope with the requirements of a community order without appropriate support.

There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct.

Research shows that the vast majority of young people begin the process of desistance in their later teens. Therefore young adults' previous convictions may not be as indicative of a tendency for further offending by comparison with older adults.

Question 18

Where the offender is a care leaver the court should enquire as to any effect a sentence may have on the offender's ability to make use of support from the local authority. (Young adult care leavers are entitled to time limited support. Leaving care services may change at the age of 21 and cease at the age of 25, unless the young adult is in education at that point). See also the Sentencing Children and Young People Guideline (paragraphs 1.16 and 1.17).

Where an offender has turned 18 between the commission of the offence and conviction the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed, but taking into account the purposes of sentencing adult offenders. See also the Sentencing Children and Young People Guideline (paragraphs 6.1 to 6.3).

When considering a custodial or community sentence for a young adult the National Probation Service should address these issues in a PSR.

M14. Sole or primary carer for dependent relatives

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. See also the [Imposition of community and custodial sentences guideline](#).

For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.

Where custody is unavoidable consideration of the impact on dependants may be relevant to the length of the sentence imposed and whether the sentence can be suspended.

For more serious offences where a substantial period of custody is appropriate, this factor will carry less weight.

When imposing a community sentence on an offender with primary caring responsibilities the effect on dependants should be a consideration in determining suitable requirements.

In addition when sentencing an offender who is pregnant relevant considerations may include:

- any effect of the sentence on the health of the offender and
- any effect of the sentence on the unborn child

The court should ensure that it has all relevant information about dependent children before deciding on sentence.

When an immediate custodial sentence is necessary, the court must consider whether proper arrangements have been made for the care of any dependent children and if necessary consider deferring sentence for this to be done.

~~In such situations~~ When considering a community or custodial sentence for an offender who has, or may have, caring responsibilities the court should ask the Probation Service to address these issues in a PSR.

Question 18

M15. Physical disability or serious medical conditions requiring urgent, intensive or long-term treatment

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

- The court can take account of physical disability or a serious medical condition by way of mitigation as a reason for reducing the length of the sentence, either on the ground of the greater impact which imprisonment will have on the offender, or as a matter of generally expressed mercy in the individual circumstances of the case.
- However, such a condition, even when it is difficult to treat in prison, will not automatically entitle the offender to a lesser sentence than would otherwise be appropriate.
- There will always be a need to balance issues personal to an offender against the gravity of the offending (including the harm done to victims), and the public interest in imposing appropriate punishment for serious offending;
- A terminal prognosis is not in itself a reason to reduce the sentence even further. The court must impose a sentence that properly meets the aims of sentencing even if it will carry the clear prospect that the offender will die in custody. The prospect of death in the near future will be a matter considered by the prison authorities and the Secretary of State under the early release on compassionate grounds procedure (ERCG).
- But, an offender's knowledge that he will likely face the prospect of death in prison, subject only to the ERCG provisions, is a factor that can be considered by the sentencing Judge when determining the sentence that it would be just to impose.

M16. Mental disorder or learning disability

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Mental disorders and learning disabilities are different things, although an individual may suffer from both. A **learning disability** is a permanent condition developing in childhood, whereas **mental illness** (or a mental health problem) can develop at any time, and is not necessarily permanent; people can get better and resolve mental health problems with help and treatment.

In the context of sentencing a broad interpretation of the terms 'mental disorder' and learning disabilities' should be adopted to include:

- Offenders with an intellectual impairment (low IQ);
- Offenders with a cognitive impairment such as (but not limited to) dyslexia, attention deficit hyperactivity disorder (ADHD);
- Offenders with an autistic spectrum disorder (ASD) including Asperger's syndrome;
- Offenders with a personality disorder;
- Offenders with a mental illness.

Offenders may have a combination of the above conditions.

Sentencers should be alert to the fact that not all mental disorders or learning disabilities are visible or obvious.

A mental disorder or learning disability can affect both:

1. the offender's responsibility for the offence and
2. the impact of the sentence on the offender.

The court will be assisted by a PSR and, where appropriate, medical reports (including from court mental health teams) in assessing:

1. the degree to which a mental disorder or learning disability has reduced the offender's responsibility for the offence. This may be because the condition had an impact on the offender's ability to understand the consequences of their actions, to limit impulsivity and/or to exercise self-control.
 - a relevant factor will be the degree to which a mental disorder or learning disability has been exacerbated by the actions of the offender (for example by the **voluntary** abuse of drugs or alcohol or by **voluntarily** failing to follow medical advice);
 - in considering the extent to which the offender's actions were voluntary, the extent to which a mental disorder or learning disability has an impact on the offender's ability to exercise self-control or to engage with medical services will be a relevant consideration.
2. any effect of the mental disorder or learning disability on the impact of the sentence on the offender; a mental disorder or learning disability may make it more difficult for the offender to cope with custody or comply with a community order.

M17. Determination and /or demonstration of steps having been taken to address addiction or offending behaviour

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm

Where offending is driven by or closely associated with drug or alcohol abuse (for example stealing to feed a habit, or committing acts of disorder or violence whilst drunk) a commitment to address the underlying issue may justify a reduction in sentence. This will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation.

Similarly, a commitment to address other underlying issues that may influence the offender's behaviour may justify the imposition of a sentence that focusses on rehabilitation.

The court will be assisted by a PSR in making this assessment.

Question 19

**Sentencing Council meeting:
Paper:**

**14 June 2019
SC(19)JUN04 – Race and Gender
analysis**

Lead officials:

**Eleanor Nicholls/Amber
Isaac/Emma Marshall**

1 ISSUE

1.1 This paper presents a suggested action plan to take forward work stemming from research on race and gender disparities in sentencing, particularly in relation to drug offences, in the context of the consultation on the revised drug offences guideline to be discussed later today.

2 RECOMMENDATION

2.1 That the Council:

- notes the findings from the analysis, updated with information from a small transcript analysis exercise;
- agrees the next steps as outlined in this paper; and
- agrees the timetable for initial discussions and publication of the research findings and consultation paper.

3 CONSIDERATION

Research findings – context

3.1 In April you considered an interim summary of findings of our research into race and gender disparities in sentencing drug offences, and asked for further work on analysis and planning for next steps. Since then, further transcript analysis, the findings of which will be discussed at the meeting, has not changed the overall picture substantially; there are still disparities in sentencing between non-white and white offenders, and between male and female offenders, which are not explained by any of the factors analysed. In considering race, the size of the disparity is considerably less than that suggested by the research published in the Lammy

review, but is nevertheless still present and, therefore, still a serious concern. In considering gender, there is a clear disparity even when many factors are accounted for.

3.2 There may be several reasons for the disparities. Firstly, it may be that there are other factors which the research did not take into account. Secondly, the disparities in sentencing outcomes may reflect other differences in society, so that the disparity could be between, for example, offenders who are employed and offenders who are not employed, and white offenders may be more likely than non-white offenders to be employed. Thirdly, it may be that there is a disparity elsewhere in the criminal justice system which is feeding into disparities in sentencing. For example, if pre-sentence reports are more likely to highlight certain factors for white offenders than they are for non-white offenders, even if those factors are in reality present equally for both white and non-white offenders, this may lead to disparity in sentencing decisions. Finally, it may be that there is some sort of otherwise unaccountable bias (whether conscious or not) influencing sentencing decisions. In practice, we believe that some combination of all these explanations is likely to be behind the disparities noticed in our research.

3.3 Some of the potential causes of the disparities fall within areas of the Council's control/influence, but most do not. There is therefore a limit to what we will be able to do alone, and a considerable part of our work on this will involve sharing our findings more widely with other organisations within the CJS and working with other organisations on areas of joint responsibility.

Next steps: actions for the Council

3.4 The first actions to consider are those which we can carry out ourselves within our current work revising the Drug Offences guidelines and in other areas. In the mental health draft guideline the Council is consulting on including references to the Equal Treatment Bench Book in light of the findings of the Independent Review of the Mental Health Act concerning disproportionality in the mental health system. Some respondents to the consultation on Expanded Explanations (to be discussed later in this meeting) suggested inclusion of a reference to the Equal Treatment Bench Book in all guidelines, or as part of the expanded explanation of some factors. Given the disparities highlighted by our research, and the response to the Expanded Explanations consultation, we propose to include a link to the Equal Treatment Bench Book in all guidelines. If the Council felt the need to consult further on this proposal this could be done as part of the next scheduled

consultation, the draft Firearms guideline due to be published in September. The proposal is that reference to the Equal Treatment Bench Book would be placed with some of the other general information near the beginning of the guideline before Step 1, reminding sentencers of where to look to find more information on these issues. It would also show other users of guidelines, including the wider public, where to find more information on how judges should be taking account of equal treatment considerations, which would be a positive step in making sentencing more transparent and reinforce guidance given in the Expanded Explanations guideline. Suggested wording is as follows:

Guideline users should be aware that information regarding gender, cultural and ethnicity considerations and outcomes for different groups in the criminal justice system is available in the Equal Treatment Bench Book. [INSERT LINK].

Question 1: Does the Council agree to including the above wording in all guidelines. If so, can this be done immediately or should it be subject to consultation?

3.5 A second potential area of action is to ensure that we consider how our guideline factors may be interpreted in ways which we had not intended, which may lead to disparities and bias within sentencing. This is something which the Council has already worked on when developing the Bladed Articles and Offensive Weapons guidelines in relation to how the guidelines referred to offences committed as part of a group or gang. In these guidelines, respondents to consultation felt that the factor as originally drafted risked being applied disproportionately to non-white offenders, and the Council made some changes to the factor to mitigate that risk.

3.6 In light of the research findings, and action which the Council has already taken in this instance, it seems appropriate to consider more pro-actively whether there are other factors which may risk being misinterpreted or applied in different ways to offenders of different ethnicities. This would also contribute to our meeting our public sector equality duty. There are two main ways in which we could do this:

- a) Enhance the equality impact section of all our consultation documents, asking a specific question to find out whether respondents feel that any of the factors given in the draft guideline could risk being interpreted in a way which leads to disparity in sentencing between different groups. At the moment, the standard equality impact question used in most consultations is very general,

asking simply whether there are “any other equality and diversity issues” which the guideline should address. Asking a more specific question would prompt respondents to suggest factors which may need to be reconsidered. Such a question, which would be in addition to the general question above, could be worded as follows:

Do you have any equality and diversity concerns about any of the factors proposed in this guideline, or how they may be interpreted and applied to different groups/offenders with different protected characteristics?

Including this question would also require policy leads and the Council to consider these risks during the guideline’s development and be more aware of potential problems, and we would add this to our checklist of things to consider when developing guidelines.

- b) Seek advice of experts on potential risks in the factors as currently drafted to support the development of future guidelines and perhaps make changes to existing guidelines where necessary. To support consideration of equality and diversity concerns as we develop future guidelines, we could commission work from external experts in this area (working with, for example, the Government Equalities Office or the Equality and Human Rights Commission) to review factors and suggest where there are potential risks. This could be done as part of development of future guidelines and/or with factors in existing guidelines or parts of the expanded explanations, particularly in light of the policy on making changes to guidelines which we published on 31 May. As a first step towards this, subject to resources, we could carry out a literature review of academic work on equality and diversity and use of language in the Criminal Justice System which would suggest any areas of concern and potential experts whose input and advice may be useful to the Council.

Question 2: Does the Council agree to enhancing our standard consultation question on equalities to prompt respondents to consider any concerns about factors?

Question 3: Does the Council agree to carrying out a literature review and scoping work with external experts on other potential risks within our factors?

3.7 Considering consultation, there is also separate action we can take to ensure we consult with a wider range of stakeholders. The Lammy review highlighted the importance of transparency and demystifying the court and sentencing process,

and one way we can begin to increase transparency is to be more proactive in contacting organisations from different sections of the community when we consult on a draft guideline and when we publish new guidelines. Seeking views more widely from a range of groups should help to bring any concerns about equality and diversity to our attention. It should also help to bring our work to a wider audience and make more people aware of sentencing guidelines. Work has already begun on this, with the intention of consulting more broadly from the next consultation (Firearms) in September.

3.8 Another potential area of work is in relation to guidance on suspending sentences. The data analysis and transcript research suggests that the disparities in sentencing may relate to judges sometimes suspending sentences in cases of white offenders but not in cases of non-white offenders. The reasons behind these differences are not clear, and further research would be needed. Judges sometimes give no reasons for suspending a sentence, or sometimes refer to “personal circumstances” of the offender leading them to suspend the sentence, but without setting out clearly what those circumstances were. This may be because they had been set out by the defence during the sentencing hearing, so they are clear to those who are present in court but not to anyone reading the remarks afterwards. It would be very helpful for us, and for anyone else carrying out research in this area, as well as for the wider public and parties in the case, to understand the reasons behind suspending a sentence, or considering suspending but deciding not to.

3.9 There are several actions the Council may be able to take to address this. Firstly, we could add research on reasons for suspending sentences to our list of research topics on which we are seeking to collaborate with academics. Secondly, and in light of further evidence, we may need to consider whether to revise the Imposition guideline to ensure that provisions on suspended sentences are not applied differently to white and non-white offenders. The Imposition guideline came into force on 1 February 2017, and no evaluation work has started yet, but revisions to parts of the guideline would be possible if there were particular concerns. Thirdly, we could discuss reasons for suspending sentences with the judicial office and Judicial College, to find out whether this is an area in which they have any concerns, what training is available about this, etc. Finally, we may wish to discuss potential changes to the Criminal Procedure Rules/Practice Directions with the Rules committee to require judges to give reasons for suspending a

sentence when giving their reasons for the sentence under s174 Criminal Justice Act 2003.

Question 4: Is the Council content for us to add “reasons for suspending sentences” to our list of proposed research topics?

Question 5: Does the Council agree to our carrying out some initial scoping work to identify areas where changes may be needed to the Imposition guideline?

Next steps: gender

3.10 The above discussion has primarily concerned the findings on race, since they were the driver behind our research and are likely to be most scrutinised when we publish the findings alongside the consultation on drug offences. Our research has shown significant disparities in sentencing for drug offences between men and women, which are not explained by any of the variables looked at. For example, our research found that, for a white offender aged 26 to 50, who pleaded guilty to a Class B PWITS offence, significant role, harm category 3, no aggravating or mitigating factors, a male was 82% more likely to receive an immediate custodial sentence than a female offender. The findings from the transcript analysis was similar in some ways to the findings for race, but the reasons behind some of the differences are not clear, so there are no specific next steps in terms of guidelines, beyond those suggested above for consultation, which should help us gather better information and strengthen connections with different groups. However, other organisations have carried out considerable research in this area and a review of this may suggest areas of the guidelines where we can take action. We therefore propose, subject to resources, to review research in this area to enable us to decide on any next steps, and help us present our research in context.

3.11 Findings of our research into these drug offences run somewhat counter to the views expressed by campaign groups such as the Prison Reform Trust, which believes that women are sentenced more harshly than men for the same offences, and has some evidence of this. We will need to address this when presenting our findings on gender, taking care to explain what our research looked at and how it relates to other work, and will speak directly to key groups working in this area as soon as the research is published.

Next steps: working with others

3.12 The third and fourth actions above, and suggested work on gender, go beyond the remit of guidelines and the Council, and are examples of steps which we can take in conjunction with other bodies within the Criminal Justice System, and information we can share with them. As suggested above, it is possible that the disparities discovered in our research result from problems elsewhere in the system (for example, production of pre-sentence reports). In relation to concerns about suspended sentences, actions three and four above require us to work with others to let them know about the results of the work, and see whether joint work can take place in the future.

Question 6: Does the Council agree to our holding initial discussions with the Judicial Office and Judicial College about suspended sentences?

3.13 More broadly, there are many organisations within the Criminal Justice System who will be interested in the research, and who, when we publish the findings alongside our consultation on the revised Drug Offences guideline in the autumn, will be challenged to take action. We need to work with them before publication to make them aware of our overall findings on both race and gender, and the implications for their areas of work, and to ensure we know what actions or further work they may wish to undertake, and how we can support them and work with them on areas of joint responsibility. We have already presented the initial findings of the research to a group of the senior criminal courts judiciary, and have discussed the research and methods with analysts at the MoJ. Building on this, we therefore propose to have some initial, confidential discussions with several organisations over the summer. These discussions may yield valuable information to us about other potential reasons which we have not identified, where we need to take action or carry out further research. It would also mean that, upon publication, we can set out actions we intend to take including those which involve working with others, and would mean that other organisations whose role and potential actions will be scrutinised when we publish the findings will be fully aware and able to set out publicly at that stage what action they will be taking in response.

3.14 The bodies with which we propose to hold initial, confidential discussions are:

- a) Judicial Office
- b) Judicial College
- c) HMPPS – probation

- d) Criminal Procedure Rules team
- e) CPS
- f) MoJ policy leads on Sentencing
- g) HMCTS
- h) The post-Lammy-review team at MoJ

3.15 We do not propose to speak to any stakeholders outside the criminal justice system at this stage prior to publication. At this stage, we wish to ensure that our discussions are kept confidential within internal CJS organisations, and focused on the main findings of the research, views from others on reasons behind the disparities, and next steps for all involved. We will report back to Council in September on the results of these discussions. When the research is published we would be able to hold wider discussions with other key groups and individuals, including criminal defence practitioners, and campaigning/charitable groups such as the Prison Reform Trust.

Question 7: Does the Council agree to our holding initial, confidential discussions with the above range of internal CJS stakeholders?

Question 8: Are there any additional internal/external bodies whom the Council wish to consult prior to publication?

3.16 The next steps set out above are summarised in the following table:

	Action	Timescale
1	Adding a reference and link to the equal treatment bench book to guidelines	From our next consultation on the draft Firearms guideline (in September 2019)
2	Enhance our consultation questions on equality and diversity	From our next consultation on the draft Firearms guideline (late September 2019)
3	Carry out a literature review of research into use of language and racial/gender disparities in the criminal justice system	Dependent on resources
4	Continue work on expanding our consultations and including a wider range of organisations	Ongoing, but further work beginning with the consultation on the draft Firearms guideline (late September 2019)

5	Adding “reasons for suspending sentences” to our research topics list	June 2019
6	Adding the Imposition guideline to our “long list” of guidelines for potential revision.	June 2019
7	Holding initial discussions with Judicial Office and Judicial College about suspended sentences	Summer 2019
8	Holding initial discussion with a range of internal CJS stakeholders	Summer 2019, to feed into publication of our research findings and consultation on the revised Drug Offences guideline (late October 2019)

Question 9: Are there any additional steps which the Council wishes to take at this stage?

3.17 We intend to bring the results of these discussions over the summer, and anything additional arising which needs to be covered in the Drug offences consultation paper, to Council in September, prior to the launch of the consultation. After the September meeting, we will also consider communications and approach to external discussions (including with David Lammy MP).

Monitoring

3.18 The action plan above sets out several actions over a period of months. We will return to Council with an update in September, prior to publication of the research and consultation on the draft revised Drug Offences guideline. We also intend to provide Council with updates on progress against the action plan, and further actions, every quarter.

4. IMPACT AND RISKS

4.1 Most of the actions proposed above can be carried out within existing guideline timescales and resources. Any changes to the Imposition guideline would, of course, require a “slot” in our workplan and may delay the development of another guideline. There is a risk, if we discuss the research and possible next steps with other CJS bodies, that information about our findings and next steps might leak out beyond those with whom we hold discussions. However, as we intend to publish the findings anyway, that may not be such a significant problem,

and we would mitigate it by taking care over the level of information we discuss, and selecting those we talk to. We should also bear in mind that all the actions above should help to mitigate reputational risks which would stem from taking no action on this issue when we publish the consultation on the revised Drug Offences guideline. However, we should be alive to the risk that other organisations with whom we discuss our findings decide not to take any actions, which could increase pressure on the Council to take further actions which may not be within our remit.

Sentencing Council

Council meeting:	14 June 2019
Paper number/name:	SC(19)JUN05 - A “vision” for the Council from April 2020
Lead official:	Emma Marshall

ISSUE

1.1 Progress and next steps on a future “vision” for the Council beyond its 10-year anniversary.

RECOMMENDATION

1.2 That the Council notes the latest progress and agrees the next steps.

CONSIDERATION

1.3 At the July 2018 meeting, the Council agreed that it should mark its 10-year anniversary in April 2020 and that one aspect of that would be to convene a one-day event to which we would invite a range of people including academics, other government departments, external organisations, legal professionals, and high-profile commentators and influencers with an interest in sentencing.

3.2 It was agreed that at the event the Council would summarise, showcase and celebrate some of its achievements in its first 10 years of operation, but that it would also provide an opportunity to seek ideas to help shape the development of the Council’s priorities and vision for the following 10 years.

3.3 A review of the Council’s role and remit is timely: in respect of its work to develop guidelines, since 2010 it has issued guidelines on all the major and high-volume offences and is likely to have achieved the Council’s stated aim to have issued guidelines on all the main triable either-way offences by 2020. It has also converted the main SGC guidelines to a Council model and has now evaluated a number of them. On this basis, it

will increasingly be looking to develop guidelines on either lower-volume or less-serious offences or niche offences where there may have been calls from specific interest groups for a guideline (e.g. level crossings, some regulatory offences).

3.4 There have also been a number of academic articles/editorials and social media communications commenting on, and at times critiquing, the Council's approach (most notably from Professor Nicola Padfield, Professor Andrew Ashworth, Rob Allen from Transform Justice, and the Howard League for Penal Reform¹). These have questioned whether the Council's strong focus on guideline development is at the expense of some of its other statutory duties and whether the Council has settled on an appropriate interpretation of its duties. Some have also argued for a body that would have an overarching remit to look more broadly at sentencing issues and provide a reliable source of evidence-based information on sentencing-related and other relevant matters.

3.5 In addition, the Council's own independent review (conducted by Professor Sir Anthony Bottoms and published in April 2018) itself highlighted areas that the Council should consider for the future, the MoJ has recently published a Tailored Review of the Council, and the Justice Select Committee in their March 2019 response to the inquiry into the prison population to 2022 suggested that they may initiate an inquiry into the role of the Council in the future². Therefore opening up a debate on the Council's future approach will not only assist in identifying key areas that Council may wish to focus on, it will demonstrate transparency and responsiveness, promote further collaborative working with stakeholders (particularly academics) and will assist in strengthening the Council's legitimacy.

Progress and next steps

3.6 A small working group has been put together in the Office to think through potential approaches to developing a future vision for the Council. We have also been developing proposals for analytical work to support the summary/showcasing of the Council's achievements at the event in April (these proposals have been the subject of separate communications with the Council to seek its approval on these ideas).

¹ For example, Padfield, N. (2016), *Guidelines galore*; Crim.L.R., 2016, 301-302, Editorial; Ashworth, A. and Padfield, N. (2015), *Five years of the Sentencing Council*, Crim.L.R., 2015, 657-658, Editorial; Ashworth, A. and Padfield, N. (2018), *Reviewing the Sentencing Council*, Crim.L.R., 2018, 8, 609-611; Editorial; Allen, R. (2016) *The Sentencing Council for England and Wales: brake or accelerator on the use of prison?*, Transform Justice.

² House of Commons Justice Committee (2019): *Prison population 2022: planning for the future*.

3.7 We have also discussed initial thoughts on progressing this work the Governance Group and as a result, plan to convene meetings with individual Council members to discuss their views on the future direction of the Council and what issues may need to be taken into account.

3.8 If possible, we plan to arrange these meetings for June and July with a view to disseminating initial ideas to the Council collectively later in the Summer. We will then work further on these ideas in order to produce a draft document that the Council is happy to use as the basis of discussions at the anniversary event; if it is not possible to publish these draft ideas in advance of the event, we will launch them on the day and provide further time after the event for people to more formally respond to them.

Question 1: Is the Council happy for us to arrange individual meetings to discuss the Council's future vision, with a view to progressing this work more fully over the summer period?

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

14 June 2019
SC(19)JUN06 – Drug Offences
Rebecca Crane and Sarah Munro
Eleanor Nicholls
020 7071 5799

1 ISSUE

1.1 This is the final discussion of the substance of the revised Drug Offences guideline prior to consultation in October, and the full range of guidelines are presented to Council for sign-off.

2 RECOMMENDATION

2.1 That the Council:

- agrees the changes proposed to the draft guidelines since the May meeting; and
- agrees to consult on these draft guidelines in late October 2019.

3 CONSIDERATION

3.1 At your last meeting, you discussed several outstanding aspects of the revised Drug Offences guideline and agreed to some changes, and some further work. This paper covers the changes discussed at the May meeting, including those on which members have made comments out of committee, sets out some further, small, changes made for consistency, and presents the last of these nine guidelines, for the offence of Possession of a Psychoactive Substance in a Custodial Institution, for the first time.

Misuse of Drugs Act 1971 – Importation offence

3.2 At your last meeting, you asked me to redraft the sentence tables for category 4 harm for this offence. The current guideline does not suggest sentence levels here, but refers sentencers to two other guidelines (Possession or Supply) depending on the seriousness of the offence, specifically, the intent. We agreed at the last meeting that instead of this somewhat confusing wording, the table should contain the actual sentence levels, imported from the Possession or Supply guidelines. The amended sentence tables are set out at pages three and four of Annex A. In order to retain the reasoning behind the current guideline, particularly as this was an area in which the Council had sought to change

sentencing practice in 2012, I have used the sentence levels for Possession as the basis of the “Lesser Role” levels (increasing slightly to account for the fact that it is Importation rather than mere Possession, as per aggravating factors in the current Possession guideline). I have then used slightly adjusted levels from the Supply guideline being used for the “Significant” and “Leading” roles. There is a risk of changing sentencing practice from current levels, of course, and the resource assessment on this part of the guideline will take place over the summer.

Question 1: Is the Council content with the sentence levels proposed for the Category 4 Importation offences?

3.3 I propose one further change to culpability factors for the Importation offence. When discussing these factors in relation to all three main offences (Importation, Supply and Cultivation) you agreed to a new factor in “Leading Role” to cover cases of cuckooing, “Exercising control over the home of another for drug-related activity”. Although it is possible that this could be relevant in an importation case (particularly in a conspiracy to import case) it is not likely to be important in many cases and I therefore propose to remove it from the Importation guideline.

3.4 A similar argument also holds for removal of the aggravating factor “Established evidence of community impact” from the importation guideline. While this may be very relevant in cases of supply/PWITS or production/cultivation, it is not a factor which we have seen in importation cases, so I propose to remove it.

Question 2: Is the Council content to remove these factors from the Importation guideline?

Misuse of Drugs Act 1971 - quantities

3.5 At the May meeting, we discussed the approach to quantities for several drugs and agreed some changes to how MDMA/Ecstasy quantities were presented. We agreed changes to the quantities of ecstasy tablets and, supported by new evidence from the police, to changes to numbers of cannabis plants in the cultivation guideline. You also asked me to make a further attempt to set out suitable quantities for synthetic cannabinoid receptor agonists (SCRAs). I sent these to members for your views out of committee. Members who responded agreed to the revised quantities for ecstasy tablets and cannabis plants, so those new quantities have been included in the draft guidelines in the Annexes A to C.

Question 3: Does the Council confirm that it agrees to consult on the basis of the revised quantities for ecstasy tablets and cannabis plants?

3.6 However, on SCRAs, the picture continues to be more complicated. NCA experts felt that giving specific quantities is problematic, given the range of ways in which the drugs can

be prepared, and most of the members who responded to my proposed quantities shared this concern. Given this, I propose (as discussed at the last meeting) to consult on using words rather than specific indicative quantities for these drugs, and to ask consultation respondents for any evidence they have as to what might be suitable indicative quantities. Suggested wording for these, based on the wording you agreed for Psychoactive Substances Act offences (in which there is a similar problem with range of substances/harm) and wording used in the cultivation of cannabis guideline, is as follows:

Category 1	<u>Very large quantity indicative of an industrial scale operation</u>
Category 2	<u>Large quantity indicative of a commercial operation</u>
Category 3	<u>Smaller quantity between categories 2 and 4</u>
Category 4	<u>Very small quantity</u>

3.7 The drafts at Annexes A to C use these descriptions for the categories for SCRAs. However, if we are not to include actual indicative quantities for these drugs, it may be that instead of including a separate line for SCRAs, with the above wording, the table should include “All other drugs”, with the above wording, which would of course include SCRAs, but may be of assistance to sentencers in cases involving other drugs. The wording at the top of the table relating to expert evidence and purity could remain, amended as follows:

Indicative quantities of the most common drugs, (upon which the starting point is to be based) are given in the table below. Where a drug is not listed in the table below, sentencers may be assisted by the factors set out under “All other drugs”. Sentencers should also expect to be provided with expert evidence to assist in determining the potency of the particular drug and in equating the quantity in the case with the quantities set out in the guidelines in terms of the harm caused. There will often be no precise calculation possible, but courts are reminded that in cases of particularly potent drugs, even very small quantities may be held to be equivalent to large quantities of the drugs listed.

Question 4: Does the Council agree to using the descriptive factors above for SCRAs or does the Council wish to give these factors for “All other drugs”, and amend the wording on sentencing cases involving other drugs?

3.8 One of the reasons for revising this guideline was because of the changing nature of drug offending, including changes to quantities and purity which have led to our changing the quantities for some drugs as set out above. In addition to asking consultation questions on the proposed quantities, we should also consult on how to ensure that the guideline remains current in the future. I propose therefore that we consult on committing to seek

evidence from experts on drug quantities every three years, and revising the quantities in the guideline (rather than the guideline as a whole) if expert evidence suggests that this is necessary. Seeking evidence on quantities any more frequently would probably not provide sufficiently robust information to allow us to be confident in the need for changes to the guideline. If, on the evidence, we did feel revisions of the quantities were necessary, we would carry out a shorter, targeted consultation on any revised quantities.

Question 5: Does the Council agree to consulting on a commitment to seek evidence on quantities and reviewing where necessary every three years?

Misuse of Drugs Act – Permitting premises and Possession offences

3.9 At the last meeting, you suggested some changes to the culpability factors in the permitting premises guideline, to include both frequency and length of time over which the drug-related activity took place. You also asked for changes to the harm tables, so that there could be specific quantities given as examples, rather than references to other guidelines. Those changes are set out in Annex D.

3.10 The final Misuse of Drugs Act guideline, for Possession offences, was agreed in January, and any small changes proposed then have been included in the version for sign-off at Annex E.

Question 6: Is the Council content with the changes made to these two guidelines?

Psychoactive Substances Act – importation, production and supply offences

3.11 When we discussed sentence levels for these offences at the last meeting, you were concerned that they may be lower than current sentencing practice. Given the potentially extremely harmful nature of these substances and a desire for the Council to be leading the way in this area, the Council agreed that sentence levels should be increased to bring them closer to the comparable Class B drug offences. I have therefore made some changes, set out in the tables at Annexes F to H, to increase the sentences to be broadly in line with Class B drug offences. If you agree to these revised levels, the resource assessment for these offences will be undertaken over the summer.

Question 7: Does the Council agree to these revised sentence levels for the main Psychoactive Substances Act offences?

3.12 I have also made some changes to the descriptive harm factors for importation and production offences. The factors which you agreed in April were designed for Supply/PWITS offences, and I have made small changes to the factors to fit with the other two offences, particularly to Category 2, in which the factors relating to supply directly to others can only apply to Supply/PWITS.

Question 8: Does the Council agree with the changes to the harm factors for PSA importation and production offences?

Possession of a Psychoactive Substance in a Custodial Institution (Annex I)

3.13 The one guideline which you have not yet discussed at all is that for the offence of Possession of a Psychoactive Substance in a Custodial Institution. Under the PSA 2016, this is the only possession offence. Drafting a guideline for such a narrow offence, which has a low statutory maximum penalty but is generally committed by offenders who are already serving a custodial sentence, has been challenging. There were 30 offenders sentenced in 2017; 73% (22 offenders) were sentenced to immediate custody, 17% (five offenders) were given a suspended sentence, and 7% (two offenders) had a conditional discharge. The average (mean) custodial sentence length for those sentenced to immediate custody in 2017 was four months (after any reduction for guilty plea), and the median was three months.

3.14 I have reviewed a sample of 11 transcripts, and it has been very difficult to separate cases in terms of culpability and, particularly, harm. Judges have in many cases simply referred to the seriousness of possessing the substance in a custodial institution, and the harm it can potentially cause, without giving reasons as to why the particular offence before them was more or less serious. Considering those factors raised, and informed by initial conversations with those in HMPPS responsible for tackling drug offences in prisons, I propose a model based on culpability alone, with two levels of culpability and no differentiation in terms of harm. The culpability factors relevant to this offence at Step 1 are:

Category 1	Offender was in a position of trust/responsibility in the custodial institution Deliberate attempts to evade detection/conceal evidence
Category 2	Cases falling between Categories 1 and 3 because: <ul style="list-style-type: none"> • factors in both categories 1 and 3 are present which balance each other out; and/or • the offender’s culpability falls between the factors as described in Categories 1 and 3.
Category 3	Evidence that offence was committed under pressure falling short of duress

3.15 The factor relating to position of trust or responsibility is primarily aimed at prison employees or others who are carrying out work in a prison, but could also apply to an offender who holds some sort of position of responsibility, such as a role on a prison council. The second high culpability factor was cited in several cases where a prisoner had made deliberate attempts to conceal the substance in his/her possession, and as it is one of the few factors cited I have moved it from Step 2 to Step 1. The lower culpability factor is aimed at circumstances where the offender was asked to “look after” a substance for someone else; it is drafted in this way, requiring “evidence” because including a specific factor on

offenders “looking after” the substance may lead offenders to claim falsely that the substance was not theirs.

Question 9: Does the Council agree to the proposed model using culpability alone at Step 1?

3.16 The sentence levels proposed are based on current sentencing practice. Sentences for this offence are in general more severe than sentences for “simple” possession of a controlled drug, in part because of the seriousness of the offence of possession in a custodial institution, but also because most of the offenders are serving prisoners, so a community sentence is not appropriate. I have included text on this above the sentencing table, based on text used in the General guideline and including reference to totality.

Question 10: Does the Council agree with the proposed sentence levels and accompanying text?

3.17 The aggravating and mitigating factors are similar to those for the possession of a controlled drug offence, but there are some differences. I have included an aggravating factor “Established evidence of impact in the custodial institution concerned” as a specific version of the normal “Established evidence of community impact”. This is because, whilst in nearly every transcript the judge referred in general terms to the impact of psychoactive substances in prisons, in some cases there was specific evidence from, for example, the governor of the prison where the offence was committed, explaining that there was a particular problem with that substance in that prison at the time.

Question 11: Is the Council content with the inclusion and drafting of the aggravating and mitigating factors? Are there any additional factors which should be included?

Next steps

3.18 Following decisions taken today, I will revise and tidy up the draft guidelines and circulate them, together with the consultation document out of committee for you to review over the summer. We will also circulate further sections of the resource assessment and, as will be covered in a separate paper, the report of the findings of our race/gender research and next steps, which will be discussed at your September meeting

Question 12: Is the Council content to sign off these draft revised Drug Offences guidelines for consultation?

4 IMPACT /RISKS

4.1 Analysis undertaken to date to assess the potential resource impact of these guidelines is covered within a separate Council paper. Further analysis will be carried out in due course based on decisions made at the June Council meeting, and a full resource assessment will be circulated to Council members during the summer.

Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug

Misuse of Drugs Act 1971 (section 3)

Customs and Excise Management Act 1979 (section 170(2))

Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused (quantity) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by the offender's role

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

Leading role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility
- Exploitation of children and/or vulnerable persons to assist in drug-related activity
- ~~Exercising control over the home of another person for drug-related activity~~

Significant role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage, (save where this advantage is limited to meeting the offender's own habit) whether or not operating alone
- Some awareness and understanding of scale of operation

Lesser role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)
- Expectation of limited, if any, financial or other advantage (including meeting the offender's own habit)

In assessing harm, quantity is determined by the weight of the product. Purity is not taken into account at step one but is dealt with at step two.

Category of harm

Indicative quantities of some common drugs, upon which the starting point is to be based, are as follows given in the table below. Where a drug is not listed in the table below, sentencers should expect to be provided with expert evidence to assist in determining the potency of the particular drug and in equating the quantity in the case with the quantities set out in the guidelines in terms of the harm caused. There will often be no precise calculation possible, but courts are reminded that in cases of particularly potent drugs, even very small quantities may be held to be equivalent to large quantities of the drugs listed.

Category 1	<ul style="list-style-type: none"> • Heroin, cocaine – 5kg • Ecstasy – <u>7,000</u> tablets* • MDMA – 5kg • LSD – 250,000 squares • Amphetamine – 20kg • Cannabis – 200kg • Ketamine – 5kg • <u>Synthetic cannabinoid receptor agonists –very large quantity indicative of an industrial scale operation</u>
Category 2	<ul style="list-style-type: none"> • Heroin, cocaine – 1kg • Ecstasy – <u>1,300</u> tablets* • MDMA – 1kg • LSD – 25,000 squares • Amphetamine – 4kg • Cannabis – 40kg • Ketamine – 1kg • <u>Synthetic cannabinoid receptor agonists – large quantity indicative of a commercial operation</u>
Category 3	<ul style="list-style-type: none"> • Heroin, cocaine – 150g • Ecstasy – <u>200</u> tablets* • MDMA – 150g • LSD – 2,500 squares • Amphetamine – 750g • Cannabis – 6kg • Ketamine – 150g • <u>Synthetic cannabinoid receptor agonists – smaller quantity between categories 2 and 4</u>
Category 4	<ul style="list-style-type: none"> • Heroin, cocaine – 5g • Ecstasy – <u>13</u> tablets* • MDMA – 5g • LSD – 170 squares • Amphetamine – 20g

	<ul style="list-style-type: none"> • Cannabis – 100g • Ketamine – 5g • <u>Synthetic cannabinoid receptor agonists – very small quantity</u>
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*Ecstasy tablet quantities based on a typical quantity of 150mg MDMA per tablet

Step two – starting point and category range

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Where appropriate, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the offender's role.

CLASS A	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	Starting point 14 years' custody Category range 12 – 16 years' custody	Starting point 10 years' custody Category range 9 – 12 years' custody	Starting point 8 years' custody Category range 6 – 9 years' custody
Category 2	Starting point 11 years' custody Category range 9 – 13 years' custody	Starting point 8 years' custody Category range 6 years 6 months' – 10 years' custody	Starting point 6 years' custody Category range 5 – 7 years' custody
Category 3	Starting point 8 years 6 months' custody Category range 6 years 6 months' – 10 years' custody	Starting point 6 years' custody Category range 5 – 7 years' custody	Starting point 3 years' custody Category range 18 months' – 5 years' custody
Category 4	Starting point 5 years' custody Category range 4 years 6 months' – 7 years 6 months' custody	Starting point 3 years' custody Category range 18 months' – 5 years' custody	Starting point Low level community order Category range Band A fine – 18 months' custody

CLASS B	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	Starting point 8 years' custody Category range 7 – 10 years' custody	Starting point 5 years 6 months' custody Category range 5 – 7 years' custody	Starting point 4 years' custody Category range 2 years 6 months' – 5 years' custody
Category 2	Starting point 6 years' custody Category range	Starting point 4 years' custody Category range	Starting point 2 years' custody Category range 18 months' – 3 years' custody

	4 years 6 months' – 8 years' custody	2 years 6 months' – 5 years' custody	
Category 3	Starting point 4 years' custody Category range 2 years 6 months' – 5 years' custody	Starting point 2 years' custody Category range 18 months' – 3 years' custody	Starting point 1 year's custody Category range 12 weeks' – 9 months' custody
Category 4	Starting point 18 months' custody Category range 26 weeks' – 3 years' custody	Starting point High level community order Category range Medium level community order – 9 months' custody	Starting point Band C fine Category range Discharge – 26 weeks' custody

CLASS C	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	Starting point 5 years' custody Category range 4 - 8 years' custody	Starting point 3 years' custody Category range 2 – 5 years' custody	Starting point 18 months' custody Category range 1 – 3 years' custody
Category 2	Starting point 3 years 6 months' custody Category range 2 - 5 years' custody	Starting point 18 months' custody Category range 1 – 3 years' custody	Starting point 26 weeks' custody Category range 12 weeks' – 18 months' custody
Category 3	Starting point 18 months' custody Category range 1 – 3 years' custody	Starting point 26 weeks' custody Category range 12 weeks' – 18 months' custody	Starting point High level community order Category range Medium level community order - 26 weeks' custody
Category 4	Starting point 9 months' custody Category range High level community order – 2 years' custody	Starting point High level community order Category range Medium level community order – 12 weeks' custody	Starting point Band B fine Category range Discharge – high level community order

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offender used or permitted a person under 18 to deliver a controlled drug to a third person
- Offence committed on bail

Other aggravating factors include:

- Targeting of any premises where children or other vulnerable persons are likely to be present
- Exposure of drug user to the risk of serious harm, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to the risk of serious harm, for example through method of transporting drugs
- Exposure of third parties to the risk of serious harm, for example, through the location of the drug-related activity
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity

- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- ~~Established evidence of community impact~~
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

Factors reducing seriousness or reflecting personal mitigation

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Importation only of drug to which offender addicted
- Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

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Supplying or offering to supply a controlled drug
Misuse of Drugs Act 1971 (section 4(3))

Possession of a controlled drug with intent to supply it to another
Misuse of Drugs Act 1971 (section 4(3))

Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused (quantity) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by the offender's role

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

Leading role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility, for example, prison employee, medical professional
- Exploitation of children and/or vulnerable persons to assist in drug-related activity
- Exercising control over the home of another person for drug-related activity

Significant role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage (save where this advantage is limited to meeting the offender's own habit), whether or not operating alone
- Some awareness and understanding of scale of operation

Lesser role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- Expectation of limited, if any, financial or other advantage (including meeting the offender's own habit)

Category of harm

In assessing harm, quantity is determined by the weight of the product. Purity is not taken into account at step one but is dealt with at step two. Where the offence is supply directly to users (including street dealing), the quantity of product is less indicative of the harm caused and therefore the starting point is not solely based on quantity. The court should consider all offences involving supplying directly to users as at least category 3 harm, and make an adjustment from the starting point within that category considering the quantity of drugs in the particular case.

Indicative quantities of the most common drugs, upon which the starting point is to be based) are given in the table below. Where a drug is not listed in the table below, sentencers should expect to be provided with expert evidence to assist in determining the potency of the particular drug and in equating the quantity in the case with the quantities set out in the guidelines in terms of the harm caused. There will often be no precise calculation possible, but courts are reminded that in cases of particularly potent drugs, even very small quantities may be held to be equivalent to large quantities of the drugs listed.

<p>Category 1</p>	<ul style="list-style-type: none"> • Heroin, cocaine – 5kg • Ecstasy – <u>7,000 tablets*</u> • MDMA – 5kg • LSD – 250,000 squares • Amphetamine – 20kg • Cannabis – 200kg • Ketamine – 5kg • Synthetic cannabinoid receptor agonists – <u>very large quantity indicative of an industrial scale operation</u>
<p>Category 2</p>	<ul style="list-style-type: none"> • Heroin, cocaine – 1kg • Ecstasy – <u>1,300 tablets*</u> • MDMA – 1kg • LSD – 25,000 squares • Amphetamine – 4kg • Cannabis – 40kg • Ketamine – 1kg • Synthetic cannabinoid receptor agonists – <u>large quantity indicative of a commercial operation</u>
<p>Category 3</p>	<p>Selling directly to users OR Supply of drugs in prison in <u>a custodial institution</u> OR</p> <ul style="list-style-type: none"> • Heroin, cocaine – 150g • Ecstasy – <u>200 tablets*</u> • MDMA – 150g • LSD – 2,500 squares • Amphetamine – 750g • Cannabis – 6kg • Ketamine – 150g • Synthetic cannabinoid receptor agonists – <u>smaller quantity between categories 2 and 4</u>

Category 4	<ul style="list-style-type: none"> • Heroin, cocaine – 5g • Ecstasy – <u>13 tablets*</u> • MDMA – 5g • LSD – 170 squares • Amphetamine – 20g • Cannabis – 100g • Ketamine – 5g • Synthetic cannabinoid receptor agonists – <u>very small quantity</u> <p>Note – where the offence is selling directly to users or supply in <u>a custodial institution</u> prison the starting point is not based on quantity – go to category 3</p>
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*Ecstasy tablet quantities based on a typical quantity of 150mg MDMA per tablet

Step two – starting point and category range

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Where appropriate, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

Where appropriate, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the offender's role.			
CLASS A	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	<p>Starting point 14 years' custody Category range 12 – 16 years' custody</p>	<p>Starting point 10 years' custody Category range 9 – 12 years' custody</p>	<p>Starting point 7 years' custody Category range 6 – 9 years' custody</p>
Category 2	<p>Starting point 11 years' custody Category range 9 – 13 years' custody</p>	<p>Starting point 8 years' custody Category range 6 years 6 months' – 10 years' custody</p>	<p>Starting point 5 years' custody Category range 3 years 6 months' – 7 years' custody</p>
Category 3	<p>Starting point 8 years 6 months' custody Category range 6 years 6 months' – 10 years' custody</p>	<p>Starting point 4 years 6 months' custody Category range 3 years 6 months' – 7 years' custody</p>	<p>Starting point 3 years' custody Category range 2 – 4 years 6 months' custody</p>
Category 4	<p>Starting point 5 years 6 months' custody Category range</p>	<p>Starting point 3 years 6 months' custody Category range 2 – 5 years' custody</p>	<p>Starting point 18 months' custody Category range</p>

	4 years 6 months' – 7 years 6 months' custody		High level community order – 3 years' custody
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CLASS B	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	Starting point 8 years' custody Category range 7 – 10 years' custody	Starting point 5 years 6 months' custody Category range 5 – 7 years' custody	Starting point 3 years' custody Category range 2 years 6 months' – 5 years' custody
Category 2	Starting point 6 years' custody Category range 4 years 6 months' – 8 years' custody	Starting point 4 years' custody Category range 2 years 6 months' – 5 years' custody	Starting point 1 year's custody Category range 26 weeks' – 3 years' custody
Category 3	Starting point 4 years' custody Category range 2 years 6 months' – 5 years' custody	Starting point 1 year's custody Category range 26 weeks' – 3 years' custody	Starting point High level community order Category range Low level community order – 26 weeks' custody
Category 4	Starting point 18 months' custody Category range 26 weeks' – 3 years' custody	Starting point High level community order Category range Medium level community order – 26 weeks' custody	Starting point Low level community order Category range Band B fine – medium level community order

CLASS C	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	Starting point 5 years' custody Category range 4 – 8 years' custody	Starting point 3 years' custody Category range 2 – 5 years' custody	Starting point 18 months' custody Category range 1 – 3 years' custody
Category 2	Starting point 3 years 6 months' custody Category range 2 – 5 years' custody	Starting point 18 months' custody Category range 1 – 3 years' custody	Starting point 26 weeks' custody Category range 12 weeks' – 18 months' custody
Category 3	Starting point 18 months' custody Category range 1 – 3 years' custody	Starting point 26 weeks' custody Category range 12 weeks' – 18 months' custody	Starting point High level community order Category range Low level community order – 12 weeks' custody
Category 4	Starting point 26 weeks' custody Category range High level community order – 18 months' custody	Starting point High level community order Category range Low level community order – 12 weeks' custody	Starting point Low level community order Category range Band A fine – medium level community order

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offender used or permitted a person under 18 to deliver a controlled drug to a third person

- Offender 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when school in use as such or at a time between one hour before and one hour after they are to be used.
- Offence committed on bail

Other aggravating factors include:

- Targeting of any premises where children or other vulnerable persons are likely to be present
- Exposure of drug user to the risk of serious harm, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to the risk of serious harm, for example through method of transporting drugs
- Exposure of third parties to the risk of serious harm, for example, through the location of the drug-related activity
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

There may be exceptional local circumstances that arise which may lead a court to decide that prevalence of drug offending should influence sentencing levels. The pivotal issue in such cases will be the harm caused to the community.

It is essential that the court before taking account of prevalence:

- has supporting evidence from an external source, for example, Community Impact Statements, to justify claims that drug offending is prevalent in their area, and is causing particular harm in that community; and
- is satisfied that there is a compelling need to treat the offence more seriously than elsewhere.

Factors reducing seriousness or reflecting personal mitigation

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Supply only of drug to which offender addicted
- Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender

- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

Production of a controlled drug

Misuse of Drugs Act 1971 (section 4(2)(a) or (b))

Cultivation of cannabis plant

Misuse of Drugs Act 1971 (section 6(2))

Step one – determining the offence category

The court should determine the offender’s culpability (role) and the harm caused (output or potential output) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender’s culpability.

Culpability demonstrated by the offender’s role

One or more of these characteristics may demonstrate the offender’s role. These lists are not exhaustive.

Leading role:

- Directing or organising production/cultivation on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility
- Exploitation of children and/or vulnerable persons to assist in drug-related activity
- Exercising control over the home of another person for drug-related activity

Significant role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage (save where this advantage is limited to meeting the offender’s own habit), whether or not operating alone
- Some awareness and understanding of scale of operation

Lesser role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- Expectation of limited, if any, financial advantage, (including meeting the offender’s own habit)
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)

Category of harm

In assessing harm, output or potential output are determined by the output or the potential output (the weight of the product or number of plants/scale of operation). For production offences purity is not taken into account at step one but is dealt with at step two.

Indicative output or potential output, upon which the starting point is to be based, is given in the table below. Where a drug is not listed in the table below, sentencers should expect to be provided with expert evidence to assist in determining the potency of the particular drug and in equating the quantity in the case with the quantities set out in the guidelines in terms of the harm caused. There will often be no precise calculation possible, but courts are reminded that in cases of particularly potent drugs, even very small quantities may be held to be equivalent to large quantities of the drugs listed.

Category 1	<ul style="list-style-type: none"> • Heroin, cocaine – 5kg • Ecstasy – 40,000 <u>7,000</u> tablets (see note below) • MDMA – 5kg • LSD – 250,000 squares • Amphetamine – 20kg • Cannabis – operation capable of producing industrial quantities for commercial use • Ketamine – 5kg • Synthetic cannabinoid receptor agonists – <u>very large quantity indicative of an industrial scale operation</u>
Category 2	<ul style="list-style-type: none"> • Heroin, cocaine – 1kg • Ecstasy – 2000 <u>1,300</u> tablets (see note below) • MDMA – 1kg • LSD – 25,000 squares • Amphetamine – 4kg • Cannabis – operation capable of producing significant quantities for commercial use • Ketamine – 1kg • Synthetic cannabinoid receptor agonists – <u>large quantity indicative of a commercial operation</u>
Category 3	<ul style="list-style-type: none"> • Heroin, cocaine – 150g • Ecstasy – 300 <u>200</u> tablets (see note below) • MDMA – 150g • LSD – 2,500 squares • Amphetamine – 750g • Cannabis – 28 <u>20</u> plants* • Ketamine – 150g • Synthetic cannabinoid receptor agonists – <u>smaller quantity between categories 2 and 4</u>
Category 4	<ul style="list-style-type: none"> • Heroin, cocaine – 5g • Ecstasy – 20 <u>13</u> tablets (see note below) • MDMA – 5g

	<ul style="list-style-type: none"> • LSD – 170 squares • Amphetamine – 20g • Cannabis – 97 plants* • Ketamine – 5g • Synthetic cannabinoid receptor agonists – <u>very small quantity</u>
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Note: ecstasy tablet quantities based on a typical quantity of 150mg MDMA per tablet

*with an assumed yield of 4055g per plant

Step two – starting point and category range

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Where appropriate, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

Where appropriate, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the offender's role.

CLASS A	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	<p>Starting point 14 years' custody Category range 12 – 16 years' custody</p>	<p>Starting point 10 years' custody Category range 9 – 12 years' custody</p>	<p>Starting point 7 years' custody Category range 6 – 9 years' custody</p>
Category 2	<p>Starting point 11 years' custody Category range 9 – 13 years' custody</p>	<p>Starting point 8 years' custody Category range 6 years 6 months' – 10 years' custody</p>	<p>Starting point 5 years' custody Category range 3 years 6 months' – 7 years' custody</p>
Category 3	<p>Starting point 8 years 6 months' custody Category range 6 years 6 months' – 10 years' custody</p>	<p>Starting point 4 years 6 months' custody Category range 3 years 6 months' – 7 years' custody</p>	<p>Starting point 3 years' custody Category range 2 – 4 years 6 months' custody</p>
Category 4	<p>Starting point 5 years 6 months' custody Category range 4 years 6 months' – 7 years 6 months' custody</p>	<p>Starting point 3 years 6 months' custody Category range 2 – 5 years' custody</p>	<p>Starting point 18 months' custody Category range High level community order – 3 years' custody</p>

CLASS B	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	Starting point 8 years' custody Category range 7 – 10 years' custody	Starting point 5 years 6 months' custody Category range 5 – 7 years' custody	Starting point 3 years' custody Category range 2 years 6 months' – 5 years' custody
Category 2	Starting point 6 years' custody Category range 4 years 6 months' – 8 years' custody	Starting point 4 years' custody Category range 2 years 6 months' – 5 years' custody	Starting point 1 year's custody Category range 26 weeks' – 3 years' custody
Category 3	Starting point 4 years' custody Category range 2 years 6 months' – 5 years' custody	Starting point 1 year's custody Category range 26 weeks' – 3 years' custody	Starting point High level community order Category range Low level community order – 26 weeks' custody
Category 4	Starting point 18 months' custody Category range 26 weeks' – 3 years' custody	Starting point High level community order Category range Medium level community order – 26 weeks' custody	Starting point Low level community order Category range Band B fine – medium level community order

CLASS C	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	Starting point 5 years' custody Category range 4 – 8 years' custody	Starting point 3 years' custody Category range 2 – 5 years' custody	Starting point 18 months' custody Category range 1 – 3 years' custody
Category 2	Starting point 3 years 6 months' custody Category range 2 – 5 years' custody	Starting point 18 months' custody Category range 1 – 3 years' custody	Starting point 26 weeks' custody Category range 12 weeks' – 18 months' custody
Category 3	Starting point 18 months' custody Category range 1 – 3 years' custody	Starting point 26 weeks' custody Category range 12 weeks' – 18 months' custody	Starting point High level community order Category range Low level community order – 12 weeks' custody
Category 4	Starting point 26 weeks' custody Category range High level community order – 18 months' custody	Starting point High level community order Category range Low level community order – 12 weeks' custody	Starting point Low level community order Category range Band A fine – medium level community order

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail

Other aggravating factors include:

- Nature of any likely supply
- Level of any profit element
- Use of premises accompanied by unlawful access to electricity/other utility supply of others, where not charged separately

- Ongoing/large scale operation as evidenced by presence and nature of specialist equipment
- Exposure of drug user to the risk of serious harm, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug ~~dealing~~ production/cultivation to the risk of serious harm, for example through method of ~~transporting drugs~~ production/cultivation
- Exposure of third parties to the risk of serious harm, for example, through the location of the drug-related activity
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity or high potential yield
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

Factors reducing seriousness or reflecting personal mitigation

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Offender's vulnerability was exploited
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

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STEP ONE
Determining the offence category

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

<p>Culpability Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender’s culpability.</p>	
<p>A - Higher culpability:</p> <ul style="list-style-type: none"> • Participates in the exploitation of a child or vulnerable person including one who is also involved in the drugs operation • Permits premises to be used primarily for drug activity • Permits use in expectation of substantial financial gain • Uses legitimate business premises to aid and/or conceal illegal activity 	
<p>B – Lower culpability</p> <ul style="list-style-type: none"> • Permits use for limited or no financial gain • No active role in drug activity taking place • Involved due to intimidation or coercion • Offender’s vulnerability has been exploited 	

<p>Harm Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm caused or likely to be caused</p>	
<p>Category 1</p>	<ul style="list-style-type: none"> • <u>Regular drug-related activity and/or premises used for drug activity over a long period</u> • Higher quantity of drugs <p>[Drop-down box] Indicative quantities:</p> <ul style="list-style-type: none"> • Heroin, cocaine – 150g • Ecstasy – <u>200 tablets</u> • MDMA – 150g • LSD – 2,500 squares • Amphetamine – 750g • Cannabis – 6kg • Ketamine – 150g • Synthetic cannabinoid receptor agonists – <u>large quantity indicative of a commercial-scale operation</u>

Category 2	<ul style="list-style-type: none"> • <u>Infrequent drug-related activity and/or premises used for drug activity over a short period</u> • Lower quantity of drugs <p>[Drop-down box] Indicative quantities</p> <ul style="list-style-type: none"> • Heroin, cocaine – 5g • Ecstasy – <u>13 tablets</u> • MDMA – 5g • LSD – 170 squares • Amphetamine – 20g • Cannabis – 100g • Ketamine – 5g • Synthetic cannabinoid receptor agonists – <u>very small quantity</u>
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STEP TWO

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial sentence.

For class A offences, section 110 of the Powers of Criminal Courts (Sentencing) Act 2000 provides that a court should impose a minimum sentence of at least seven years' imprisonment for a third class A trafficking offence except where the court is of the opinion that there are particular circumstances which (a) relate to any of the offences or to the offender; and (b) would make it unjust to do so in all the circumstances.

Class A

HARM	CULPABILITY	
	A	B
Harm 1	<p>Starting point 2 years 6 months' custody</p> <p>Category range 18 months' – 4 years' custody</p>	<p>Starting point 36 weeks' custody</p> <p>Category range High level community order - 18 months' custody</p>
Harm 2	<p>Starting point 36 weeks' custody</p> <p>Category range High level community order - 18 months' custody</p>	<p>Starting point Medium level community order</p> <p>Category range Low level community order - High level community order</p>

Class B

HARM	CULPABILITY	
	A	B
Harm 1	<p>Starting point 1 year's custody</p> <p>Category range 26 weeks' – 18 months' custody</p>	<p>Starting point High level community order</p> <p>Category range Low level community order - 26 weeks' custody</p>
Harm 2	<p>Starting point High level community order</p> <p>Category range Low level community order - 26 weeks' custody</p>	<p>Starting point Band C fine</p> <p>Category range Band A fine - low level community order</p>

Class C

HARM	CULPABILITY	
	A	B
Harm 1	<p>Starting point 12 weeks' custody</p> <p>Category range High level community order – 26 weeks' custody*</p>	<p>Starting point Low level community order</p> <p>Category range Band C fine - high level community order</p>
Harm 2	<p>Starting point Low level community order</p> <p>Category range Band C fine - high level community order</p>	<p>Starting point Band A fine</p> <p>Category range Discharge - low level community order</p>

*When tried summarily, the maximum penalty is 12 weeks' custody.

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When considering imposing a custodial sentence, the court should also consider the Imposition guideline, and specifically the section on imposition of custodial sentences. In particular the following must be considered;

- 1) **Has the custody threshold been passed?**
- 2) **If so, is it unavoidable that a custodial sentence be imposed?**

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or gender identity

Other aggravating factors:

- ~~Premises used for drug activity over a long period of time~~
- Premises adapted to facilitate drug activity
- Location of premises, for example proximity to school
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- ~~High purity~~
- Presence of weapons, where not charged separately
- Failure to comply with current court orders
- Other offences taken into consideration (TICs)
- Offence committed whilst on licence or subject to post sentence supervision
- Established evidence of community impact

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- ~~Premises used for drug activity over a short period of time~~
- Involved due to naivety
- Isolated incident
- Low purity
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability, where not linked to the commission of the offence
- Sole or primary carer for dependent relative(s)

Possession of a controlled drug

Misuse of Drugs Act 1971 (section 5(2))

Triable either way

Class A

Maximum: 7 years' custody

Offence range: Fine – 51 weeks' custody

Class B

Maximum: 5 years' custody

Offence range: Discharge – 26 weeks' custody

Class C

Maximum: 2 years' custody

Offence range: Discharge – Community order

STEP ONE
Determining the offence category

The court should identify the offence category based on the class of drug involved.

Category 1	Class A drug
Category 2	Class B drug
Category 3	Class C drug

STEP TWO
Starting point and category range

The court should use the table below to identify the corresponding starting point. The starting point applies to all offenders irrespective of plea or previous convictions. The court should then consider further adjustment within the category range for aggravating or mitigating features, set out below.

Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 may be a proper alternative to a custodial sentence.

Offence category	Starting Point (applicable to all offenders)	Category Range (applicable to all offenders)
Category 1 (class A)	Band C fine	Band A fine – 51 weeks' custody
Category 2 (class B)	Band B fine	Discharge – 26 weeks' custody
Category 3 (class C)	Band A fine	Discharge – medium level community order

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

In particular, possession of drugs in prison is likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Where appropriate, consider the custody threshold as follows:

- has the custody threshold been passed?
- if so, is it unavoidable that a custodial sentence be imposed?
- if so, can that sentence be suspended?

Where appropriate, the court should also consider the community threshold as follows:

- has the community threshold been passed?

Factors increasing seriousness

Statutory aggravating factors

- Previous convictions, having regard to a) nature of the offence to which conviction relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail

Other aggravating factors include

- Possession of drug in prison
- Presence of others, especially children and/or non-users
- Possession of drug in a school or licensed premises
- Large quantity*
- Failure to comply with current court orders
- Offence committed on licence
- Attempts to conceal or dispose of evidence, where not charged separately
- Established evidence of community impact

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Small quantity*
- Offender is using cannabis to help with a diagnosed medical condition
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Isolated incident
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

*The court should bear in mind that different types of drug have different levels of potency and therefore the relevance of high or low quantity will depend on the drug concerned.

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Importing or exporting a psychoactive substance

Psychoactive Substances Act 2016 (section 8)

Step one – determining the offence category

The court should determine the offender’s culpability (role) and the harm caused (quantity) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender’s culpability.

Culpability demonstrated by the offender’s role

One or more of these characteristics may demonstrate the offender’s role. These lists are not exhaustive.

Leading role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility
- Exploitation of children and/or vulnerable persons to assist in the offending
- ~~Exercising control over the home of another person for drug related activity~~

Significant role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage, (save where this advantage is limited to meeting the offender’s own habit) whether or not operating alone
- Some awareness and understanding of scale of operation

Lesser role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)
- Expectation of limited, if any, financial or other advantage (including meeting the offender’s own habit)

In assessing harm, the sentencer should consider the factors below. Where there are characteristics present which fall under different harm categories the court should balance these characteristics to reach a fair assessment of harm.

<i>Category of harm</i>	
Where evidence is available as to the potential effects of the substance and harm likely to be caused by those effects, the court should consider whether this affects the category of harm. Where the harm is very great, or very small, this may lead the court to move the starting point for the offence up or down within the category, or to place the offence in a higher or lower category than that indicated by the other factors listed.	
Category 1	<ul style="list-style-type: none"> • Large quantity indicative of commercial-scale operation • Supply in a custodial institution
Category 2	<ul style="list-style-type: none"> • Supply directly to users • <u>Quantity indicative of smaller-scale commercial operation</u>
Category 3	<ul style="list-style-type: none"> • Very small quantity

Step two – starting point and category range

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Where appropriate, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

Where appropriate, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	Starting point 4 years' custody Category range 3 – 6 years' custody	Starting point 2 years' custody Category range 12 months' – 3 years' 6 months' custody	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody
Category 2	Starting point 2 years' custody Category range 12 months' – 3 years' 6 months' custody	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody	Starting point High level community order Category range Low level community order – 26 weeks' custody
Category 3	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody	Starting point High level community order Category range Low level community order – 26 weeks' custody	Starting point Band B fine Category range Discharge – high level community order

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail

Other aggravating factors include:

- Targeting of any premises where children or other vulnerable persons are likely to be present
- Exposure of psychoactive substance user to the risk of serious harm, for example, through the method of production/mixing of the substance
- Exposure of those involved in dealing in the psychoactive substance to the risk of serious harm, for example through method of transporting the substance
- Exposure of third parties to the risk of serious harm
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- ~~Established evidence of community impact~~
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

Factors reducing seriousness or reflecting personal mitigation

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Importation only of psychoactive substance to which offender addicted
- Mistaken belief of the offender regarding the type of substance, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity

- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

Supplying, or offering to supply, a psychoactive substance
Psychoactive Substances Act 2016 (sections 5(1) or 5(2))

Possession of psychoactive substance with intent to supply
Psychoactive Substances Act 2016 (section 7(1))

Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by the offender's role

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

Leading role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility, for example, prison employee, medical professional
- Exploitation of children and/or vulnerable persons to assist in the offending
- Exercising control over the home of another person for the purposes of the offending

Significant role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage (save where this advantage is limited to meeting the offender's own habit), whether or not operating alone
- Some awareness and understanding of scale of operation

Lesser role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- Expectation of limited, if any, financial or other advantage (including meeting the offender's own habit)

In assessing harm, the sentencer should consider the factors below. Where there are characteristics present which fall under different harm categories the court should balance these characteristics to reach a fair assessment of harm.

<i>Category of harm</i>	
Where evidence is available as to the potential effects of the substance and harm likely to be caused by those effects, the court should consider whether this affects the category of harm. Where the harm is very great, or very small, this may lead the court to move the starting point for the offence up or down within the category, or to place the offence in a higher or lower category than that indicated by the other factors listed.	
Category 1	<ul style="list-style-type: none"> • Large quantity indicative of commercial-scale operation • Supply in a custodial institution
Category 2	<ul style="list-style-type: none"> • Supply directly to users
Category 3	<ul style="list-style-type: none"> • Very small quantity

Step two – starting point and category range

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Where appropriate, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

Where appropriate, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	Starting point 4 years' custody Category range 3 – 6 years' custody	Starting point 2 years' custody Category range 12 months' – 3 years' 6 months' custody	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody
Category 2	Starting point 2 years' custody Category range 12 months' – 3 years' 6 months' custody	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody	Starting point High level community order Category range Low level community order – 26 weeks' custody
Category 3	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody	Starting point High level community order Category range Low level community order – 26 weeks' custody	Starting point Low level community order Category range Band B fine – medium level community order

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- In connection with the offence, the offender used a courier who, at the time of the commission of the offence, was aged under 18 (except where taken into account at Step 1)
- The offence was committed on or in the vicinity of school premises at a relevant time
- The offence was committed in a custodial institution
- Offence committed on bail

Other aggravating factors include:

- Targeting of any premises where children or other vulnerable persons are likely to be present
- Exposure of psychoactive substance user to the risk of serious harm, for example, through the method of production/mixing of the substance
- Exposure of those involved in dealing in the psychoactive substance to the risk of serious harm, for example through method of transporting the substance
- Exposure of third parties to the risk of serious harm
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

There may be exceptional local circumstances that arise which may lead a court to decide that prevalence of psychoactive substance offending should influence sentencing levels. The pivotal issue in such cases will be the harm caused to the community.

It is essential that the court before taking account of prevalence:

- has supporting evidence from an external source, for example, Community Impact Statements, to justify claims that psychoactive substance offending is prevalent in their area, and is causing particular harm in that community; and
- is satisfied that there is a compelling need to treat the offence more seriously than elsewhere.

Factors reducing seriousness or reflecting personal mitigation

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Supply only of psychoactive substance to which offender addicted
- Mistaken belief of the offender regarding the type of substance, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

Producing a psychoactive substance

Psychoactive Substances Act 2016 (section 4)

Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused (output or potential output) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by the offender's role

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

Leading role:

- Directing or organising production on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility
- Exploitation of children and/or vulnerable persons to assist in the offending
- Exercising control over the home of another person for the purposes of the offending

Significant role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage (save where this advantage is limited to meeting the offender's own habit), whether or not operating alone
- Some awareness and understanding of scale of operation

Lesser role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- Expectation of limited, if any, financial advantage, (including meeting the offender's own habit)
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)

In assessing harm, the sentencer should consider the factors below. Where there are characteristics present which fall under different harm categories the court should balance these characteristics to reach a fair assessment of harm.

<i>Category of harm</i>	
Where evidence is available as to the potential effects of the substance and harm likely to be caused by those effects, the court should consider whether this affects the category of harm. Where the harm is very great, or very small, this may lead the court to move the starting point for the offence up or down within the category, or to place the offence in a higher or lower category than that indicated by the other factors listed.	
Category 1	<ul style="list-style-type: none"> • <u>Large quantity indicative of industrial scale operation</u>
Category 2	<ul style="list-style-type: none"> • <u>Quantity indicative of smaller-scale commercial operation</u>
Category 3	<ul style="list-style-type: none"> • Very small quantity

Step two – starting point and category range

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Where appropriate, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

Where appropriate, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	Starting point 4 years' custody Category range 3 – 6 years' custody	Starting point 2 years' custody Category range 12 months' – 3 years' 6 months' custody	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody
Category 2	Starting point 2 years' custody Category range 12 months' – 3 years' 6 months' custody	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody	Starting point High level community order Category range Low level community order – 26 weeks' custody
Category 3	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody	Starting point High level community order Category range Low level community order – 26 weeks' custody	Starting point Low level community order Category range Band B fine – medium level community order

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail

Other aggravating factors include:

- Nature of any likely supply
- Level of any profit element
- Use of premises accompanied by unlawful access to electricity/other utility supply of others, where not charged separately
- Ongoing/large scale operation as evidenced by presence and nature of specialist equipment
- Exposure of psychoactive substance user to the risk of serious harm, for example, through the method of production/mixing of the substance
- Exposure of those involved in producing the psychoactive substances to the risk of serious harm, for example through method of production
- Exposure of third parties to the risk of serious harm
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity or high potential yield
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

Factors reducing seriousness or reflecting personal mitigation

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Isolated incident
- Low purity

- No previous convictions **or** no relevant or recent convictions
- Offender's vulnerability was exploited
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

Possession of a psychoactive substance in a custodial institution

Psychoactive Substances Act 2016 (section 9)

Triable either way

Maximum: 2 years’ custody

Offence range: Medium level community order – 18 months’ custody

STEP ONE
Determining the offence category

The court should identify the offence category based on the culpability factors set out below.

Category 1	Offender was in a position of trust/responsibility in the custodial institution Deliberate attempts to evade detection/conceal evidence
Category 2	Cases falling between Categories 1 and 3 because: <ul style="list-style-type: none"> • factors in both categories 1 and 3 are present which balance each other out; and/or • the offender’s culpability falls between the factors as described in Categories 1 and 3.
Category 3	Evidence that offence was committed under pressure falling short of duress

STEP TWO
Starting point and category range

The court should use the table below to identify the corresponding starting point. The starting point applies to all offenders irrespective of plea or previous convictions. The court should then consider further adjustment within the category range for aggravating or mitigating features, set out below.

Where the defendant is not in custody at the point of sentence, but is dependent on or has a propensity to misuse controlled drugs or psychoactive substances and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 may be a proper alternative to a custodial sentence.

Where the offender is serving a custodial sentence at the point of sentence for this offence a community order will not be available and a short custodial sentence should be substituted. Generally the sentence for the new offence will be consecutive to the sentence being served as it will have arisen out of an unrelated incident. The court must have regard to the totality of the offender’s criminality when passing the second sentence, to ensure that the total sentence to be served is just and proportionate. Refer to the [Totality guideline](#) for detailed guidance.

Offence category	Starting Point (applicable to all offenders)	Category Range (applicable to all offenders)
Category 1	6 months' custody	3 months' custody to 18 months' custody
Category 2	4 months' custody	1 months' custody to 12 months' custody
Category 3	2 months' custody	Medium level community order to 6 months' custody

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

Factors increasing seriousness

Statutory aggravating factors

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

Other aggravating factors include

- Presence of others, especially non-users
- Large quantity*
- Failure to comply with current court orders
- Established evidence of impact in the custodial institution concerned

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions / no relevant, recent convictions
- Remorse
- Good character and/or exemplary conduct
- Small quantity*
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Isolated incident
- Age and/or lack of maturity
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

*The court should bear in mind that different types of psychoactive substance have different levels of potency and therefore the relevance of high or low quantity will depend on the substance concerned.

Sentencing Council

Sentencing Council meeting: 14 June 2019
Paper number: SC(19)JUN07 – Drug Offences
Resource Impact
Lead Council members: Rebecca Crane and Sarah Munro
Lead officials: Eleanor Nicholls and Caroline Nauth-Misir
020 7071 5799/5778

1 ISSUE

1.1 This paper details the expected impact of the revised drug offences guideline on prison and probation resources, using the guidelines agreed at the January and May Council meetings.

2 RECOMMENDATION

2.1 That the Council:

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

3 CONSIDERATION

3.1 In September 2018, you agreed that you did not wish to make any significant changes to sentencing practice overall.

Importation/Exportation, Supply/PWITS and Production/cultivation offences (Misuse of Drugs Act 1971)

3.2 In May, you agreed to retain the majority of sentence levels given in the current guideline for importation, supply/PWITS and production offences.

3.3 It was, however, agreed that actual sentence levels should be included within category 4 harm for importation offences (rather than the wording used in the existing guideline). Sentence levels are being signed off at the June Council meeting,

therefore the expected resource impact of this aspect of the importation guideline will be circulated to Council members at a later date (outside of Council meetings).

Culpability factors

3.4 A number of changes have been made to the culpability factors in these guidelines, which might potentially result in changes to the way in which current cases are categorised. These changes are summarised in the table below:

Culpability factor	Change	Potential impact
“Exploitation of children and/or vulnerable persons to assist in drug-related activity”	New factor added to “Leading” role	Could potentially cause more cases to be placed in this category than currently
“Exercising control over the home of another person for drug-related activity”	New factor added to “Leading” role	Could potentially cause more cases to be placed in this category than currently
“Expectation of substantial financial or other advantage”	Existing “Leading” role factor has been broadened (to now cover ‘other advantage’); it was previously worded “Expectation of substantial financial gain”	Could potentially cause more cases to be placed in this category than currently
“Expectation of significant financial or other advantage (save where this advantage is limited to meeting the offender’s own habit), whether or not operating alone”	Existing “Significant” role factor has been broadened (to now cover ‘other advantage’) but also narrowed (excluding cases where offender is meeting own habit); it was previously worded “Motivated by financial or other advantage, whether or not operating alone”	‘Other advantage’ could potentially cause more cases to be placed in this category than currently, as could ‘Expectation’ as opposed to ‘Motivated by’, whereas ‘meeting the offender’s own habit’ might cause fewer cases to be placed here

“Supply, other than by a person in a position of responsibility, to a prisoner for gain without coercion”	Existing factor has been removed from “Significant” role in the supply/PWITS guideline	Could potentially result in fewer cases being placed in this category
“Expectation of limited, if any, financial or other advantage (including meeting the offender’s own habit)”	New “Lesser” role factor added which now covers ‘limited, if any, financial or other advantage’; previous similar factor stipulated the absence of any financial gain; “If own operation, absence of any financial gain, for example joint purchase for no profit, or sharing minimal quantity between peers on non-commercial basis”	Could potentially cause more cases to be placed in this category than currently

3.5 An analysis of transcripts of Crown Court judges’ sentencing remarks for supply/PWITS and production offences¹ was undertaken to assess whether there might be any potential resource impact related to the above changes. This analysis did not suggest that any cases would necessarily result in a different categorisation under the revised guideline, however the specific circumstances being investigated were quite rare in the sample analysed (i.e. cases involving exploitation of children, exercising control over the home of another, or a non-financial advantage), and it should be noted that this analysis is only based on the information explicitly mentioned in the transcripts.

3.6 Based on this analysis of a sample of cases, the above changes to culpability factors are not expected to result in an impact on prison and probation resources.

Sentences over 20 years

3.7 In the current guideline for importation, supply/PWITS and production, the following text is included above the culpability and harm tables:

¹ Importation offences were not analysed as this offence is much lower in volume than supply/PWITS and production.

“Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the offender’s role.”

3.8 In the revised guideline for these offences, this text has been moved to a more prominent position; above the Class A sentencing table, creating a risk that higher sentences might be given in more cases than currently, where perhaps the sentencer had missed (or forgotten about) the text and subsequently remained within the offence range (up to 16 years’ custody). Analysis of transcripts was undertaken to assess whether there were any cases which might result in a higher sentence under the revised guideline, given the more noticeable position of the wording. This analysis did not find any evidence of an impact, although the sample size was small so this finding is tentative.²

Quantities

Ecstasy tablets

3.9 Following May’s Council meeting, the quantities given in the importation and supply/PWITS guidelines have been amended for ecstasy, to reflect the fact that average purity has increased from 100mg to 150mg.

3.10 Transcript analysis showed that on occasion sentencers adjusted the starting point due to the actual quantity of drugs in the case being slightly different to the indicative quantity in the guideline. This is corroborated by the findings from early research undertaken with a small number of Crown Court judges (in Canterbury and Birmingham), which also found that sentencers use the indicative quantities and then adjust the starting point according to the quantities in the case. Overall, therefore, it seems likely that changing the quantities of ecstasy tablets given in the guideline may result in an increase in sentences in some cases.

3.11 However, there was also evidence in the transcript analysis that often, sentencers either used the starting point given in the guideline for the relevant harm category (irrespective of the actual quantity of drugs in the case) or categorised the offence as street dealing (harm category 3). This suggests that in many cases, changes to the quantities will not affect sentences, and so the impact mentioned above will only apply in a small proportion of cases.

² The sample included four transcripts covering 10 offenders for whom this issue was relevant.

3.12 In addition, it is likely that in current cases involving tablets with a purity of around 150mg (i.e. higher than that indicated in the existing guideline), sentencers are using the aggravating factor 'High purity' to increase the sentence from the starting point. As the new guideline takes account of the fact that the average purity is higher, this aggravating factor is less likely to be used, and therefore the net impact of revising these quantities may be small.

MDMA

3.13 The revised guideline for importation, supply/PWITS and production/cultivation offences also includes quantities in kilograms for MDMA. Analysis of transcripts found that MDMA is often described as being in tablet form, or in both tablet and crystalline form within the same case, and the sentencer uses the relevant ecstasy tablet quantities to sentence the offender. It is expected that for these offenders, it is unlikely that there will be any impact.

3.14 In a very small number of cases where MDMA was described in terms of the weight (in grams), the amount in rocks/pieces or the monetary value of the drugs, the sentencer either seemed to be able to convert the amount of the drug to an equivalent estimated number of tablets and sentence using the ecstasy quantities, sentence the offender on the basis of street dealing, or sentence the offender based on a perception that the amount of the drug was substantial and that therefore they would fall into the highest harm category. It is unclear in these cases how the sentencer converted the amount of the drug, so it is not possible to understand how the new MDMA weights will affect sentence levels. However, most of these cases either seem to involve street dealing (which will still fall within category 3), a substantial quantity of drugs (which will still fall into category 1) or a very small quantity of drugs (which will still fall into category 4), and as the sentence starting points are not changing, it is likely that most offenders would continue to receive the same sentence under the new guideline. In a small proportion of cases, the new MDMA weights may cause different categorisations or adjustments from the new indicative quantity starting points, but it is expected that any impact would be small.

Cannabis plants

3.15 The numbers of cannabis plants indicated in the production/cultivation guideline have also been amended, to reflect the fact that the average yield of a plant has increased from 40g to 55g.

3.16 Analysis of transcripts suggests that in some cases, sentencers adjust the starting point according to the actual number of plants in the case. It therefore seems

likely that, as with ecstasy tablets, changing the number of plants in the guideline may result in an increase in sentences in some cases (although it is not possible to accurately quantify this).

Question 1: Is the Council content to amend these quantities in the revised guideline, given that there may be a resource impact? Does the Council have any comments on these findings?

Synthetic cannabinoid receptor agonists

3.17 Following May's Council meeting, it is now proposed that descriptive factors (rather than specific quantities) are used to categorise offence seriousness for synthetic cannabinoid receptor agonists (SCRAs).

3.18 Analysis of a small number of transcripts relating to SCRA offences has been carried out, to identify whether there are likely to be any changes to sentences under the new guideline for these offences.³ The analysis found that information relating to weights or quantities was rarely mentioned in SCRA transcripts, although some referred to street dealing. It is therefore difficult to estimate whether the guideline will result in any changes to sentencing practice for these offences.

3.19 The lack of data available means it is not possible to say whether there will be an impact on prison and probation resources for SCRA offences. However, given that there is currently no guideline for these offences, it is likely that sentencing will become more consistent following the introduction of the guideline.

Question 2: Is the Council content to sign off the guidelines including SCRA offences, given that the lack of data available means it is not possible to say whether there will be a resource impact?

Possession of a controlled drug

3.20 The revised possession guideline is very similar to the existing guideline; both the structure of the guideline (where the offence category is determined by the class of drug) and the sentence levels have remained unchanged.

3.21 The wording above the sentence table has been amended slightly (see below), which has broadened the scope of cases where the sentencer might consider imposing a community order rather than a custodial sentence. This could potentially encourage more sentencers to give a community order than previously (i.e. in cases

³ Eight transcripts relating to SCRA offences were analysed. Of these only one gave any indication of the quantity of drug being taken into account, described by the judge in terms of the street value of the drug.

where the custodial sentence length is more than moderate). However, there is no evidence to suggest that sentencers are not already considering the option of a community order, irrespective of the custodial sentence length.

Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 ~~can~~ may be a proper alternative to a ~~short or moderate length~~ custodial sentence.

3.22 There have been some minor changes to aggravating and mitigating factors at step two: “Large quantity” has been added as an aggravating factor; “Charged as importation of a very small amount” has been removed from the list of aggravating factors; and “Small quantity” has been added as a mitigating factor. Given that sentence levels are largely driven by the offence category determined at step one, as opposed to aggravating and mitigating factors at step two, these changes to factors are not expected to result in any resource impact.

3.23 Overall therefore it is not anticipated that the revised possession guideline will have any impact on prison and probation resources.

Question 3: Does the Council have any comments on these findings?

Permitting premises to be used for drug-related activity

3.24 The permitting premises guideline is being signed off at the June Council meeting, therefore the expected resource impact of this guideline will be circulated to Council members at a later date (outside of Council meetings).

Psychoactive Substances Act 2016 (PSA) offences

3.25 The supply/PWITS NPS guideline is being signed off at the June Council meeting, therefore the expected resource impact of this guideline will be circulated to Council members at a later date (outside of Council meetings).

4 RISKS

4.1 Two main risks have been identified:

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

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

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

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

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

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

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

Sentencing Council meeting:
Paper number:

14 June 2019
SC(19)JUN08 – General Guideline and
Expanded Explanations (paper 2)
Maura McGowan
Ruth Pope
0207 071 5781

Lead Council member:
Lead official:

1 ISSUE

1.1 This is the second of two papers to consider the responses to the expanded explanations consultation and to sign off both stages of the project to replace the *Seriousness* guideline.

2 RECOMMENDATION

2.1 That the Council considers the responses to the remaining questions in the expanded explanations consultation and agrees to publish the expanded explanations and the General Guideline on 24 July 2019.

3 REMAINING CONSULTATION QUESTIONS

Changes to medium culpability in Fraud, Theft and Robbery guidelines

3.1 All respondents who expressed a view supported the proposal to change *medium* culpability in these guidelines from:

- Other cases where characteristics for categories A or C are not present

To:

- Other cases that fall between categories A or C because:
 - Factors are present in A and C which balance each other out **and/or**
 - The offender's culpability falls between the factors as described in A and C

Presentation of maximum sentences

3.2 Views were sought on standardising the way in which guidelines refer to the maximum sentence for offences in guidelines:

Fines:

There is some inconsistency as to how the maximum sentence is expressed in the title section of guidelines, in some cases it is x years custody and/or unlimited fine. In others x years custody. It is proposed that only where a fine is an option within a guideline that reference is made to the statutory maximum fine. Where the maximum fine is other than unlimited (e.g. level 3 fine) a link will be provided to a table giving the maximum amounts for each level. See, for example, the [Drunk and Disorderly](#) guideline.

Either way offences:

Most guidelines for either way offences give just one maximum sentence (effectively the maximum sentence on indictment) but some give the maximum when tried summarily and the maximum on indictment. It is proposed only to include the summary maximum for either way offences if it is other than 6 months/unlimited fine.

3.3 Most respondents were in favour of these proposals. A couple were unsure exactly what was being proposed. Consultees also approved of the policy (already implemented in the case of Terrorism offences) of adding a note to a guideline when there has been a change to the statutory maximum sentence that has not been reflected in the guideline.

Dangerousness

3.4 Views were sought on proposals to update and standardise the wording relating to dangerous offenders and offenders who are subject to a life sentence for a second listed offence across all relevant guidelines. It was also proposed to provide a link to the Crown Court Compendium to assist sentencers where the application of these provisions may be more complicated (for example for historic offences).

3.5 Respondents agreed that the references should be updated and standardised and were in favour of providing a link to the Compendium.

Question 20: Does the Council agree to implement the changes set out above?

Treating the General Guideline as an overarching guideline

3.6 The consultation sought views on whether the General Guideline should be available as an overarching guideline that court can refer to when sentencing any offence. The consultation document set out the pros and cons:

The advantages of the explanations having wider application could include:

- Greater consistency in how factors are taken into account
- Greater transparency of how factors are taken into account
- A single point of reference for a wide range of issues, replacing and updating the *Seriousness* guideline.

The disadvantages could include:

- Possibility of irrelevant issues being brought into the sentencing process
- The particular considerations of individual offences being obscured by the application of non-specific guidance
- An increasing complication of the sentencing process.

3.7 There was a mixed response to this question but with the majority in favour of treating the General guideline as an overarching guideline:

This requires a balancing exercise and on balance this seems to be a sensible proposal ensuring that sentencers are lent the maximum possible assistance and guidance from the guidelines. The concern about over-complication is not a trivial

concern and guidance to sentencers should be as simple as possible, as clear as possible and, as much as possible, in one place.

Provided that sentencers are able to link through to the General guidelines as an overarching guideline then the virtues of designating the guideline as overarching will not be obscured. *CBA*

No objection to creating an overarching guideline to which sentencers can refer at their discretion. However in reality, whilst often working under time pressure, sentencers will tend to consider the factors listed in the offence specific guideline only. *West Sussex Bench*

We believe that:

1. The General guideline, which (when published as a definitive guideline) will contain all of the explanations in Annex A, should be treated as an overarching guideline that courts may refer to when sentencing any offence. We consider the advantages of doing so outweigh the disadvantages.
2. Magistrates will be able to determine (from the individual sentencing guideline for an offence) which are the relevant factors to be considered when assessing seriousness, and this together with their common sense and life experience will prevent them from introducing spurious and irrelevant factors into sentencing discussions and decisions.
3. Any additional guidance on “step one factors” is also considered helpful, if it is needed for particular offences. So the added Annex A explanations should be available for reference to sentencers when considering step one factors, if for a particular offence there was any uncertainty as to how such a factor should be interpreted. This will also help with consistency of sentencing. *West London Bench*

We agree that all Annex A factors should be included within the General guideline. Inclusion of all factors under each offence specific guideline may be impractical and risk omission to a specific guideline, where individual circumstances of case concern this factor. The Step 2 factors are a non-exhaustive list. We would observe that sentencers should not need to refer to the factors within the General guideline and should be reminded of this to ensure that there is no increase in the complexity of the sentencing process. *JCS*

We believe that it would be best as an overarching guideline, for those offences with an offence-specific guideline. This is because this will improve consistency and ensure that the information is readily available for sentencers, who can be relied upon to only take account of relevant factors. As all guidelines will be accessed digitally via iPads, this will make it easier to move between different guidelines or pages. *MA*

The General guideline *should* be treated as an overarching guideline. One possible cause of inconsistency in sentencing, despite the existence of offence-specific guidelines, is that factors that are relevant to sentencing are interpreted differently by different courts. Two courts may be applying the same guideline and applying the same factors but, if they are interpreting those factors differently, they are likely to reach different sentences. *Law Society*

- 3.8 The main dissenting voices were the Council of HM Circuit Judges and the CLSA:

We take the view the disadvantages outweigh the benefits. In particular, the sentencing process, already complicated, will become more so. *Council of HM Circuit Judges*

The CLSA always endorses the need to review the way in which the sentencing exercise is carried out. However, there is a need for certainty and clarity, and guidelines are just that, "Guidelines". The risk of making sentencing a less scientific, and based on the risk of irrelevant issues being brought into play concerns practitioners at every level. Sentencing should carry certainty at every level, overcomplicating the process makes certainty less likely. Too many subjective factors are at play. Personal mitigation can address the need for the Court to consider the appropriate sentence for the defendant, however, if too many factors come into play, the likelihood of uncertainty and abuse of the appeal process is all but inevitable. *CLSA*

3.9 If the General guideline is to be treated as an overarching guideline, consideration will need to be given to the subtitle of the guideline. As can be seen at Annex B, it is currently subtitled: 'For sentencing offences for which there is not offence specific guideline'. Perhaps the following wording could be used:

The General guideline may also be referred to when sentencing any offence for which the explanations in this guideline may be relevant.

Question 21: Does the Council agree that the General Guideline should be made available as an overarching guideline?

Question 22: If so, how should the title/ preamble to the guideline indicate this?

The effect of the proposals on sentencing practice

3.10 The consultation contained the question: 'Which, if any, of the proposed expanded factors or other proposed changes are likely to have an effect on sentencing practice? What do you think that effect would be?'.

3.11 In general respondents did not identify any significant impact on sentence levels, though several thought that there could be an increase in consistency. The changes to culpability B (see 3.1 above) were considered to be significant by many respondents, but the expected impact was not necessarily in one direction:

The explanation of age and lack of maturity will be helpful and have an impact, in my view, as the Court of Appeal's judgment on the topic has not filtered through to all courts as yet. I suspect that the changes to Culpability B in robbery and theft will have a material impact, because of the prevalence of offences covered by those guidelines, and the scale of the sentences to be imposed for robbery. *Mr Justice Warby*

It is difficult to be specific about the effects of these explanations. In general, we have not seen anything in the explanations that comes as a big surprise, so from that point of view we would expect there to be minimal impact on the increase or decrease of individual sentences. We agree that the provision of the additional guidance should reinforce current best practice, by bringing together guidance that (after all) already

exists, albeit in different documents. Providing easy access to the guidance materials for magistrates via the Sentencing Guidelines should, in our view, assist in improving consistency and transparency in sentencing between different benches of magistrates, and between different LJAs. *West London Bench*

I'm sure there will be some effect mostly on consistency of sentencing. The explanations may assist sentencers in coming to more speedy decisions by spending less time trying to interpret what is meant by certain factors. I don't foresee either an overall increase or decrease in average sentences as a result of these changes. *West Sussex Bench*

It would seem that Question 20, relating to medium culpability factors would be likely to have the most profound effect on sentencing. It may be that we see a move towards the middle of the sentencing range, rather than at the extremes as a result, perhaps with more of a shift away from the lowest category for the reasons described above. *Insolvency Service*

We believe that the detailed explanation to offence committed in custody will and should highlight the significance of offences committed within prison establishments. Magistrates may rarely see such offences. This guidance will provide sentencers with the justification to ensure that such offences are dealt with more severely than would otherwise be the case. This will assist in the proper maintenance of safety and control measures within prisons. *JCS*

We believe the proposed expanded factors will improve consistency, not just across different geographical areas but across similar level offences. The expansion should also improve the quality of sentencing by drawing attention to all aspects of the offence, and make it easier to refer to material more quickly. However, we do not believe the proposals will have a major impact on sentencing. *MA*

One would hope that the major effect will be a higher level of consistency in sentencing. *Law Society*

The proposed extension in relation to the offender being under the influence of drugs or alcohol is likely to have an effect on sentencing practices, because of a lack of understanding of substance use and the stigma associated with this. It is not sufficient to say "it has not been possible to estimate how sentencing severity might be affected by any change, given the limited data about how this factor is currently being applied". The changes we have proposed at A1 and M17, would reduce the risk and ensure greater consistency. However, a further impact assessment should be carried out following implementation. *Release*

It is envisaged that the clarification of the allocation of cases to Culpability B is likely to lead to more cases being sentenced within Culpability B. This may, of course, mean that some cases are sentenced less severely than they may have been and other more severely. It does not seem that any of the proposed changes are likely to result in a radically different approach to sentencing. *CBA*

3.12 The CLSA and the Council of HM Circuit Judges repeated their misgivings about the proposals, though for opposing reasons:

The CLSA are not able to speculate on whether the proposals will have an impact on sentencing in practise. There are consistently different sentences imposed for similar offences in different regions often taking into account established local concerns and

priorities. Different Judges and Judicial tribunals will have different views. Frankly, the more certain the guidelines, the greater transparency and consistency as opposed to blurring and attempting to tailor guidelines. Sentencing should be certain, not speculative. It is not the role of the CLSA or indeed any other organisation to try to establish what the proposed expanded factors would be. *CLSA*

We re-iterate the proposed changes will, in our view, add an extra layer to the sentencing process which, save for the exceptions we have identified above, is unnecessary and likely to be counter-productive. There is likely to be a sense on the part of many judges that these proposals are too prescriptive and at odds with a discipline that is an art rather than a science. We respectfully take the view that many of the proposed expanded explanations stray into academic areas concerning offending rather than the practicalities of how to sentence an offender. *Council of HM Circuit Judges*

3.13 A combined resource assessment will be published for the expanded explanations and the *General* guideline. Once the decisions from this meeting have been taken into account, the resource assessment will be circulated to members for comments prior to publication. The responses to consultation have not highlighted any previously unidentified areas of concern and so the assessment is likely to be largely unchanged since consultation, namely: while the changes are designed to reflect current best practice rather than alter sentencing practice, it remains difficult to estimate with any precision the impact the changes may have on prison and probation resources.

Equality and Diversity

3.14 The expanded explanations consultation set out ways in which the Council had sought to have regard to equality and diversity issues, specifically the effect of the proposals on victims and offenders with protected characteristics. A question was asked: Are there any other equality and diversity issues that the explanations should address?

3.15 Most respondents who answered this question did not raise any issues, others referred to points that they had made earlier in response to specific explanations. The PRT responded as follows:

As highlighted above, we believe that the following sections of the draft guidance will have disproportionate equality impacts in their current form and require revision:

- PSR guidance - Mental health; learning disability, women
- SA1 – Previous convictions - Mental health; learning disability; young adults, BAME
- A1 – Commission of the offence while under the influence of alcohol or drugs – Mental health; BAME
- A2. Offence was committed as part of a group – BAME; young adults
- A12. Offence committed in the presence of other(s) (especially children) - women
- A14. Blame wrongly placed on others – mental health; learning disability, autism
- A16. Offence committed on licence or post sentence supervision or while subject to court order(s) – mental health; learning disability; young adults; women
- M3. Remorse – learning disability, autism

The guideline should include clear links to the extensive information provided in the Equal Treatment Bench Book published by the Judicial College, which warrants much more vigorous dissemination including by the Sentencing Council <https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amended-March-2019.pdf>

3.16 The Council will have already considered providing a link to the Equal Treatment Bench Book as raised by the Race/Gender paper. The inclusion of such a link in all guidelines would reinforce much of the guidance in the expanded explanations.

Question 23: Does the Council wish to include a link to the Equal Treatment Bench Book in all guidelines?

Other comments

3.17 Respondents were invited to make any comments or suggestions that were not covered by other questions.

3.18 The West London Bench noted that the explanations are applicable to sentencing adults only and suggested that future consideration should be given to providing additional explanations and guidance on the aggravating and mitigating factors in the digital version of this Overarching Principles Guideline for Children and Young People. It is proposed to keep a note of this suggestion to be considered when that guidance is next looked at.

3.19 The PRT and CLSA raised the issue of training for judges and magistrates on the changes. Plans are already in place to develop training materials in conjunction with the Judicial College to ensure that sentencers and other guideline users are aware of the explanations, know how to access them and understand how to use them.

3.20 The Howard League also noted the need for training and raised concerns about how the expanded explanations will be made available to those without computer access. They state: 'It is essential that sentencing guidelines are transparent and accessible, especially for remand prisoners. The definitions must be made available in a format that will enable all people to access it regardless of their computer access and literacy.'

3.21 It will have been noted that the consultation responses raised a wide range of issues, some of which the Council may feel are worthy of further consideration in future. Additionally, once the expanded explanations have been published and are in use, it is likely that suggestions for changes or additions will be made by users. It is proposed that if the Council is considering changes to the explanations in future, consultation on those changes can be included in other consultations on new or revised guidelines. This will enable the Council to be responsive to the need for change and ensure that the explanations remain helpful and current.

Next steps

3.22 If the *General* guideline and expanded explanations are signed off by the Council today the next steps will be as follows:

1. Any changes agreed will be made to the draft explanations. These will apply to the General guideline as well as to offence specific guidelines. These changes will be made on the test version of the Council's website – ready for transfer to the live site on launch.
2. The Communications team will put together a plan for the launch.
3. The resource assessment (covering both the General guideline and the expanded explanations) will be completed and circulated to members for comments.
4. The consultation response document (covering both the General guideline and the expanded explanations) will be written and circulated to members for comments.
5. Training materials will be developed in conjunction with the Judicial College who have already made provisional plans to utilise bench meetings to deliver the training in the autumn. We plan to make a short video showing how the expanded explanations are accessed and used.
6. The General guideline and expanded explanations will be published on the Council's website on 24 July to come into force on 1 October. The resource assessment and consultation response will also be published on 24 July.
7. The changes to medium culpability will be made and published on 24 July
8. The other changes to existing guidelines consulted on will be made at a later date (probably over the summer)

3.23 The publication of this project is a little different to most guidelines in that once the expanded explanations are published on the live site they will be available even though not in force. We intend to add a note to each explanation stating that it is not in force until 1 October and in addition the General guideline will show as a different colour until the in-force date.

3.24 Any of the changes to existing guidelines considered at 3.1 to 3.5 approved by the Council today, are separate from the expanded explanations and General guideline. Once these changes are made on the live site they will effectively be in force.

3.25 It is proposed that changes to medium culpability in the *Robbery, Fraud and Theft* guidelines are published on 24 July and that attention is drawn to the changes as part of the communications at the launch. The changes will also be shown on the log of changes published on the Council's website

3.26 The proposed changes to the wording/ presentation of maximum sentences and dangerousness are not substantive changes to guidelines, and making (and checking) the changes to all relevant guidelines may take some time and so it is proposed that these are published at a later date, alongside a news item on the website and communication to relevant stakeholders (e.g. magistrates, judiciary, prosecutors, probation etc) and shown in the log of changes.

Question 24: Does the Council agree to the next steps as outlined above?

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General guideline

For sentencing offences for which there is no offence specific sentencing guideline

The General guideline may also be referred to when sentencing any offence for which the explanations in this guideline may be relevant.

Applicability of guideline

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all offenders aged 18 and older, who are sentenced on or after [date].

Section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing offences committed on or after 6 April 2010:

“Every court –

- a. must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender’s case, and
- b. must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.”

This guideline applies only to offenders aged 18 and older. General principles to be considered in the sentencing of youths are in the Sentencing Guidelines Council’s definitive guideline, [Sentencing children and young people - overarching principles](#).

STEP ONE – reaching a provisional sentence

- a) Where there is no definitive sentencing guideline for the offence, to arrive at a provisional sentence the court should take account of all of the following (if they apply):
- the statutory maximum sentence (and if appropriate minimum sentence) for the offence;
 - sentencing judgments of the Court of Appeal (Criminal Division) for the offence; and
 - definitive sentencing guidelines for analogous offences

The court will be assisted by the parties in identifying the above.

For the avoidance of doubt the court should **not** take account of any draft sentencing guidelines.

When considering definitive guidelines for analogous offences the court must apply these carefully, making adjustments for any differences in the statutory maximum sentence and in the elements of the offence. This will not be a merely arithmetical exercise.

- b) Where possible the court should follow the stepped approach of sentencing guidelines to arrive at the sentence.

The seriousness of the offence is assessed by considering:

- the **culpability** of the offender and
- the **harm** caused by the offending.

- c) The initial assessment of harm and culpability should take no account of plea or previous convictions.

The court should consider which of the five purposes of sentencing (below) it is seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence.


- the punishment of offenders
- the reduction of crime (including its reduction by deterrence)
- the reform and rehabilitation of offenders
- the protection of the public
- the making of reparation by offenders to persons affected by their offences

More information:


Culpability is assessed with reference to the offender’s role, level of intention and/or premeditation and the extent and sophistication of planning.

- The court should balance these factors to reach a fair assessment of the offender’s overall culpability in all the circumstances of the case and the offender.

- The mere presence of a factor that is inherent in the offence should not be used in assessing culpability.
- Deliberate or gratuitous violence, or damage to property, over and above what is needed to carry out the offence will normally indicate a higher level of culpability
- For offences where there is no requirement for the offender to have any level of intention, recklessness, negligence, dishonesty, knowledge, understanding or foresight for the offence to be made out, the range of culpability **may** be inferred from the circumstances of the offence as follows:

Highest level  Lowest level	Deliberate - intentional act or omission
	Reckless - acted or failed to act regardless of the foreseeable risk
	Negligent - failed to take steps to guard against the act or omission
	Low/no culpability - act or omission with none of the above features

- For offences that require some level of culpability (eg intention, recklessness or knowledge) to be made out, the range of culpability will be narrower. Relevant factors **may** typically include but are not limited to:


Highest level  Lowest level	High level of planning/ sophistication/ leading role
	Some planning/ significant role
	Little or no planning/ minor role

- These models of assessing culpability will not be applicable to all offences

Harm – which the offence caused, was intended to cause or might foreseeably have caused.

- There may be primary and secondary victims of an offence and, depending on the offence, victims may include one or more individuals, a community, the general public, the state, the environment and/or animal(s). In some cases there may not be an identifiable victim.
- An assessment of harm should generally reflect the overall impact of the offence upon the victim(s) and may include direct harm (including physical injury, psychological harm and financial loss) and consequential harm.
- When considering the value of property lost or damaged the court should also take account of any sentimental value to the victim(s) and any disruption caused to a victim’s life, activities or business.
- When considering harm to animals or the environment relevant considerations will include the impact on rare or endangered species or sensitive locations, and any suffering caused.
- Where harm was intended but no harm or a lower level of harm resulted – the sentence will normally be assessed with reference to the level of harm intended.
- Where the harm caused is greater than that intended - the sentence will normally be assessed with reference to the level of harm suffered by the victim.
- Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.
- Risk of harm is less serious than the same actual harm. Where the offence has caused risk of harm but no (or less) actual harm the normal approach is to move down to the next category of harm. This may not be appropriate if either the likelihood or extent of potential harm is particularly high.

- A Victim Personal Statement (VPS) or other impact statement may assist the court in assessing harm, but the absence of a VPS or other impact statement should not be taken to indicate the absence of harm.
- The court should balance these characteristics to reach a fair assessment of harm in the context of the circumstances of the offence

Highest level  Lowest level	Very serious harm caused to individual victim(s) or to wider public/ environment etc
	Serious harm caused OR high risk of very serious harm
	Significant harm caused OR high risk of serious harm
	Low/ no harm caused OR high risk significant harm

The table should be used in conjunction with the notes above and may not be applicable to all offences.

STEP TWO

Once a provisional sentence is arrived at the court should take into account factors that may make the offence more serious and factors which may reduce seriousness or reflect personal mitigation.

- Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.
- It is for the sentencing court to determine how much weight should be assigned to the aggravating and mitigating factors taking into account all of the circumstances of the offence and the offender. Not all factors that apply will necessarily influence the sentence.
- When sentencing an offence for which a **fixed penalty notice [link to information below]** was available the reason why the offender did not take advantage of the fixed penalty will be a relevant consideration.
- **If considering a community or custodial sentence refer also to the *Imposition of community and custodial sentences* definitive guideline. [link to information below]**
- **If considering a fine – see information on fine bands [link to information below]**

Penalty notices may be issued as an alternative to prosecution in respect of a range of offences. An admission of guilt is not a prerequisite to issuing a penalty notice. An offender who is issued with a penalty notice may nevertheless be prosecuted for the offence if he or she:

- asks to be tried for the offence; or
- fails to pay the penalty within the period stipulated in the notice and the prosecutor decides to proceed with charges.

In some cases of non-payment, the penalty is automatically registered and enforceable as a fine without need for recourse to the courts. This procedure applies to penalty notices for disorder and fixed penalty notices issued in respect of certain road traffic offences but not to fixed penalty notices issued for most other criminal offences

When sentencing in cases in which a penalty notice was available:

- the fact that the offender did not take advantage of the penalty (whether that was by requesting a hearing or failing to pay within the specified timeframe) does not increase the seriousness of the offence and must not be regarded as an aggravating factor. The appropriate sentence must be determined in accordance with the sentencing principles set out in this guideline (including the amount of any fine, which must take an offender's financial circumstances into account), disregarding the availability of the penalty. In some cases this may result in a fine that is lower than the fixed penalty.
- where a penalty notice could not be offered or taken up for reasons unconnected with the offence itself, such as administrative difficulties outside the control of the offender, the starting point should be a fine equivalent to the amount of the penalty and no order of costs should be imposed. The offender should not be disadvantaged by the unavailability of the penalty notice in these circumstances.

Where an offender has had previous penalty notice(s), the fact that an offender has previously been issued with a penalty notice does not increase the seriousness of the current offence and must not be regarded as an aggravating factor. It may, however, properly influence the court's assessment of the offender's suitability for a particular sentence, so long as it remains within the limits established by the seriousness of the current offence.

[The information on fines, community orders and custodial sentences, aggravating and mitigating factors will be the same as for the expanded explanations set out in Annex A to paper 1]

STEP THREE

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

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

STEP FOUR

Reduction for guilty pleas

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

STEP FIVE

Dangerousness

Where the offence is listed in Schedule 15 and/or Schedule 15B of the Criminal Justice Act 2003

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 224A or section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

STEP SIX

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

Where the offence is listed 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 one year for which the offender is to be subject to a licence.

See the Crown Court Compendium, Part II Sentencing S4-3 [\[link\]](#) for further details

STEP SEVEN

Totality principle

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

STEP EIGHT

Compensation and ancillary orders

In all cases the court should consider whether to make compensation and/or other ancillary orders. The court will be assisted by the parties in identifying relevant ancillary orders.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

STEP NINE

Reasons

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

STEP TEN

Consideration for time spent on bail (tagged curfew)

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

Sentencing Council

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

14 June 2019
SC(19)JUN09 – Business Plan
N/A
Steve Wade
020 7071 5779

1 ISSUE

1.1 To agree the order of priorities for upcoming guidelines and their inclusion in the 2019-20 Business Plan.

2 RECOMMENDATION

2.1 That the Council agrees:

- to the ordering of priorities as outlined in Annex A
- to publish the Business Plan in due course once full content is finalised (a copy will be circulated to the Governance subgroup and then Council for sign-off prior to publication).

3 CONSIDERATION

Background information

3.1 Business plans are generally published early in the new Financial Year, setting out the organisation's priorities for the forthcoming year. The annual report then outlines to what extent the objectives set out in the business plan have been met and other significant achievements or activities that have happened within the year.

3.2 Prior to last year, publication of the two documents had moved out of sync with the standard reporting cycle (annual reports moving to October or November and the business plan to September). Last year we moved to a more orthodox timetable and published our annual report in July in line with the rest of the business areas within MoJ. We had intended to publish the Business Plan in May but as our budgetary delegation was not issued until mid-June it ended up being published in July. This year we intend again to publish the Annual Report in July (and this is a substantive item on this month's agenda as well). At the time of writing, we have again had a delay in receiving our financial allocation. We have received provisional allocation of our settlement for this FY, which is in line with our expectations, but

have not received the written formal delegation letter. We therefore expect to publish the business plan early in July again as with last year.

3.3 The content of the business plan is mostly standard from year to year (for example the lists of members; the budgetary information; the setting out of our guideline development cycle). The two main areas of substance are the Chairman's foreword and the workplan. The focus of today's discussion is on the ordering of our priorities for upcoming guidelines to inform the workplan section. The workplan covers a rolling three-year period in order to give external audiences advance notice of forthcoming work and enable us to make early decisions on which guidelines to pick up next given that the lead in time for each (in terms of preparatory legal and analytical work) is considerable.

Question 1: Is the Council content to retain this basic approach?

Discussion

3.4 Annex A sets out the proposed order of priorities for the guidelines for the coming three years. The ordering of priorities is based on the following considerations:

- previous discussions at Council on priorities for the coming year;
- the need to consider the impact on analytical resource across guidelines and ensure a balance between new guidelines that are greater or lesser resource-intensive;
- the need to finalise the delivery of the Council's 2020 ambition to have revised all its predecessor body's guidelines, and to have produced guidelines for all the highest volume offences by its 10th anniversary;
- the need to ensure adequate resource to support the successful delivery of our 10 year anniversary events; and
- any emerging issues that have arisen since the last Council discussion on priorities.

3.5 Previously the Council had indicated that its next priority was to revisit the Burglary Guideline. Initially this was intended to be in advance of us starting the work on firearms, drugs, and immigration and modern slavery. However, last year we moved drugs up the agenda given the range of issues arising within drug offending. We also pushed burglary back given that the experience of revising assault suggested that the analytical input was substantial and picking up burglary straight after assault would place too great a pressure on

the Analysis and Research team. It was agreed then that burglary would be the next guideline after drugs and work has already started on this guideline, with an initial paper due in September.

3.6 Last month, Council agreed to revise our (relatively) recently published Terrorism Guideline given the legislative changes already enacted. Work on this has already kicked off with Vicky's arrival back and a first paper is due in July.

3.7 Other work already underway, or previously agreed, was the work to revise the remaining either way guidelines published by the SGC. This was to enable the Council to meet its 2020 target of issuing guidelines for all the major offences and to have replaced all of its predecessor bodies guidelines. Work on trademark offences has already started and a first paper was considered by Council in September 2018. Some of the remaining offences are being picked up as part of the work on Immigration and Modern Slavery, and Firearms. Council has already decided not to produce a guideline to replace that which deals with 'tax disc' offences on the grounds that they are rarely prosecuted since the introduction of digital vehicle licences and DVLA have confirmed they have no issue with this. Beyond these, the only remaining offences are driving related offences which are considered in more detail below.

3.8 There are a small number of amendments to the current MCSG guidelines that have been identified and agreed in principle by Council at our May meeting and we will begin to pick these up from September when gaps in the agenda and staff time allow.

3.9 In addition to these smaller MCSG amendments, there is an amendment that may be required to the Totality and Breach guidelines. There is a passage in the Breach of a Community Order Guideline, which gives guidance on dealing with an offender convicted of an offence during the currency of a community order. This passage is a direct lift from the Totality Guideline. It has been pointed out to us that it is at best misleading, and at worst inaccurate, in that it says:

- Where an offender, in respect of whom a community order made by a Crown Court is in force, is convicted by a magistrates' court, the magistrates' court may, and ordinarily should, commit the offender to the Crown Court, in order to allow the Crown Court to re-sentence for the original offence and the additional offence.

3.10 The issue is that a magistrates' court can only commit the new offence to the Crown Court if there is a separate power to do so, otherwise it must sentence the new offence and may commit the offender to the Crown Court to consider re-sentencing the community order. There is also some case law on when it is appropriate for the magistrates' court to deal with the old offence and when to commit to the Crown Court. We suggest that this may mean that the emphasis of the guidance may need to be changed. We intend to consider this as with the minor MCSG amends, when gaps in the agenda allow.

3.11 We turn now to motoring offences. This is an area that has consistently been high on the list of guidelines to be considered. The intention for some time has been to wrap up a variety of motoring offences – from causing death by dangerous driving to some of the smaller either way offences – in a suite of motoring offences guidelines. However, we have pushed these back for some time now whilst the Government considered raising the statutory maximum for causing death by dangerous driving to life imprisonment. Following a public consultation the Government has now announced a firm intention to legislate to that effect, once parliamentary time allows. MoJ officials have indicated that this remains the Government's intention once a suitable legislative vehicle is found. Given the intention of the Government to legislate in this area and the strength of public feeling on this issue our recommendation is that causing death by dangerous driving, and at least those offences immediately below it in terms of seriousness, is pushed back. If we were to produce a guideline we risk disappointing those who take issue with the current statutory maximum as well as risking the work being instantly out of date were legislation to be brought forward.

3.12 Previously the Council had agreed to wrap up the remaining either way offences relating to motoring as part of one set of guidelines. However, we do think there is benefit in looking at some of these offences separately and in advance of the more serious motoring offences. Those that might be in scope include Taking of a Vehicle without Consent (TWOC), Aggravated TWOC, or dangerous driving: all of which are in the current MSGC. Picking these off would enable us to fulfil our 2020 commitment bar the more serious offences that are under consideration by Government.

Question 3: Does the Council agree not to produce a full set of guidelines for motoring offences at this time?

Question 4: Does the Council agree to develop a guideline for the remaining either way motoring offences (precise scope to be agreed)?

3.13 Other guidelines that Council has previously provisionally agreed to develop when time allows are a group of guidelines relating to cybercrime, and guidelines relating to witness intimidation and perverting the course of justice (to be developed together). Both of these pieces of work have now been added to our workplan as time would become available to begin to pick them up from January 2020

Question 5: Does the Council agree to develop guidelines relating to Cybercrime, and Witness Intimidation and Perverting the Course of Justice as the next priorities?

3.14 Assuming that Council agrees to the guidelines outlined above, the proposed order of priority, and draft timescales, would be as per Annex A.

Question 6: Does the Council agree to the order of priorities as outlined in Ann

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Sentencing Council Guideline Work Plan – 2019 to 2022*

(GREYED OUT BOXES HAVE ALREADY BEEN COMPLETED)

Guideline	Consultation period	Publish definitive guideline	Definitive guideline in force¹
Arson and Criminal damage	27 March 2018 – 26 June 2018	3 July 2019*	1 October 2019
Public order	9 May 2018 – 8 August 2018	Early October 2019	1 January 2020
General guideline (updating the SGC Seriousness guideline)	19 June 2018 – 11 Sept 2018	24 July 2019*	1 October 2019
Expanded explanations for offence specific guidelines (updating the SGC Seriousness guideline)	28 February – 23 May 2019	24 July 2019*	1 October 2019
Overarching guideline on mental health	9 April 2019 – 9 July 2019	March 2020	1 July 2020
Firearms offences	Late Sept 2019 – Late Dec 2019	November 2020	1 January 2021
Drug Offences: revision of SC guideline	October 2019 – January 2020	September 2020	1 January 2021
Further updates to MCSG offences and other minor amendments ³	November 2019 to January 2020	June 2020	1 October 2020
Terrorism: revision of SC guideline	Autumn 2019	Summer 2020	1 October 2020
Revision of SC assault and SGC attempted murder guidelines	January 2020 – March 2020	February 2021	1 April 2021
Trademark offences	February 2020 – March 2020	September 2020	1 January 2021

Guideline	Consultation period	Publish definitive guideline	Definitive guideline in force¹
Immigration/modern slavery	March 2020 – May 2020	Spring 2021	2021
Burglary: revision of SC guideline	Spring 2020	Late 2020	2021
Motoring offences ²	Summer 2020	2021	2021
Perverting the course of justice	Summer 2020	Late 2020	2021
Cybercrime	Autumn 2020	2021	2022

* The dates shown in this work plan are indicative and may be subject to change

¹ In most instances we aim to bring definitive guidelines into force quarterly, on 1 January, 1 April, 1 July and 1 October

² Precise scope to be agreed but excluding Causing Death by Dangerous Driving excluded pending legislative change following Government review of offences

³ Includes a correction to the Totality Guideline and consequential correction to the Breach Guideline

Sentencing Council meeting: 14 June 2019
Paper number: SC(19)JUN10 – Annual Report
Lead official: Phil Hodgson 020 7071 5788

1. Issue

- 1.1 This paper presents the Sentencing Council Annual Report 2018/19 for consideration by members of the Council.

2. Recommendation

- 2.1 That the Council approves the Annual Report for submission to the Lord Chancellor and subsequent laying before Parliament.

3. Consideration

- 3.1 The Annual Report is a summary of the activities and achievements of the Sentencing Council between 1 April 2018 to 31 March 2019.
- 3.2 This year's report follows the same structure as was used last year. It includes:
- Foreword from the Chairman
 - Table of key events
 - A report for each guideline on which work was done during the year
 - Sentencing and non-sentencing factors reports
 - Accounts of work completed by the Analysis and Research and Communication functions
 - The Council's budget
- 3.3 For the first time we have included in the report four "features" designed to illustrate some of the wider work carried out by the Council.
- 3.4 We will also be introducing colour photography to this year's report. The photographs will show magistrates' and Crown Court buildings in London, Birmingham and Newport, and the Royal Courts of Justice. The Lady Justice image on the front cover will also be reproduced in colour.

- 3.5 The Council is required by statute to provide the Lord Chancellor with a report on the exercise of the Council's functions during the year. The Lord Chancellor must lay a copy of the report before Parliament, after which the Council will publish it. The schedule for this year is as follows:
- Thursday 20 June – submission to the Lord Chancellor and Robert Buckland MP, as the Council's sponsoring Minister
 - Thursday 11 July – laid in Parliament (am) and published (pm)
- 3.6 The report will also be seen, prior to publication, by the Bail, Sentencing and Release Policy Team in MoJ, who are our sponsorship team.
- 3.7 The report has been considered and approved by the Council's Governance Sub-group.
- 3.8 Members are asked to discuss any substantive corrections or suggestions for changes to the report at the Council meeting on Friday 14 June, and to forward any further minor changes to Phil (phil.hodgson@sentencingcouncil.gov.uk) by end of Monday 17 June.

Question: Subject to any minor changes, does the Council approve the Annual Report 2018/19 for submission to the Lord Chancellor?

Sentencing Council



**Sentencing Council
Annual Report 2018/19**

Sentencing Council Annual Report 2018/19

The Sentencing Council is an independent, non-departmental public body of the Ministry of Justice

This report is presented to Parliament pursuant to Section 119(2) of the Coroners and Justice Act 2009



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Foreword

by the Chairman

Image to come

I am pleased to introduce the Sentencing Council's annual report for 2018/19, the Council's ninth and my first as Chairman. I shall start by thanking my predecessor Sir Colman

Treacy for his leadership of the previous five years and for handing into my custody an exciting and challenging programme of work. In his time as Chairman, Sir Colman oversaw the production of 17 definitive guidelines, providing the courts with a significant body of guidance to assist decision-making on allocation, imposition and guilty pleas; sentencing offences such as theft, robbery, sexual offences, terrorism and manslaughter; and sentencing children and young people. He also spearheaded the move to modernise the guidelines by producing them online. Sir Colman leaves us with an expert, talented and committed Council, strongly placed to continue to meet its statutory obligations.

Sentencing guidelines

The primary duty of the Sentencing Council is to provide judges and magistrates with guidelines that promote a clear, fair and consistent approach to sentencing, while maintaining the independence of the judiciary. During this last year we have continued to meet this duty, while making considerable progress towards the goals we set ourselves for 2020: to have updated all the guidelines produced by our predecessor

body the Sentencing Guidelines Council (SGC) and to have issued new guidelines for the most-frequently sentenced offences.

Since April 2018, the Council has published four definitive guidelines, all of which have come into effect. The Breach Offences guidelines, which cover 10 different types of breach, came into effect on 1 October 2018 (see [pxx](#)). These guidelines have provided the courts with clear guidance on what action should be taken against those offenders who ignore court orders. Court orders exist to protect the public, and the public has a right to expect that non-compliance will be dealt with firmly and consistently. Our Intimidatory Offences guidelines also came into effect on 1 October (see [pxx](#)). They cover harassment, stalking, disclosing private sexual images, controlling or coercive behaviour, and threats to kill. The guidelines recognise the intimate, personal nature of these types of offences, and the devastating, long-term impacts they can have, and provide the courts with comprehensive guidance that will help ensure sentences reflect the seriousness of the offending.

The Manslaughter guideline came into effect on 1 November 2018 (see [pxx](#)). It covers four offences: unlawful act manslaughter, gross negligence manslaughter, manslaughter by reason of loss of control and manslaughter by reason of diminished responsibility. Manslaughter is very serious in nature but offences can vary hugely and cases do not come before individual judges very frequently. The introduction of our guidelines will be particularly useful in promoting consistency in sentencing and transparency in terms of how sentencing decisions are reached.

The final guidelines we published this year covered three offences: cruelty to a child; causing or allowing a child to die or suffer serious physical harm; and failing to protect a girl from the risk of female genital mutilation. Child cruelty offences vary greatly. They can range from a one-off lapse of care, which puts a child at risk of harm, to a campaign of deliberate cruelty that leads to serious injury or even death. The new guideline will help make sure that sentences reflect the culpability of the offender and the harm done to the child. In assessing harm, these guidelines take into account for the first time developmental and/or emotional harm, which might for example be manifested in developmental milestones that a child has not met. The guidelines also introduce a new aggravating factor of an offender wrongly blaming others for an offence. Cases of this nature will frequently involve one parent or carer/guardian seeking to blame the other for what has happened in order to avoid prosecution. The Child Cruelty guidelines came into effect on 1 January 2019 (see [pxx](#)).

Three other guidelines – Bladed Articles and Offensive Weapons; Terrorism Offences; and Overarching Principles: Domestic Abuse – also came into effect during the year.

In consultation

Consultation remains the cornerstone of our approach to developing guidelines and we are grateful to members of the judiciary, our colleagues in the criminal justice system and others with an interest in criminal justice, individuals and organisations with expertise in our topic areas and members of the

public whose contributions all help inform our approach. This year, we have consulted on four guidelines, including the General Guideline, which will replace the current Seriousness guideline and will provide judges and magistrates with a clear structure to follow when sentencing offences that do not have an offence specific guideline (see [pxx](#)).

In summer 2018 we consulted on a draft guideline for sentencing high-volume public order offences. This is an area in which, at present, there is limited guidance in magistrates' courts and none for sentencing offenders in the Crown Court. We also held a consultation to revise the guideline covering arson and criminal damage offences. As with public order, there is currently limited guidance, available only to magistrates' courts. Once published, these guidelines will provide a comprehensive framework for sentencing these offences in both magistrates' courts and the Crown Court.

Our final consultation this year was on proposals to embed expanded explanations in all offence specific guidelines to provide useful supporting information to sentencers and other criminal justice practitioners in an accessible way. The expanded explanations will also help to give the public, including victims and witnesses, a clearer understanding of how sentencing works. We expect all these definitive guidelines to be published during the next reporting year.

On 8 November 2018 we completed our project to make the sentencing guidelines fully digital, publishing all guidelines that are used in the Crown Court in a digital format

on our website and digital versions of all the overarching guidelines. The magistrates' courts sentencing guidelines have been provided in this format for some time on the website and in an app that is used on the court-supplied iPads. The move to digital removes the need for sentencers to take paper copies of guidelines into court or worry about making sure their printed guidelines are the most up to date. It also makes the guidelines more visible to the public. The early response from sentencers and other practitioners in the Crown Court has been overwhelmingly positive.

Considering the role and work of the Council

The Council is open to scrutiny and keen to improve the way it carries out its work. In April 2018, we published a review written by Professor Sir Anthony Bottoms, in which he examined how the Council might best exercise its statutory functions. The review outlines many areas in which the Council may consider itself to have been successful, for example the production of offence specific and overarching guidelines and the analytical work to understand their impact and how they are used by sentencers. The report also suggests areas where more could potentially be done. We very much welcome Professor Bottoms' report and have already made considerable progress in a number of the areas he has identified. This work is set out on [pxx](#).

One of Professor Bottoms' recommendations was that the Council would benefit from fostering greater links with the academic

community. In November 2018, we hosted a symposium that was attended by a number of the leading academics in the field of sentencing, members of the judiciary, solicitors and barristers, officials from the Ministry of Justice, and representatives from the Law Commission, the Youth Justice Board and the Justice Select Committee, together with a range of other individuals and organisations with an interest in sentencing and its impacts. The symposium facilitated the sharing of sentencing research and analysis and included discussions around how the Council could collaborate more with academics in areas of mutual interest. More information on the event can be found on [pxx](#).

On 11 July 2018, my predecessor Sir Colman Treacy gave evidence to the Justice Select Committee inquiry: Prison Population 2022: Planning for the future, in which he clarified the Council's position and discussed the principal factors that lead to inflation. As a statutory consultee, the Justice Committee is one of the Council's most important stakeholders and we welcome its input to our consultations and ongoing interest in our work.

On 20 February 2019, the Council was invited to give evidence to the Joint Select Committee on Human Rights inquiry: The Right to Family Life: Children whose mothers are in prison. This was a welcome opportunity to demonstrate the ways in which the sentencing guidelines acknowledge the wider implications of sentencing and ask the court to consider whether the impact of imprisonment on dependents will make the sentence of imprisonment disproportionate to the purposes of punishment.

Also in February 2019, the Council received the final report of a tailored review conducted by the Ministry of Justice. The review found that the Council is effective and efficient in the delivery of its responsibilities, that its functions are still required and that the current model is still the most appropriate to deliver those functions. The review also made a number of recommendations for action, which we will be taking forward this year.

Membership of the Council

The Sentencing Council is now approaching its 10th anniversary in 2020. The years ahead will, I am sure, be stimulating and demanding for the Council, and I am looking forward to working with my colleagues to achieve our goals and meet the challenges ahead. I thank my colleagues on the Council for their expertise, commitment and energy. Without their knowledge and insight, none of our work would be possible.

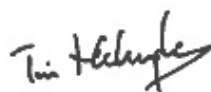
This year we have seen a reasonably high degree of turnover in Council members. In addition to Sir Colman standing down as Chairman, we bade farewell to a further six members: Simon Byrne, Mark Castle, Martin Graham, Jill Gramann, Professor Julian Roberts and Alison Saunders. I would like to thank each of them for the important contribution they have made to the work of the Council.

We have also welcomed six new members to the Council this year who, between them, bring a wealth of experience from diverse professional backgrounds: Her Honour Judge Rosa Dean and Rob Butler JP joined as members representing the judiciary or magistracy; Max Hill QC, Director of Public

Prosecutions, Dr Alpa Parmar and Beverley Thompson OBE, as members with other specific experience of sentencing or the criminal justice system. At the time of writing we are recruiting a Police member. In the interim I am very grateful to Assistant Commissioner Nick Ephgrave and, before him, Chief Constable Olivia Pinkney for providing a police presence at our council meetings. Between them they have made a valuable contribution and ensured that the police perspective has continued to be brought to Council discussions.

I would also like to thank those Council members who have served over the last year on one of our three sub-groups: analysis and research, confidence and communication and governance. Our work benefits greatly from their challenge and scrutiny.

It is a privilege to have been appointed to lead this influential and successful organisation, following in the footsteps of two formidable and committed predecessors, and to have taken over the reins at such a pivotal point in the Council's evolution. We are now turning our minds to what the Council might achieve in the next 10 years and how we will work with magistrates, judges, practitioners, academics and our other supporters to ensure that the sentencing guidelines continue to play a vital role in delivering access to justice.



Tim Holroyde
Lord Justice Holroyde
July 2019

Introduction

The Sentencing Council is an independent, non-departmental public body of the Ministry of Justice. It was set up by Part 4 of the Coroners and Justice Act 2009 to promote greater transparency and consistency in sentencing, while maintaining the independence of the judiciary.

The aims of the Sentencing Council are to:

- promote a clear, fair and consistent approach to sentencing;
- produce analysis and research on sentencing; and
- work to improve public confidence in sentencing.

This annual report covers the period from 1 April 2018 to 31 March 2019. For information on past Sentencing Council activity, please refer to our earlier annual reports, which are available on our website at:

www.sentencingcouncil.org.uk.

In 2018/19 the Council's work was aligned to the following four objectives:

1. Prepare sentencing guidelines that meet their stated aims, with particular regard to the likely impact on prison, probation and youth justice services, the need to consider the impact on victims, and to promote consistency and public confidence.
2. Monitor and evaluate the operation and effect of guidelines and draw conclusions.
3. Promote awareness of sentencing and sentencing practice.
4. Deliver efficiencies, while ensuring that the Council continues to be supported by high-performing and engaged staff.

The activities for 2018/19 that have contributed to the delivery of these objectives are outlined in this report.

Also in this report, produced in accordance with the Coroners and Justice Act 2009, are two reports considering the impact of sentencing (ppxx-x) and non-sentencing factors (ppxx-x) on the resources required in the prison, probation and youth justice services to give effect to sentences imposed by the courts in England and Wales.

Key events of 2018/19

2018		
April	18	Council publishes independent review
	27	Terrorism offences definitive guideline – came into effect
May	3	Dr Alpa Parmar appointed to the Council as non-judicial member
	3	Her Honour Judge Rosa Dean and Rob Butler JP appointed to the Council as judicial members
	9	Public order offences draft guideline – consultation opened
	24	Overarching principles: domestic abuse definitive guideline – came into effect
June	1	Bladed articles and offensive weapons definitive guideline – came into effect
	1	Drug offences definitive guideline – assessment published
	7	Breach offences definitive guideline – published
	15	Beverley Thompson OBE to the Council as non-judicial member
	19	General guideline: sentencing offences for which there is no definitive guideline – consultation opened
	25	Sentencing of drug offences involving newer and less common drugs – guidance issued
	26	Fraud, bribery and money laundering offences definitive guideline – assessment published
July	5	Intimidatory offences definitive guideline – published
	20	Sentencing Council annual report and account 2017/18 published
	31	Manslaughter definitive guideline – published
August	1	Lord Justice Holroyde appointed Chairman of the Sentencing Council
	8	Public order offences – consultation closed

September	6	Child cruelty definitive guideline – published
	11	General guideline: sentencing offences for which there is no definitive guideline – consultation closed
October	1	Breach offences definitive guideline – came into effect
	1	Intimidatory offences definitive guideline – came into effect
	29	Sexual offences definitive guideline – assessment published
November	1	Manslaughter definitive guideline – came into effect
	7	Collaborating to shape the future of sentencing research: Innovation and impact – seminar held in partnership with the Centre for the Study of Legal Professional Practice, City Law School
	8	Digital sentencing guidelines for use in the Crown Court launched
2019		
January	1	Child cruelty offences definitive guideline – came into effect
February	5	Theft offences definitive guideline – assessment published
	7	Government publishes Tailored Review of the Sentencing Council
	15	Robbery offences definitive guideline – assessment published
	28	Expanded explanations in sentencing guidelines – consultation opened

Sentencing Guidelines

The sentencing guidelines are intended to help ensure a consistent approach to sentencing, while preserving judicial discretion. Under the Coroners and Justice Act 2009, a court must follow relevant sentencing guidelines unless satisfied in a particular case that it would be contrary to the interests of justice to do so.

Consultations are not only a statutory duty but also a valuable resource for the Council. When launching consultations, we seek publicity via mainstream and specialist media, making Council spokespeople available for media interviews, as we do when launching definitive guidelines. We promote consultations on Twitter and on the Sentencing Council website, and make a particular effort to reach relevant professional organisations and representative bodies, especially those representing the judiciary and criminal justice professionals, but also others with an interest in a particular offence or group of offenders. Many of the responses come from organisations representing large groups so the number of replies does not fully reflect the comprehensive nature of the input.

The work conducted on all the guidelines during the period from 1 April 2018 to 31 March 2019 is set out here, separated into four key stages: development, consultation, post-consultation, and evaluation and monitoring. Because guidelines were at different stages of development during the year, reporting varies between guidelines.

Arson and criminal damage offences

Consultation

The Council consulted on a draft Arson and Criminal Damage Offences guideline from March to June 2018, during which time we also carried out research with sentencers on the application of the draft guideline. The research included 12 interviews with Crown Court judges and a discussion event attended by a number of people and organisations with an interest in the subject. It also included group discussions and exercises on the racially aggravated offences, which were completed by approximately 100 magistrates at three separate events. A statistical bulletin and draft resource assessment were published alongside the draft guideline.

The draft guideline covered five offences:

- Arson
- Criminal damage/arson with intent to endanger life or reckless as to whether life endangered
- Criminal damage with a value exceeding £5,000, including racially or religiously aggravated criminal damage
- Criminal damage with a value not exceeding £5,000, including racially or religiously aggravated criminal damage

- Threats to destroy or damage property

Post-consultation

The Council received 26 responses to the guideline consultation and the responses were broadly supportive of the proposals. These responses and the results of the research with sentencers helped to inform changes to the draft guidelines, such as the inclusion of more factors within medium culpability in order to assist sentencers. The definitive guideline is expected to be published in summer 2019.

Assault – revising the existing guideline

Development

Following an assessment of the impact and implementation of the existing Assault definitive guideline, we have started work to produce a revised version. The revised guideline will comprise all offences in the existing guideline, including:

- causing grievous bodily harm with intent to do grievous bodily harm/wounding with intent to do grievous bodily harm;
- inflicting grievous bodily harm/unlawful wounding;
- assault occasioning actual bodily harm;
- assault with intent to resist arrest;
- assault on a police constable in execution of his duty; and
- common assault.

The guideline will also include two new offences:

- Assault on emergency workers
- Attempted murder

Evaluation and monitoring

In 2018/2019 the Council carried out research to inform the development of the revised draft guideline. We conducted 23 interviews with magistrates, exploring the draft guidelines for common assault and assault occasioning actual bodily harm (ABH), and 20 interviews with Crown Court judges, exploring the guidelines for ABH, grievous bodily harm/wounding with intent (section 18) and grievous bodily harm/unlawful wounding (section 20). A number of judges also assisted us by taking part in online exercises to test various elements of the guidelines.

Breach offences

The Breach Offences definitive guideline was published in June 2018 and came into effect on 1 October 2018. The guideline includes guidance on sentencing ten different types of breach:

- Breach of a community order
- Breach of a suspended sentence order
- Breach of post-sentence supervision
- Failure to surrender to bail
- Breach of a protective order (restraining and non-molestation orders)

- Breach of a criminal behaviour order (also applicable to breach of an anti-social behaviour order)
- Breach of a sexual harm prevention order (also applicable to breach of a sexual offences prevention order and to breach of a foreign travel order)
- Fail to comply with notification requirements
- Breach of disqualification from acting as a director
- Breach of disqualification from keeping an animal

Evaluation and monitoring

The definitive guideline was published alongside a consultation response document and final resource assessment.

The data from which the resource assessment was drawn were gathered between November 2017 to March 2018, in an exercise that examined how breaches of protective orders, community orders and suspended sentence orders were being sentenced across a sample of magistrates' courts.

Media coverage

On 7 June 2018, the Council published the Breach Offences definitive guideline. We achieved national coverage from The Times, The Independent and The Daily Telegraph and received a good level of attention from the regional press.

Child cruelty

Post-consultation

The Child Cruelty offences definitive guideline was published on 6 September 2018 and came into effect on 1 January 2019.

The definitive guideline covers the offences of cruelty to a child, causing or allowing a child to die or suffer serious physical harm, and failing to protect a child from female genital mutilation. In consultation in 2017 respondents broadly supported our approach and suggested some additional factors. We made some changes to the guideline in light of consultation responses and further data analysis, particularly to ensure that the guideline assists sentencers in balancing factors across the full range of cases covered by these broad offences.

Media coverage

Publication of the definitive guideline received coverage in The Times and The Daily Telegraph, with our spokespeople quoted in both. The story was also issued by the Press Association and picked up by the regional press. The guidelines were mentioned in Politics Home, Sky News online, Police Oracle, Police Professional and 60 times on BBC local radio.

Exercising the Council’s statutory functions

On 18 April 2018 the Council published its response to an internal review conducted by Professor Sir Anthony Bottoms, Emeritus Professor at the Institute of Criminology, University of Cambridge. Professor Bottoms, working with his colleague, Dr Jo Parsons, had conducted the review at our request to consider how best the Council could exercise its statutory functions and to make recommendations on areas of work the Council might want to consider taking forward in the future.

The review outlines areas in which the Council has been successful since its inception in 2010 and identifies areas where more work could potentially be done, which include the following.

Making the Sentencing Council website more “user-friendly”

In 2018 we started work to revise both the design and content of our website to make it more easily accessible for all its users, including practitioners, victims, offenders, the public and anyone wanting to access specific information, for example statistical data. The revised site will give more context to the guidelines and help our non-expert audiences gain a better understanding of how the guidelines work and how sentencers use them. Building on research that told us what visitors want and expect to find when they come to our website, we commissioned an independent digital development agency to re-structure the site. We worked with a specialist writer to help us create useful and relevant information about sentencing and make the language across the site more easily understood by non-experts. We expect to launch our revised website later in 2019.

Improving public confidence

We commissioned this year work from the independent agency ComRes to help the Council develop a better insight into the public’s attitudes towards, and knowledge of, sentencing and the criminal justice system. The research was carried out across England and Wales and involved an online survey of 2,000 adults aged 18 and over, eight group discussions each with six to eight members of the public, and 12 interviews with victims of crime.

We expect to publish the research report later in 2019. Once complete, the work will allow us to identify audiences that the Council may wish to prioritise with its communications, and provide us with valuable insights into the sort of messages that might resonate most and help our audiences gain a better understanding of, and confidence in, sentencing.

Assessing consistency of sentencing

Under section 120(11)(b) of the Coroners and Justice Act 2009, the Council in producing guidelines must have regard to “the need to promote consistency in sentencing”. While there is no universally accepted definition of consistency in sentencing, the general concept is clear: similar offenders who commit similar offences in similar circumstances should be expected to receive similar sentencing outcomes. To help the Council assess the extent to which our guidelines have met this objective, we have this year commissioned analytical work from two independent academics. The project involves developing a methodology to measure consistency of approach to sentencing and applying this methodology to sentencing data for several specific offences, to gain a better understanding of whether the Council’s guidelines have increased consistency as intended. A summary of this work will be published in 2019.

The Council is also reviewing the way we use and present the data we draw on when assessing the impact of guidelines.

Developing a general guideline

In autumn 2018 the Council consulted on a General Guideline. The guideline provides courts with guidance for sentencing offences for which there is currently no offence specific guideline. It includes information on the purposes of sentencing and guidance on areas such as previous convictions, and mitigating and aggravating factors.

The guideline will provide advice to courts for a wide range of offences where, due to their low volume, no specific guidance exists. Currently, courts rely on judgments from the Court of Appeal or the now out-of-date Seriousness guideline issued by the Sentencing Guidelines Council. We expect to publish the General Guideline in the next reporting year.

Fostering links with the academic community

The Council is keen to benefit from closer links with academics and has made considerable progress against this recommendation. See [pxx](#).

Further initiatives

The Council very much welcomes Professor Bottoms’ review. We thank the authors for their hard work and the advice they have given us, and have committed to take forward a number of initiatives. The review and the Council’s response can be found on our website: www.sentencingcouncil.org.uk/news/item/council-publishes-independent-review/

Drug offences

Evaluation and monitoring

In June 2018, the Council published a summary of an assessment of the Drug Offences guideline, which came into effect in February 2012.

To assess the impact of the guideline, the Council commissioned an analysis of data from the Crown Court Sentencing Survey (which ran between 2010 and 2015) and data from the Ministry of Justice's Court Proceedings Database. The analysis also included data from a bespoke data collection exercise in magistrates' courts (which ran between November 2015 and February 2016).

While the guideline had led to some small unanticipated changes in sentencing severity, its overall effect was not considered to be a cause for concern. However, given that the nature of drug offending is likely to change over time, the Council decided to undertake more research. The aim of this work is to examine how the guideline might be revised to ensure that it fully reflects the type of offending coming before the courts today and is flexible enough to work well in the future. To this end, group discussions were held with Crown Court judges across two court centres that see a high number of drug offences. We are drawing on the results of these discussions to inform development of the new draft guideline.

Drug offences – sentencing drug offences involving newer and less common drugs

Since publication of the Drug Offences guideline in 2012, there has been an increase in the number of cases before the courts involving newer drugs, such as synthetic opioids, which may have much higher potency and potential to cause harm than more common drugs. In addition, some new offences have been created, for example, those in the Psychoactive Substances Act 2016.

On 25 June 2018 the Council published guidance to help courts sentence offences involving newer and less common drugs, in particular covering how to assess the harm caused. The guidance does not carry the same authority as a sentencing guideline, and sentencers are not obliged to follow it. The Council expects to consult later in 2019 on a revised drugs offences guideline that will incorporate this guidance.

Expanded explanations in sentencing guidelines

See Seriousness – replacing the Sentencing Guidelines Council guideline, [pxx](#).

Firearms

Development

Firearms is an area of serious offending where there is currently minimal sentencing guidance. There is one existing firearms guideline, which provides guidance to magistrates sentencing the offence of carrying a firearm in a public place. The Firearms Act 1968 was recently amended by the Policing and Crime Act 2017, implementing recommendations from a Law Commission report.¹ There are no further legislative changes expected in the near future aside from additional prohibited weapons being introduced through the Offensive Weapons Bill.

The Council started work developing a group of guidelines in early 2018 and we have engaged with relevant organisations and experts to inform the development of the guidelines. The group will consist of eight guidelines, which will cover the highest-volume firearms offences and those with the greatest maximum penalties, including possession of a prohibited weapon, other possession offences, possession with intent, and transfer or manufacture of a prohibited weapon. Where applicable, we include guidance on the minimum sentence and exceptional circumstances.

Fraud, bribery and money laundering offences

Evaluation and monitoring

In June 2018 we published an analysis of our Fraud, Bribery and Money Laundering Offences definitive guideline.

The guideline came into effect in October 2014. To assess its impact, the Council commissioned an analysis of data from the Crown Court Sentencing Survey (which ran between 2010 and 2015) and data from the Ministry of Justice's Court Proceedings Database.

None of the findings suggested that the guideline has caused a change in average sentencing severity so the Council concluded that, based on the evidence available, the guideline is working as expected.

While the analysis indicates that there is no specific need to revisit the guideline, the Council will continue to be alert to any changes (such as new legislation) that may affect whether the guideline remains fit for purpose.

General Guideline

See Seriousness – replacing the Sentencing Guidelines Council guideline, [pxx](#).

¹ Firearms Law – Reforms to Address Pressing Problems [Law Com 363] (2015).

Shaping the future of sentencing research

In November 2018, the Council held an academic seminar with the theme of Collaborating to Shape the Future of Sentencing Research: Innovation and Impact.

Our objectives for the day were to:

- facilitate a greater understanding of the role and purpose of the Council and how analytical work is integral to those;
- share current academic work in the area of sentencing;
- initiate discussion on how the Council might work more collaboratively with academics in the future; and,
- provide a networking opportunity for the Council, academics and other stakeholders with an interest in our field.

Close to 100 people joined us on the day, coming from a range of different areas and disciplines, including academia, the judiciary, solicitors and barristers, important stakeholders such as the Prison Reform Trust, RoadPeace and the Nuffield Foundation, officials from the Ministry of Justice and representatives from the Justice Select Committee, Law Commission, Scottish Sentencing Council and Youth Justice Board.

The presentations made throughout the day covered a wide range of subjects and stimulated constructive and lively discussions on issues facing sentencers and others working in today's criminal justice system. Papers included:

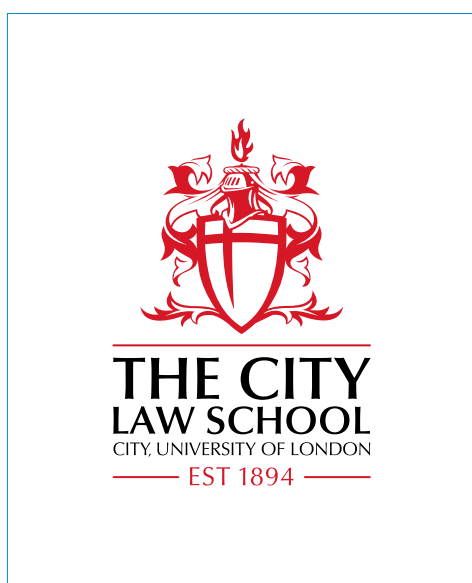
- A comparison of the impacts of short-term custody versus community sentences
- The role of gender and intoxication in sentencing assault offences
- The role of perceived choice in sentencing addicted offenders
- Sentencing for multiple versus single offences
- Evaluation of the Council's sexual offences guideline
- Algorithmic risk tools in sentencing processes

Delegates were also given updates on the work of the Sentencing Council and its Analysis and Research Team, and of the newly established Sentencing Academy. The Council is extremely grateful to all the presenters for sharing their learning and insights, and for contributing to what was a successful and stimulating event. Feedback from the day was very positive, with attendees appreciating the opportunity to come together to share research within this area and understand more about the Sentencing Council.

The Council decided to hold the event in response to the recommendation in Professor Sir Anthony Bottoms' review that the Council would benefit from fostering greater links with the academic community (see [pxx](#)), and to follow on from a small roundtable event we hosted jointly with Professor Bottoms in December 2017, kindly funded by Cambridge University.

We welcome the work of academics in the area of sentencing. We believe that, by working collaboratively with the academic community, the Council will be well placed to reap the benefits of new and emerging thinking. We plan to hold an annual event, providing a forum for sharing and exploring academic work and, later in 2019, we will be identifying potential areas for research relating to sentencing and inviting academics to work with us on these investigations.

The Council is very grateful to Professor Peter Hungerford-Welch, who facilitated the day's proceedings, and to City Law School's Centre for the Study of Legal Professional Practice for most generously hosting and funding the event.



Guilty plea

Evaluation and monitoring

The Reduction in Sentence for a Guilty Plea definitive guideline came into effect on 1 June 2017, following which the Council established a dedicated monitoring group.

Throughout 2018/19, the group continued its work to steer efforts to collect a range of information that will feed into an assessment of the implementation and impact of the guideline. Members of the group include representatives of the Sentencing Council, the police, the Crown Prosecution Service, Her Majesty's Courts and Tribunal Service, Victim Support, Judicial Office, Her Majesty's Prison and Probation Service, the Justices' Clerks Society and the Ministry of Justice.

Health and safety offences, corporate manslaughter and food safety and hygiene offences

Evaluation and monitoring

During 2018/19, the Council undertook an exercise to assess the impact of the Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences definitive guideline, which came into effect in February 2016.

We analysed data from the Ministry of Justice's Court Proceedings Database, along with prosecutions data provided by the Health and Safety Executive. We also carried out a content analysis of Crown Court judges' sentencing remarks and an analysis of a sample of judgments heard by the Court of Appeal.

A summary of our analysis was published in April 2019.

Intimidatory offences

The Intimidatory Offences definitive guideline was published on 5 July 2018 and came into effect on 1 October 2018. The guideline covers harassment, stalking, disclosing private sexual images, controlling or coercive behaviour, and threats to kill.

Post-consultation

As we noted in last year's Annual Report, the responses we received to the consultation on the Intimidatory Offences draft guideline were broadly supportive of our proposals so the main structure and content of the final, definitive guideline remain as consulted on. Some changes were made as a result of the consultation such as revisions to the guidance for racially or religiously aggravated offences, in order to give greater assistance to sentencers for these sensitive offences.

Media coverage

Publication of the definitive guideline in July 2018 achieved coverage in seven national papers and seven regional. We fielded a spokesperson from the Council for interview on Sky News. We also achieved coverage across BBC national radio stations, including the Today Programme, and 35 BBC regional radio stations. The coverage was positive and clearly carried our key messages.

Manslaughter

The Manslaughter definitive guideline was published on 31 July 2018, alongside a response to consultation document and a resource assessment. The guideline came into effect on 1 November 2018.

Post-consultation

In 2017, the Council consulted on draft guidelines for four offences.

- Unlawful act manslaughter
- Gross negligence manslaughter
- Manslaughter by reason of loss of control
- Manslaughter by reason of diminished responsibility

We received 45 responses from organisations and individuals, which were generally supportive of the draft guidelines. In light of the responses and research conducted with judges, we made a number of changes, including the following.

- Some draft culpability factors in gross negligence manslaughter were changed; it was felt they did not accurately reflect the seriousness of the offending.
- Mitigating factors were added to gross negligence manslaughter to reflect situations where an offence is committed in the context of external pressures.
- Guidance was added to the assessment of responsibility in manslaughter by reason of diminished responsibility.
- The caveat attached to the lower culpability factor relating to reduced responsibility was removed from all guidelines. The Council accepted that the complex interaction between mental health issues and drug and alcohol misuse was such that the caveat was unhelpful and could lead to injustice.

The aim of the Council with this guideline was to maintain current sentence levels in most circumstances; the exception being in some cases of gross negligence manslaughter where sentences were expected to increase. The sentence levels in the draft guideline were checked against sentence levels for cases sentenced in 2016 and some further research was conducted with judges to verify the findings. Taking account of the changes made to culpability factors, the Council concluded that no changes were required to the sentence levels in the draft guideline.

Media coverage

The launch of the Manslaughter definitive guideline achieved coverage in both broadsheets and tabloids, specifically the Guardian, the Times, Telegraph, Independent, Sun and Mirror. There were also mentions in trade media, including Construction Manager and Construction Index. The story also ran in BBC Radio 5 Live, and 16 BBC local radio stations.

Mental health**Development**

Evidence suggests that people in the criminal justice system are more likely to suffer from mental health problems than the general population. The prevalence of offenders with these conditions has led to calls for a guideline to assist in their sentencing.

In early 2018, the Council started work to develop a guideline for sentencing offenders with mental health conditions or disorders and those with learning disabilities, autism, brain injury, substance misuse disorders and dementia.

To help inform the development of the guideline we discussed our proposals from an early stage with interested organisations and experts in the field. We also designed and launched a programme of research with judges and magistrates, which continued into 2019.

Consultation

The Council held a consultation on our draft proposals between April and July 2019.

Public order**Consultation**

Between May and August 2018, the Council conducted a consultation on a draft guideline for sentencing a number of public order offences:

- Riot (section 1)
- Violent Disorder (section 2)
- Affray (section 3)
- Fear or provocation of violence (section 4) and the racially or religiously aggravated counterpart offences (section 31 Crime and Disorder Act 1988)
- Disorderly behaviour with intent to cause harassment, alarm or distress (section 4A) and the racially or religiously aggravated counterpart offences (section 31 Crime and Disorder Act 1988)
- Disorderly behaviour causing or likely to cause harassment, alarm or distress (section 5) and the racially or religiously aggravated counterpart offences (section 31 Crime and Disorder Act 1988)
- Offences relating to stirring up racial or religious hatred and hatred based on sexual orientation (sections 18 – 23 and 29B-29G)

These offences are relatively high-volume and, although some sentencing guidance exists for magistrates, there is currently no guidance for judges in the Crown Court.

During the consultation period we carried out research to examine systematically how the guideline might work in practice. This work included 12 interviews with Crown Court judges on the draft affray guideline, and group discussions and exercises on the guideline for racially aggravated public order offences, which were attended by approximately 150 magistrates across three events.

The consultation was informed by a resource assessment and statistical bulletin, which were published alongside the consultation document.

Post-consultation

We received 95 consultation responses. The vast majority of responses were from individual members of the public and focused predominantly on the hate crime and racial aspect of the guidelines.

The Council has been considering responses and research findings to identify whether any changes are required to the definitive versions of the guidelines. The Council expects to approve the definitive guideline in July 2019 for publication in the autumn.

A resource assessment will accompany the final version of the guidelines.

Media coverage

The consultation on public order opened on 9 May 2018. We achieved coverage of the launch in five national newspapers, including The Times, The Daily Telegraph, Independent, Daily Mail and Daily Express, as well as several regional newspapers. We fielded a spokesperson from the Council for interview on LBC, and the Press Association carried a lengthy factual piece, which was reproduced in a number of local papers.

Robbery

Evaluation and monitoring

During 2018 we undertook research to assess the impact of the Robbery Offences guideline, which has been effective from 1 April 2016. We commissioned an analysis of data from: the Crown Court Sentencing Survey (which ran between 2010 and 2015); a similar survey exercise post guideline (which ran between November 2016 and April 2017); and the Ministry of Justice's Court Proceedings Database.

The analysis suggested that, while the guideline appears to be working largely as intended, there have been some unanticipated changes. We published a summary of our analysis in February 2019.

The Council intends to investigate further in due course, and will consider at that stage whether any revision of the guideline is necessary.

Seriousness – replacing the Sentencing Guidelines Council guideline

The project to replace the Sentencing Guidelines Council (SGC) Overarching Principles: Seriousness guideline is being undertaken in two phases:

1. The General Guideline – a new guideline for use where there is no offence specific guideline. This will provide general guidance on the assessment of harm and culpability and will include expanded explanations of factors; and
2. The Expanded Explanations – expanded explanations of factors in offence specific guidelines.

Both phases of the project take advantage of the fact that all Sentencing Council guidelines are now published in digital format on the Council's website.

Consultation

The Council consulted on the General Guideline from June to September 2018 and carried out research with sentencers on the application of the guideline during the consultation period. A draft resource assessment was published alongside the draft guideline.

The consultation on the Expanded Explanations was launched on 28 February 2019 to run until 23 May 2019. A draft resource assessment was also published for this phase of the project.

Post-consultation

The Council received 27 responses to the General Guideline consultation, most of which came from organisations. These responses, and the results of the research with sentencers, helped to inform changes to the explanations in the guideline that are carried across to the draft Expanded Explanations.

At the conclusion of the Expanded Explanations consultation, the Council will consolidate the responses to both consultations and publish both phases of the project at the same time.

Sexual offences

Evaluation and monitoring

In October 2018, the Council published an analysis of the Sexual Offences definitive guideline, which came into effect in April 2014.

To assess the impact of the guideline, the Council commissioned an analysis of data from the Crown Court Sentencing Survey (which ran between 2010 and 2015) and data from the Ministry of Justice's Court Proceedings Database.

The analysis suggests that the guideline is generally being implemented in the way that the Sentencing Council expected, although there has been an increase in sentencing severity for sexual assault, which was not anticipated.

The Council intends to investigate further the operation of the guideline in due course, and will consider at that stage whether any revision of the guideline is necessary.

Theft offences

Evaluation and monitoring

In February 2019, the Council published an analysis of the Theft Offences definitive guideline, which came into effect in February 2016.

To assess the impact of the guideline, the Council commissioned an analysis of data from the Ministry of Justice's Court Proceedings Database and from a bespoke data collection exercise carried out in magistrates' courts. The latter exercise ran for a period before the new guideline came into effect (from November 2015 to February 2016) and after (September 2016 to December 2016).

The assessment showed that there were some unanticipated effects following the introduction of the guideline. The Council has decided to continue to monitor the trend over time before deciding on whether or not to revisit the guideline.

Communication

The Sentencing Council has a statutory obligation, in producing guidelines, to have regard to “the need to promote public confidence in the criminal justice system”. To help the Council meet this duty, it has set itself a strategic objective: to improve awareness and understanding of sentencing among victims, witnesses, offenders and the public.

The Communication team has a central role to play in supporting this objective, which we do by delivering high-quality, proactive and reactive communications that aim to:

- inform and equip our professional audiences, and strengthen their confidence in the Council, the sentencing guidelines and the Council’s sentencing model; and
- inform and educate our public audiences, and improve their understanding of, and confidence in, sentencing and the criminal justice system.

Working with the media

The Council publicises its work via general and specialist media. Our aim is to make sure that sentencers, criminal justice practitioners and the wider public are aware of what work the Council is undertaking and are kept informed about the publication of new guidelines. We also make sure that practitioners and stakeholders with an

interest in specialist topic areas are aware of our consultations so that they are able to respond and share their knowledge and expertise with the Council.

The four definitive guidelines and three consultations published over the period of this annual report were supported by a programme of communication activities targeting the media, including criminal justice publications, national and regional print and broadcast channels and other specialist titles where relevant. Council members were fully briefed and prepared to talk to the media for each announcement and undertook a variety of interviews, including on high-profile, national programmes such as the Today programme, Sky News and Good Morning Britain, as well as on regional radio.

The work of the Council remained of significant interest to the media and, over the course of the year, there were 252 mentions of the Council in print media, 311 broadcast mentions and 1,338 mentions online, not including social media.

Our press office also routinely answers media enquiries about sentencing issues, provides background for sentencing related articles and puts forward spokespeople, where appropriate.

The office also handles many calls and emails from members of the public enquiring about sentencing and the guidelines. While we are not able to provide advice or comment on individual cases, we provide information and alternative sources where we can.

Working to engage the public and victims of crime

As in previous years, the Council has worked with partner organisations who have direct contact with the public, to improve understanding of sentencing particularly among victims and witnesses.

We have focused on our communication with the police service, aiming to reach the officers who most often engage with the public. Our activities have included ensuring police publications receive Council announcements, working with Police Professional magazine to provide articles and features on aspects of sentencing and establishing relationships with relevant groups of officers, such as Family Liaison Officers (FLOs). Among other duties, FLOs provide the link between bereaved families and the police during major investigations. In September 2018 we spoke at the National FLO Conference, to update officers on the recently published manslaughter guideline, which came into effect on 1 November 2018, and to ensure FLOs have the information they need to talk to victims, witnesses and their families about sentencing.

Throughout the year the Witness Service continued to use our materials about sentencing to support and reassure witnesses and victims.

Videos on our YouTube channel continue to attract a consistent level of attention. Our most viewed video, which describes how sentencing works in clear, easy-to-follow terms, and which we promote on our website, was watched more than 21,000 times during the year.

Developing relationships with partners and interested parties

To further our work to engage stakeholders and build relationships across the criminal justice system, Council members and staff from the Office of the Sentencing Council gave a series of speeches and presentations covering all aspects of sentencing and developing guidelines. Our audiences included magistrates, judges, legal practitioners, academics and NGOs.

We also accepted invitations to raise the profile of the Council in other jurisdictions. We shared our expertise on sentencing and developing guidelines on 30 October 2018 with the Attorney General of Oman and his colleagues from the Omani Public Prosecution Office and Royal Oman Police and, on 26 November, with the President of the Supreme Court of Somaliland.

In October 2018 we were invited to present at an international symposium at the University of Leeds School of Law, funded by the National Centre for Research Methods. We gave a talk on the Sentencing Council and our collection and use of data. The symposium, “New Questions, Methods, and Data in Sentencing Research”, was attended by a global audience of academics, magistrates and other government representatives.

Website

The Sentencing Council's website, **www.sentencingcouncil.org.uk**, has continued to be a source of information for sentencers and others in the criminal justice system, as well as for victims, witnesses, the public and journalists. Traffic to the website has remained consistently high, with the number of unique visitors reaching almost a million: from 1 April 2017 to 31 March 2018, there were 978,212 unique visitors.

In December 2018 we commissioned the digital development agency that manages our website to start work to revise both the design and content of the site. The aim of this development work is to enable the Council to continue to serve the professional users of our website while creating more compelling public-facing content that would contribute to meeting our objective of improving public confidence in sentencing. For more information on this project, see [pxx](#).

Developing our digital capability

In November 2018 the Council launched a digital version of the sentencing guidelines that are used in the Crown Court, making the guidelines available as individual web pages on a dedicated area of the Council's website, and marking a significant milestone in our project to deliver digital guidelines to all sentencers in England and Wales.

Digital guidelines for the Crown Court

The aims of this project were to:

- deliver digital sentencing guidelines that meet user needs and work effectively in the context of the Crown Court;
- ensure the digital guidelines work within the context of CJS digital reform and are available within every Crown Court;
- ensure sentencers and other practitioners in the Crown Court know about the guidelines and know how to use them;
- motivate sentencers and other practitioners in the Crown Court to adopt digital guidelines; and
- facilitate ongoing feedback and evaluation.

We undertook initial research with Crown Court judges and other potential users during 2017 to gain a clear understanding of the ways in which the guidelines were being used and what sentencers considered their priorities to be.

Informed by this research and what we had learned from developing digital guidelines for the magistrates' courts in 2016 and 2017, we briefed our development agency to prepare digital templates for offence specific sentencing guidelines used in the Crown Court and for the overarching guidelines. These guidelines were approved for testing by the Council on 13 April 2018 and published on a "mirror" website. Throughout summer 2018, we tested the guidelines with judges, prosecutors and defence advocates and, as a result, made a series of refinements to the template before converting all the existing guidelines to a digital format.

We launched the Crown Court sentencing guidelines area of the website, including offence specific and overarching guidelines, on 8 November 2018.

Preparing the ground

The launch of the guidelines was supported with a message to Crown Court judges from the Chairman of the Council, which was published on the Judicial Intranet. Judges also received direct emails informing them of the publication of the guidelines and linking them

to guidance materials and an introductory video, showing how the guidelines work. The video was also published on the Judicial College Learning Management System. Bulletins were included in the monthly Criminal e-Letter sent by the Judicial College to all criminal judges and recorders, and in the Law Society Gazette and Counsel magazine. Use of digital guidelines was also included in the one-day Judicial College training courses attended between October and March by all circuit judges and recorders who sit in crime.

Digital by default

With the launch of digital guidelines for the Crown Court, the Council has achieved its aim of making the sentencing guidelines available to all sentencers in a format that is immediately accessible, quick and easy to use and designed to support the existing working practices of judges, magistrates and other practitioners.

“Going digital” also means that the guidelines are capable of being updated instantly. This feature allows the Council to reflect any changes or amendments to guidelines quickly, and gives sentencers confidence that they are always looking at the most up-to-date version of a guideline.

The development of digital guidelines has enabled the Council to achieve its long-term objective to cease production and design of printed and pdf guidelines. This change will result in a significant reduction in costs (estimated by 2019/20 to be in the region of £47,000 per annum), which will enable the Council to live within its budget as reduced by the Ministry of Justice.

The digitisation of sentencing guidelines also contributes directly to the Government's objectives to modernise the courts and for services to be digital by default.

Evaluation

The digital guidelines are being well used, with more than 68,000 unique visits since launch and an average of around 600 visitors each working day. Anecdotally, initial responses have been positive and encouraging. The Council will be running a user survey in early summer 2019 to get a clearer picture of how users are engaging with the guidelines and identify any areas for improvement.

The Council would like to thank all the judges, magistrates, and prosecution and defence advocates who contributed to the development of the digital guidelines. We are keen to continue to refine and improve them in line with our users' needs, and welcome any feedback.

Analysis and research

The statutory duties of the Council include requirements to carry out analysis and research into sentencing. Our work in this area includes the following.

Undertaking analysis to support the development of guidelines

The Council regularly carries out social research that aims to augment the evidence base underpinning guidelines, ensuring, in particular, that guidelines are informed by the views and experiences of those who sentence. We conduct primary research with users of the guidelines: primarily Crown Court judges, district judges and magistrates, using a range of methods. These methods include surveys, face-to-face and telephone interviews and group discussions. Our researchers also review sentencing literature and analyse the content of Crown Court sentencing remark transcripts. This work helps to inform the content of the guidelines at an early stage of development.

During the development of draft guidelines, the Council also draws on a range of data sources to produce statistical information about current sentencing practice, including offence volumes, average custodial sentence lengths and breakdowns by age, gender and ethnicity. We use this information to understand the parameters of current sentencing practice, and to fulfil the Council's Public Sector Equality Duty.

Publishing an assessment of the resource implications of guidelines

The Council has a statutory duty to produce a resource assessment to accompany each sentencing guideline that estimates the effects of the guideline on the resource requirements of the prison, probation and youth justice services. This assessment enables the Council and our stakeholders to better understand the consequences of the guidelines in terms of impact on correctional resources.

The work that goes into resource assessments also results in wider benefits for the Council. The process involves close scrutiny of current sentencing practice, including analysis of how sentences may be affected by guilty plea reductions and consideration of the factors that influence sentences. This analysis provides a 'point of departure' for the Council when it is considering the appropriate sentencing ranges for a guideline.

Where the Council intends for a guideline to improve consistency, while causing no change to the overall severity of sentencing, the guideline sentencing ranges will aim to reflect current sentencing practice, as identified from the analysis. Where we intend for a guideline to effect changes in the severity of sentencing for an offence, the Council may set sentencing ranges higher or lower than those indicated by current sentencing practice.

Monitoring the operation and effect of sentencing guidelines and drawing conclusions

The actual impact of the guideline on sentencing and, consequently, on resources, is assessed through monitoring and evaluation after the guideline has been implemented. To achieve this, we may use a range of different approaches and types of analysis, including putting in place bespoke, targeted data collections in courts, qualitative interviews with sentencers, transcript analysis and analysis of administrative data. These data are supplemented by data collected through the Crown Court Sentencing Survey (which ran until March 2015).

Publishing sentencing factors and non-sentencing factors reports

See [ppoo-o](#) for these reports.

We publish our research and statistical outputs on the analysis and research pages of our website: <https://www.sentencingcouncil.org.uk/analysis-and-research/>.

More information about the analysis and research we have undertaken to support the development of new guidelines or to evaluate existing guidelines is included in the Guidelines chapter of this report ([pxx](#)).

A cycle of continuous improvement

The Council has embedded a culture of continuous improvement into the guideline development process. Analytical work is crucial to this process: it helps ensure the Council has timely, relevant and robust data on which to base its decisions.

On 29 October 2018, we published an assessment of the impact of the Sexual Offences definitive guideline.² The guideline, which came into force in 2014, covers over 50 offences including rape, assault by penetration, sexual assault, sexual activity with a child and indecent images.³ To complete the development of the guideline and the subsequent assessment of its impact, the Council undertook and commissioned a portfolio of analytical work.

Data analysis

We brought together data from different sources, including Ministry of Justice (MoJ) administrative sources and Council's Crown Court Sentencing Survey (CCSS). These data included sentencing outcomes for sexual offence cases and the factors influencing sentencing decisions, and were important in helping the Council develop an understanding of current sentencing practice in this area.

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"the"

Social research

In addition – and as a result of the Council's recognition of the gravity of sexual offending and the very particular emotional and physical harm experienced by victims – we commissioned an independent social agency, Natcen Social Research, to undertake research into victim and public attitudes to the sentencing of sexual offences.

The research, which was conducted with the assistance of organisations such as Rape Crisis, involved people who had been victims of sexual offences (or their parents or guardians). Members of the public also participated in discussions, exploring attitudes to sentencing and sharing views on appropriate sentences and factors that should be considered when sentencing. The report helped inform the harm factors incorporated into the guideline for each of the offences.

Sentencing behaviour

Once the Council had developed a draft guideline, we also undertook some work to assess any behavioural implications of the proposals and ascertain whether the guideline might affect sentencing practice. This involved a small survey of Crown Court judges to establish how they would currently sentence certain sexual offences, face-to-face interviews with

² <https://www.sentencingcouncil.org.uk/publications/item/sexual-offences-assessment-of-guideline/>

³ <https://www.sentencingcouncil.org.uk/crown-court?s&collection=sexual-offences>

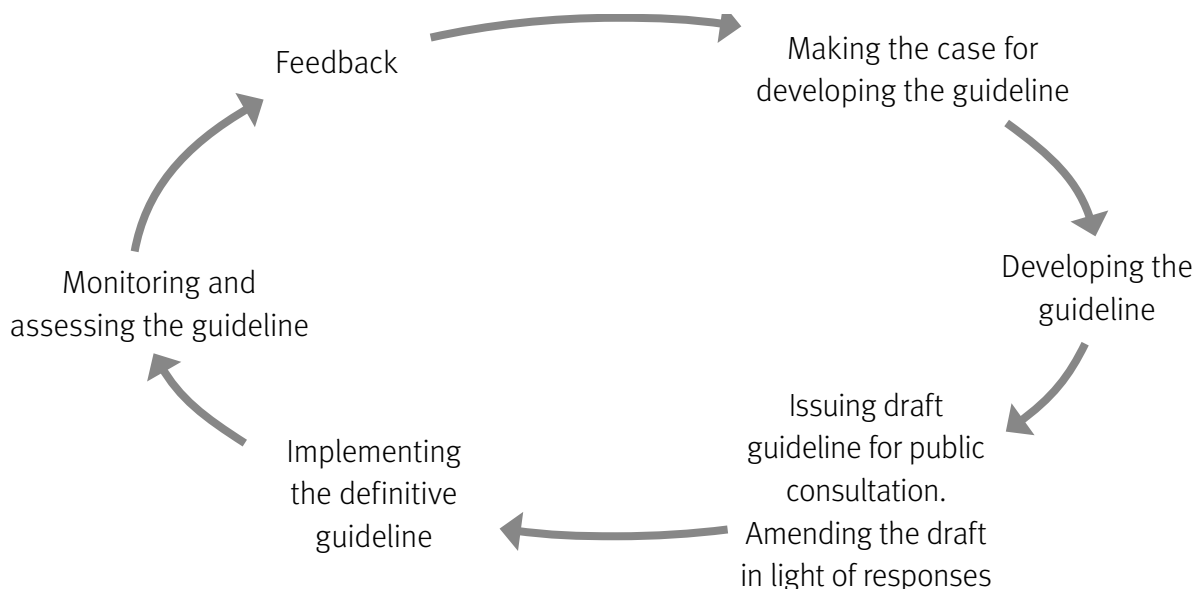
judges and content analysis of a small number of sentencing transcripts. The findings from these exercises helped to further refine the guideline proposals and ascertain whether there was any potential for sentencing changes. This was fed into work to estimate the impact of the guideline on correctional resources, which is one of the Council’s statutory duties.

Assessing impact

After the guideline had been in force for some time (sufficient time to enable it to “bed in”), the Council undertook work to assess whether it had had an impact on sentencing outcomes and to explore whether there were any problems or issues with the guideline’s implementation. Once again, this involved statistical analysis of MoJ administrative data and the CCSS, along with further interviews with Crown Court judges.

As a result of this assessment, it was found that that the guideline is generally being implemented in the way that the Sentencing Council anticipated, although increases in sentencing severity for sexual assault are at the upper limits of what had been expected. The analysis also found that a new harm factor of ‘Severe psychological harm’ had a significant impact on sentences for some sexual offences, including sexual assault; in interview, judges had also highlighted some issues around interpretation of this factor.

As a result of the findings from these analyses, the Council has committed to revisiting areas of the guideline where issues were identified, a clear example of the value of analytical work in ensuring the Council considers areas where guidelines may need improvement.



Sentencing factors report

In accordance with section 130 of the Coroners and Justice Act 2009 this report considers changes in the sentencing practice of courts (hereafter 'sentencing practice'), and their possible effects on the resources required in the prison, probation and youth justice services.

Sentencing guidelines are a key driver of change in sentencing practice. Some guidelines aim to increase the consistency of approach to sentencing while maintaining the average severity of sentencing. Other guidelines explicitly aim to cause changes to the severity of sentencing.

Changes in sentencing practice can also occur in the absence of new sentencing guidelines and could be the result of many factors such as Court of Appeal guideline judgments, legislation and changing attitudes towards different offences.

This report considers only changes in sentencing practice caused by changes in sentencing guidelines.

Sentencing guidelines

During its ninth year (to 31 March 2019), the Council published the following definitive guidelines:

- Breach offences
- Intimidatory offences
- Manslaughter
- Child cruelty

Breach offences

Breach of a suspended sentence order

For breaches of suspended sentence orders (SSOs), there is a considerable amount of uncertainty regarding the impact of the guideline on sentencing. There is no reliable information about the number of offenders sentenced, very little information about sentencing practice at the Crown Court and only limited information on sentencing at magistrates' courts. It has therefore not been possible to assess previous sentencing practice or to make any realistic or informative estimate of the impact of the guideline on prison or probation services.

Data from an early extract of a data collection at magistrates' courts in 2017/18 suggested that while just over half of offenders dealt with for breaching a SSO had their custodial sentence activated, just under half did not. The new guideline says that sentencers must activate the custodial sentence unless it would be unjust in all the circumstances to do so, and therefore it is possible that there could be a substantial increase in the number of sentences that are activated. However, the guideline provides some circumstances in which it may be appropriate not to activate, and so it is expected that in some cases, sentencers will continue to deal with breaches in a different way.

The impact of the guideline for breaches of SSOs also depends partly on the impact of the Council's *Imposition of Community and Custodial Sentences* guideline, which came into effect on 1 February 2017. Evidence identified during the early development of the Breach guideline suggested that SSOs are sometimes imposed as a more severe form of community order (CO). The Imposition guideline was developed to ensure that the principles for the imposition of these sentences are clarified to reverse this trend.

If implemented as intended, the Imposition guideline should lead to an overall decrease in the number of SSOs imposed, resulting in a decrease in the volume of offenders for whom a sentence can be activated. It is therefore possible that a reduction in the number of offenders affected may balance out any increase in the proportion of offenders whose sentences are activated as a result of the Breach guideline.

Any changes in sentencing practice as a result of the Breach guideline could have an impact on the prisons, with more offenders being sent to custody than at present. However, analysis has suggested that sentences may be short, and work has been undertaken to embed the use of the Imposition guideline in courts. This should help to reduce any possible impact, and if SSOs are only imposed as intended – in line with the Council's Imposition guideline – then the impact of the guideline may not be substantial.

Breach of a community order

For breaches of COs by failing to comply with requirements, the new guideline states that where the non-compliance is wilful and persistent, the sentencer should revoke the order and impose a custodial sentence. Analysis of an early extract of data collected from magistrates' courts in 2017/18 shows that around 12 per cent of breaches of COs were considered to be 'wilful and persistent non-compliance'.

For all other types, the sentencer is told either to revoke the order and re-sentence the original offence, add curfew requirements, add additional hours of unpaid work, extend the length of the order, add additional requirements or impose a fine. These options are too varied for it to be feasible to estimate the impact of the guideline for high, medium, low or no compliance, because it would not be possible to determine with any certainty how the penalty may be different under the new guideline.

However, as some offenders whose non-compliance was deemed to be ‘wilful and persistent’ currently receive a non-custodial sentence, it is expected that a small proportion would receive a different sentence under the new guideline.

Overall, assuming the data from the magistrates’ court data collection are representative of all offenders sentenced for breach of a CO, it is estimated that just under three per cent of offenders will be sentenced to immediate custody under the new guideline when they wouldn’t have been under current sentencing practice (i.e. were deemed to be wilfully and persistently non-compliant, and will receive an immediate custodial sentence under the new guideline where they had previously received a non-custodial sentence).

In a similar way as for breaches of SSOs, the number of offenders dealt with for breach of a CO at court per year was not known, so it has not been possible to estimate the likely resource impact of the guideline.

Breach of post-sentence supervision

For breach of post sentence supervision (PSS), it is anticipated that the guideline could lead to a reduction in the requirement for prison resources, although due to a lack of data it has not been possible to estimate what the impact might be.

Firstly, the new guideline includes the option of a custodial penalty only for offenders at the lowest level of compliance, whereas in the impact assessment the Ministry of Justice published relating to PSS, it was

assumed that 70 per cent of sanctions imposed following a breach would be committal to custody. Given that offenders would be distributed across all levels of compliance in the new guideline, it is unlikely that 70 per cent of offenders would fall into the lowest level of compliance and be committed to custody. Therefore, there could be a reduction in the requirement for prison resources. However, without full data on current sentencing practice for this offence, or information about how offenders would be split across the levels of compliance in the new guideline, it has not been possible to estimate the size of this impact.

Secondly, the guideline includes a penalty of up to seven days’ committal to custody at the lowest level of compliance. No data are currently available on the sentence lengths of offenders committed to custody. However, in the impact assessment the Ministry of Justice published relating to PSS, it was assumed that all offenders committed to custody would spend two weeks in custody. It is therefore possible that the new guideline may result in a reduction in the requirement for prison places due to a reduction in the time spent in custody, although without data on current sentence lengths for this offence, it has not been possible to quantify the potential impact on prison or probation resources.

Breach of disqualification from acting as a director and breach of disqualification from keeping an animal

The guidelines have been written with current sentencing practice in mind, therefore it is not anticipated there will be any impact on correctional resources. In addition, due to the low volume of these offences and the fact that only a very small proportion of offenders receive a custodial sentence, any potential impact would be minimal.

Failing to surrender to bail

The guideline has been written with current sentencing practice in mind, and therefore it is not anticipated that there will be any impact on prison and probation resources.

Breach of a protective order (restraining and non-molestation orders)

For breach of a protective order (which includes both restraining orders and non-molestation orders), in general the sentencing ranges have been set with current sentencing practice in mind and therefore it is not anticipated that there will be any impact on prison and probation resources in the majority of cases. There are two exceptions which may lead to higher sentences for some breaches of a protective order.

Firstly, it is likely that a small number of cases categorised at the highest category in the new guideline would receive a higher sentence. However, any costs to correctional resources incurred may be offset by the fact

that the category with the highest level of harm but the lowest level of culpability in the new guideline has a lower starting point and range than the top harm category in the previous guideline.

Secondly, an offender who breaches an order by resuming a relationship with the protected subject of an order, but doesn't cause any direct harm because the protected subject is willingly in contact, is expected to be sentenced more severely under the new guideline. The Council felt that, in order to enhance the efficacy of the restraining order, these types of offences should be treated more severely than they have been previously. In addition, it was felt that the sentence levels for this offence should not be lower than the same category for breach of an Anti-Social Behaviour Order (ASBO) or Criminal Behaviour Order (CBO).

It is not possible to estimate the number of breaches which may fall into these categories, due to a lack of data. However, the numbers are not likely to be large.

Breach of a Criminal Behaviour Order

For breach of a CBO, the sentencing ranges have generally been set with current sentencing practice in mind and therefore it is not anticipated that there will be any impact on prison and probation resources in the majority of cases. The exception is for the most serious breach cases that fall into the highest categories of harm and culpability (categories A1, A2 and B1), where there has been an extension to the category ranges, and also at the bottom of the distribution where

there may be a reduction in sentence severity.

Breach of a Sexual Harm Prevention Order

For breach of a Sexual Harm Prevention Order, the guideline has been written with current sentencing practice in mind, and therefore it is not anticipated that there will be any impact on prison and probation resources.

Failing to comply with a notification requirement

For failing to comply with a notification requirement, the new guideline may increase sentences for some cases. A review of transcripts of cases confirmed that the previous guidance was not considered adequate by sentencers to address offences falling within the top end of seriousness. The new guideline is more prescriptive and as a consequence it is possible that there may be more sentences at the top end of the guideline range. However, due to lack of data and the differences between the two guidelines it is not possible to quantify the size of the impact.

Intimidatory offences

For the offences of harassment (without violence) and stalking, threats to kill, disclosing private sexual images and films with intent to cause distress, and controlling or coercive behaviour in an intimate or family relationship, it is not anticipated that the guideline will have any impact on prison and probation resources.

For the offences of harassment (putting people in fear of violence) and stalking

(involving fear of violence or serious alarm or distress), it is also not anticipated that the guideline will have any impact on prison and probation resources. A small number of offenders falling in the highest category of seriousness are likely to receive higher sentences as a result of new legislation that has doubled the statutory maximum, but any increase as a result of this would not be attributable to the guideline.

For racially or religiously aggravated harassment and stalking offences, the guidelines are expected to increase some sentences. However, these are low volume offences and therefore this is anticipated to have a very small impact on the prison population, with a requirement for fewer than 10 additional prison places per year. As with the basic offences (the non-racially/religiously aggravated versions of the offences), any increase as a result of the new legislation that has doubled the statutory maximum sentence would not be attributable to the guideline.

Manslaughter

Overall, the Manslaughter guideline is anticipated to change sentencing practice only for cases which arise very infrequently, and therefore it is expected to have a minimal impact on correctional resources.

For unlawful act manslaughter, manslaughter by reason of loss of control and manslaughter by reason of diminished responsibility the sentencing ranges have been set with current sentencing practice in mind, and therefore it is not anticipated that there will be any impact on prison and probation resources.

For most types of gross negligence manslaughter, the Council's aim is to increase consistency in sentencing practice and not to change sentencing severity in the majority of cases. However, for some cases typically in the workplace, such as where an employer has had a long-standing disregard for the safety of employees and is motivated by cost cutting, the Council came to the conclusion that it would be appropriate for sentences to increase. It is therefore expected that where an offender has been convicted of manslaughter in circumstances where there has been a disregard for the risk of death to others motivated by financial gain, an increase may be seen in immediate custodial sentence lengths. However, these cases appear very infrequently, with transcript analysis showing that only seven offenders were sentenced for these offences in 2016, and only three offenders were sentenced in 2014. Therefore, the increase in sentence lengths for these specific types of cases is anticipated to have a very small impact on correctional resources (around 10 prison places per year).

It is possible that manslaughter sentences may continue to increase after the guideline has come into effect, as they have done over the past decade as a result of changing case mix and the influence of legislative changes, rather than as a result of the guideline.

Child cruelty

The Child Cruelty Definitive Guideline aims to improve consistency of sentencing but for the vast majority of cases it is not intended to change sentencing practice.

For the offence of cruelty to a child, the guideline is anticipated to change sentencing practice for a small number of cases involving weapons, and therefore it is expected to have a small impact on correctional resources, with the requirement for up to 10 additional prison places per year.

For the offences of cruelty to a child and causing or allowing a child to die or suffer serious physical harm, there may be an increase to sentences for some cases involving defendants who fail to protect a child. However, the cases that the guideline would affect appear very infrequently, and therefore this is expected to have a small impact on correctional resources, with a requirement for around 15 additional prison places per year (around 10 prison places per year for the cruelty to a child offence, and around 5 prison places per year for causing or allowing a child to die or suffer serious physical harm).

At the time of publication of the resource assessment, there had not yet been any sentences passed for the new offence of failure to protect a girl from the risk of female genital mutilation. Therefore, any increases in the prison population are expected to be due to a gradual increase in the number of offenders sentenced under the new legislation and not due to the guideline.

Non-sentencing factors report

The Sentencing Council is required under the Coroners and Justice Act 2009 to prepare a report of non-sentencing factors to identify the quantitative effect that non-sentencing factors are having, or are likely to have, on the resources needed or available to give effect to sentences imposed by courts in England and Wales.

We begin this report by defining non-sentencing factors and explaining their importance to resource requirements in the criminal justice system. We then signpost the most recently published evidence on these factors.

Definition of non-sentencing factors and their significance

The approach taken by the courts to sentencing offenders is a primary driver of requirements for correctional resources in the criminal justice system. We discuss this in our report on sentencing factors (see [ppxx-o](#)). However, non-sentencing factors also exert an important influence on requirements for correctional resources.

Non-sentencing factors are factors that do not relate to the sentencing practice of the courts but which may affect the resources

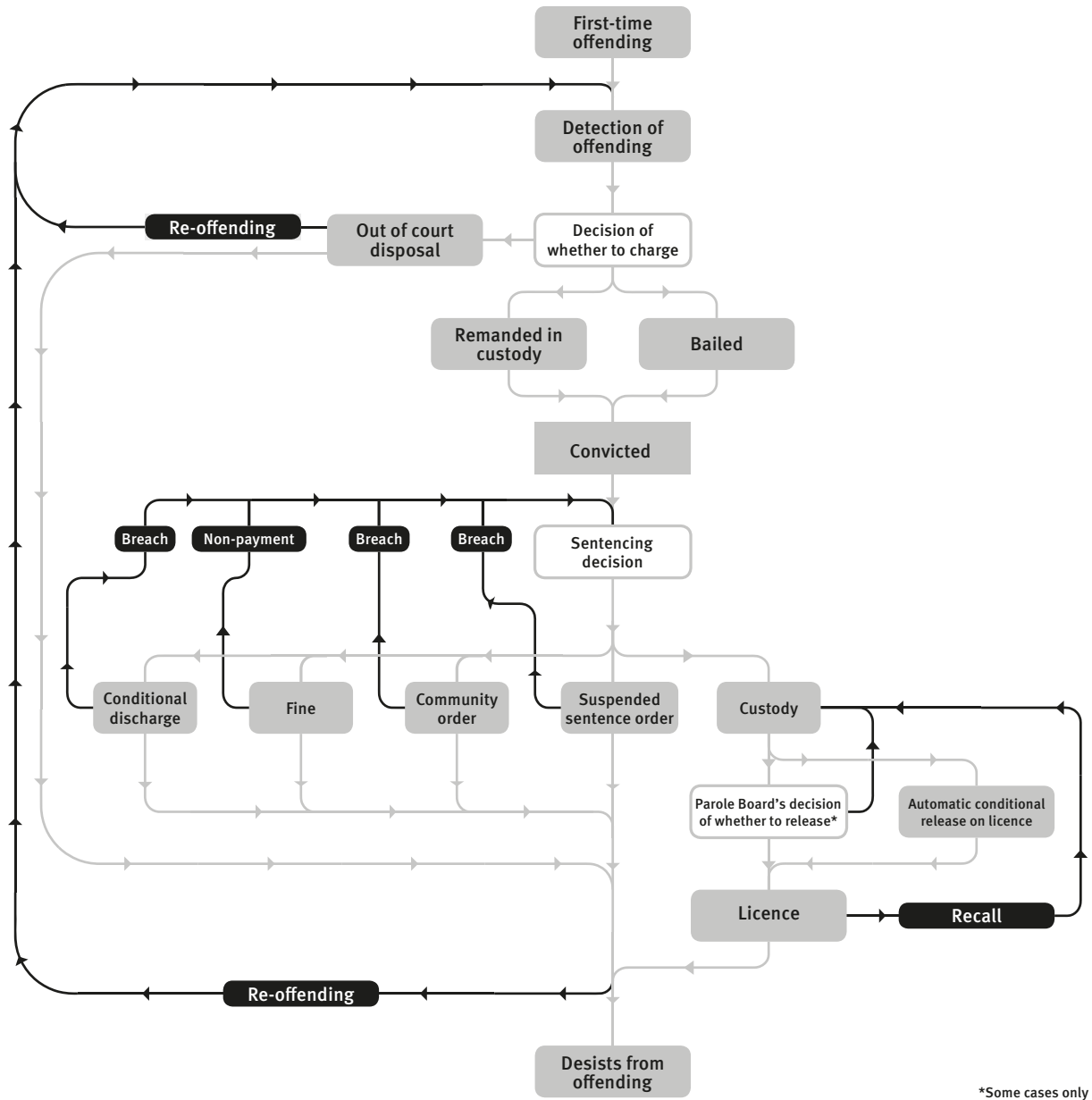
required to give effect to sentences. For example, the volume of offenders coming before the courts is a non-sentencing factor: greater sentencing volumes lead to greater pressure on correctional resources, even if the courts' treatment of individual cases does not change. Release provisions are another example: changes in the length of time spent in prison for a given custodial sentence have obvious resource consequences.

Statistics on the effect of non-sentencing factors on resource requirements

It is relatively straightforward to analyse the available data on non-sentencing factors. However, it is extremely difficult to identify why changes have occurred and to isolate the resource effect of any individual change to the system. This is because the criminal justice system is dynamic and its processes are interconnected.

Figure 1 shows a stylised representation of the flow of offenders through the criminal justice system. This figure demonstrates the interdependence of the system and how changes to any one aspect will have knock-on effects in many other parts.

Figure 1



The remainder of this report examines the available data on non-sentencing factors. Because of the complexities explained above, we have not attempted to untangle the interactions between different non-sentencing factors to explain the causes of observed changes and their impact on resources.

Volume of sentences and composition of offences coming before the courts

The Ministry of Justice (MoJ) publishes Criminal Justice System Statistics Quarterly, which gives quarterly statistics on the volume of sentences and the offence types for which offenders are sentenced.⁴

For the most detailed information on sentencing outcomes, follow the link to Criminal Justice System Statistics Quarterly: December 2018 to use the sentencing tool. The tool provides statistics on the total number of sentences passed and how this has changed through time. The statistics can be broken down by sex, age group, ethnicity, court type and offence group.

The rate of recall from licence

An offender is recalled to custody by the Secretary of State if they have been released from custody but then breach the conditions of their licence or appear to be at risk of doing so. Because time served in custody is considerably more costly than time spent on licence, recall decisions have a substantial resource cost.

Statistics on recall from licence can be found in the MoJ publication, Offender Management Statistics Quarterly.⁵

The tables concerning licence recalls, Table 5.1 to Table 5.11, can be found via the link Offender Management Statistics Quarterly: October to December 2018. For example, Table 5.1 contains a summary of the number of licence recalls since 1984.

Post-sentence supervision

The Offender Rehabilitation Act 2014 expanded license supervision, which means that since 1 February 2015 all offenders who receive a custodial sentence of less than two years are subject to compulsory post-sentence supervision (PSS) on their release for 12 months. MoJ publishes statistics on the number of offenders under PSS in Offender Management Statistics Quarterly.⁶

See Table 4.7 in the probation tables.

The rate at which court orders are breached

If an offender breaches a court order, they must return to court. Their revised sentence will typically add or augment requirements to the order or involve custody. Breaches can therefore have significant resource implications.

Statistics on breaches can also be found in Offender Management Statistics Quarterly.⁷ Refer to the probation tables, specifically Table 4.11, which gives a breakdown of terminations of court orders by reason.

4 <https://www.gov.uk/government/collections/criminal-justice-statistics-quarterly>

5 <https://www.gov.uk/government/collections/offender-management-statistics-quarterly>

6 *ibid*

7 *ibid*

Patterns of reoffending

MoJ publishes reoffending statistics in Proven Reoffending Statistics.⁸

The frequency and severity of reoffending is an important driver of changes in requirements for criminal justice resources. Detailed statistics of how reoffending rates are changing through time can be found in the report. Additional statistics can be found in supplementary tables.

Release decisions by the Parole Board

Many offenders are released from prison automatically under release provisions that are set by Parliament and MoJ. However, in a minority of cases, which are usually those of serious offences committed by dangerous offenders, the Parole Board makes release decisions.

Statistics on release rates for these cases can be found in the annual reports of the Parole Board for England and Wales.⁹

Remand

Decisions to hold suspected offenders on remand are a significant contributor to the prison population. The remand population can be broken down into the untried population and the convicted but yet to be sentenced population.

Statistics on the number of offenders in prison on remand can be found in MoJ's Offender Management Statistics Quarterly.¹⁰

The prison population tables can be found via the link Offender Management Statistics Quarterly: October to December 2018. For example, Table 1.1 contains data on how the remand population has changed through time.

⁸ <https://www.gov.uk/government/collections/proven-reoffending-statistics>

⁹ <https://www.gov.uk/government/publications?departments%5B%5D=parole-board>

¹⁰ <https://www.gov.uk/government/collections/offender-management-statistics-quarterly>

Budget

Financial report

The cost of the Sentencing Council

The Sentencing Council's resources are made available through the Ministry of Justice (MoJ); the Council is not required to produce its own audited accounts. However, the Council's expenditure is an integral part of MoJ's resource account, which is subject to audit. The summary below reflects expenses directly incurred by the Council and is shown on an accrual basis.

	2018/19 (actual) £000s
Total funding allocation	1,404
Staff costs	1,207
Non-staff costs	163
Total expenditure	1,370

Appendices

Appendix A: About the Sentencing Council

The primary function of the Sentencing Council is to prepare sentencing guidelines,¹¹ which the courts must follow unless it is contrary to the interests of justice to do so.¹²

The Council also fulfils other statutory functions:

- Publishing the resource implications in respect of the guidelines we draft and issue¹³
- Monitoring the operation and effect of our sentencing guidelines, and drawing conclusions¹⁴
- Preparing a resource assessment to accompany new guidelines¹⁵
- Consulting when preparing guidelines¹⁶
- Promoting awareness of sentencing and sentencing practice¹⁷
- Publishing a sentencing factors report¹⁸

- Publishing a non-sentencing factors report¹⁹
- Publishing an annual report²⁰

Governance

The Sentencing Council is an advisory non-departmental public body (NDPB) of the Ministry of Justice (MoJ). Unlike most advisory NDPBs, however, the Council's primary role is not to advise Government ministers but to provide guidance to sentencers.

The Council is independent of the government and the judiciary with regard to the guidelines we issue to courts, our impact assessments, our publications, how we promote awareness of sentencing and our approach to delivering these duties.

The Council is accountable to Parliament for the delivery of our statutory remit set out in the Coroners and Justice Act 2009. Under section 119 of the Act, the Council must make an annual report to the Lord Chancellor on how we have exercised our functions. The

¹¹ s.120 Coroners and Justice Act 2009

¹² s.125(1) *ibid*

¹³ s.127 *ibid*

¹⁴ s.128 *ibid*

¹⁵ s.127 *ibid*

¹⁶ s.120(6) *ibid*

¹⁷ s.129 *ibid*

¹⁸ s.130 *ibid*

¹⁹ s.131 *ibid*

²⁰ s.119 *ibid*

Lord Chancellor will lay a copy of the report before Parliament, and the Council will publish the report.

Ministers are ultimately accountable to Parliament for the Council's effectiveness and efficiency, for our use of public funds and for protecting our independence.

Section 133 of the 2009 Act states that the Lord Chancellor may provide the Council with such assistance as we request in connection with the performance of our functions.

The Council is accountable to the Permanent Secretary at MoJ as Accounting Officer and to ministers for the efficient and proper use of public funds delegated to the Council, in accordance with MoJ systems and with the principles of governance and finance set out in Managing Public Money, and other relevant Treasury instructions and guidance.

The budget is delegated to the Head of the Office of the Sentencing Council from the Director General, Policy, Communications and Analysis Group at MoJ (prior to November 2018, responsibility lay with Director General, Justice Analysis and Offender Policy Group). The Head of the Office of the Sentencing Council is responsible for the management and proper use of the budget.

The Director General, Policy, Communications and Analysis Group at MoJ is accountable for ensuring that there are effective arrangements for oversight of the Council in its statutory functions and as one of MoJ's arm's-length bodies. (Prior to November

2018, responsibility lay with Director General, Offender Reform and Commissioning Group.)

How the Council operates

The Council is outward-facing, responsive and consultative. We draw on expertise from relevant fields where necessary while ensuring the legal sustainability of our work. The Council aims to bring clarity in sentencing matters, in a legally and politically complex environment.

The Council aims to foster close working relationships with judicial, governmental and non-governmental bodies while retaining our independence. These bodies include: the Attorney General's Office; the College of Policing; the Council of Circuit Judges; the Council of Her Majesty's District Judges (magistrates' courts); the Criminal Procedure Rules Committee; the Crown Prosecution Service; the Home Office; the Judicial Office; the Justices' Clerks' Society; the Magistrates Association; the Ministry of Justice; the National Bench Chairs' Forum and the National Police Chiefs' Council.

The Council engages with the public on sentencing, offers information and encourages debate.

The Council meets 10 times a year to discuss current work and agree how it should be progressed. The minutes of these meetings are published on our website.²¹

²¹ www.sentencingcouncil.org.uk

The Council has sub-groups to enable detailed work on three key areas of activity:

Analysis and research – to advise and steer the Analysis and Research strategy, including identifying research priorities so that it aligns with the Council’s statutory commitments and work plan. Chairman: Dr Alpa Parmar.²²

Confidence and Communication – to advise on and steer the work programme for the Communication team so that it aligns with the Council’s statutory commitments and work plan. Chairman: the Hon Mr Justice Goose.

Governance – to support the Council in responsibilities for issues of risk, control and governance, by reviewing the comprehensiveness and reliability of assurances on governance, risk management, the control environment and the integrity of financial statements. Chairman: Beverley Thompson OBE

The sub-groups’ roles are mandated by the Council, and all key decisions are escalated to the full membership.

Relationship with Parliament

The Council has a statutory requirement to consult Parliament, specifically the House of Commons Justice Select Committee.

In order to facilitate the work of the Committee, the Council informs all organisations and individuals who respond to our consultations that their responses may be shared with the Justice Select Committee.

The Office of the Sentencing Council

The Council is supported in its work by the Office of the Sentencing Council (OSC), in particular in:

- preparing draft guidelines for consultation and publication, subject to approval from the Council;
- ensuring that the analytical obligations under the Act are met;
- providing legal advice to ensure that the Council exercises its functions in a legally sound manner;
- delivering communication activity to support the Council’s business; and
- providing efficient and accurate budget management, with an emphasis on value for money.

At 31 March 2019 there were 18 members of staff, including the Head of the Office of the Sentencing Council.

In the 2018 Civil Service Staff Engagement Survey, the OSC recorded a staff engagement index of 76 per cent. This places the Office 14 percentage points ahead of other arm’s-length bodies and 9 percentage points ahead of other high-performing units across the Civil Service.

²² To 2 May 2018, this sub-group was chaired by Professor Julian Roberts.

Senior management team

The work of the OSC is overseen by a senior management team comprising the Head of Office and senior staff. The role of the team is to:

- monitor and evaluate progress of the Council's workplan, as published in the Business Plan;
- monitor and evaluate budget expenditure, and make decisions regarding budget allocation;
- undertake regular review of the risk register on behalf of the Governance sub-group, with a view to ensuring that all information regarding delivery of the Sentencing Council's objectives and mitigation of risks is current and updated; and
- consider and make decisions on any other issues relating to the work of the OSC as may be relevant.

Guideline development

In developing guidelines, the Council follows a process that is based on the policy cycle set out by HM Treasury in the Green Book on Appraisal and Evaluation in Central Government (2003) and allows a culture of continuous improvement to be embedded. The process, from first consideration by the Council to publication of a definitive guideline, can extend to 18 months or more. However, if the Council believes there to be a pressing need, it can be expedited.

For an illustration of the development cycle, see [pxx](#).

Appendix B: Membership of the Sentencing Council

The Lord Chief Justice of England and Wales, The Rt Hon the Lord Burnett of Maldon, is President of the Council. In this role he oversees Council business and appoints judicial members, with the agreement of the Lord Chancellor.

Lord Justice Holroyde, a Court of Appeal judge, was appointed Chairman of the Sentencing Council from 1 August 2018.²³

The Lord Chancellor and Secretary of State for Justice appoints non-judicial members, with the agreement of the Lord Chief Justice.

Membership of the Council on 31 March 2019

Judicial members

Chairman: The Right Honourable Lord Justice Holroyde, appointed 6 April 2015, appointed as Chairman 1 August 2018

In order of appointment:

Her Honour Judge Sarah Munro QC,
6 April 2013

The Right Honourable Lady Justice Hallett,
27 November 2013

The Honourable Mr Justice Goose,
26 June 2014

The Honourable Mrs Justice McGowan,
2 January 2017

Her Honour Judge Rebecca Crane,
1 April 2017

Her Honour Judge Rosa Dean, 6 April 2018

Rob Butler JP, 6 April 2018

Non-judicial members

In order of appointment:

Mark Castle OBE, former Chief Executive of Victim Support, 1 August 2015

Rosina Cottage QC, barrister, 18 July 2016

Dr Alpa Parmar, Academic, University of Oxford, 6 April 2018

Beverley Thompson OBE, CJS Consultant and former CEO of Probation, 15 June 2018

Max Hill QC, Director of Public Prosecutions and Head of the Crown Prosecution Service, 1 November 2018

Register of members' interests

At 31 March 2019, one member of the Council had personal or business interests to declare:

- Rob Butler JP declared his appointment in May 2018 as Non-executive Director, Her Majesty's Prison and Probation Service.

²³ Lord Justice Holroyde replaced Sir Colman Treacy on 1 August 2018.

Copies of this report are available at
www.sentencingcouncil.org.uk

For other enquiries, please contact:

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Photography: **XXXX XXXX**

Copies of this report may be downloaded from our website: **www.sentencingcouncil.org.uk**

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ANALYSIS AND RESEARCH

NOTE OF SUBGROUP MEETING

07 May 2019

Members present: Alpa Parmar (Chair), Rebecca Crane, Maura McGowan

In attendance: Emma Marshall (Head of Analysis and Research)
Amber Isaac (Statistician)
Pamela Jooman (Statistician)
Caroline Nauth-Misir (Statistician)
Sarah Poppleton (Social Researcher)
Heidi Harries (Social Researcher)
Husnara Khanom (Social Researcher)

1 UPDATE ON SOCIAL RESEARCH WORK

- 1.1 Sarah Poppleton (SP), Heidi Harries (HH) and Husnara Khanom (HK) gave an overview of their current work; in brief: the data collection across all magistrates' courts for five offences/orders (bladed article/offensive weapon; harassment and stalking; and breach of community order, suspended sentence order and protective order) commenced on 23 April and will end on 30 September. The response rate for the first week was 40%, which is higher than any previous exercise in the magistrates' court, and is due not least to intensive efforts to publicise the exercise and make the online forms as accessible as possible (e.g. the online video). On our public confidence work, some questions have been re-run on an omnibus survey and the report is being prepared for publication in the summer. The team is also completing interviews for the road testing of the mental health guideline, and preparing the data used in the theft assessment for publication (for use by the public, primarily academics).

2 UPDATE ON STATISTICAL AND RESOURCE ASSESSMENT WORK

- 2.1 Amber Isaac (AI) told the group about some of the statisticians' current projects: Pamela Jooman (PJ) has been producing a new tool, using the programming language 'R', to automate the production of the statistical tables that are published alongside the guidelines. This will save the team multiple days per year, enabling it to focus on other priorities. Caroline Nauth-Misir (CNM) gave details of some of the resource assessments that she is currently working on, including those for arson and criminal damage, drug offences and firearms. This work involves (amongst other analyses) transcript analysis of judges' sentencing remarks, analysis of data collected through the Crown Court Sentencing Survey and at magistrates' courts, and data from the Home Office on drugs seizures. AI talked about the exercise that is currently being run across the office, to re-sentence cases of assault using some of the new draft guidelines, to determine

how sentencing practice may change under the new guidelines. Several Council members have volunteered to help with this exercise to make it as robust as possible.

3 REVIEW OF RISK REGISTER AND BUDGET

Risk register

- 3.1 Emma Marshall (EM) noted that the risk register has been updated to reflect changes agreed at the last subgroup meeting.
- 3.2 EM flagged that the register will be reviewed at the next subgroup meeting (likely to be in September), which is timed to feed into the meetings of the Governance subgroup.
- 3.3 She noted that she plans to update risk 7 - criticism that guidelines do not take account of specific minority groups, including BAME – with the fact that AI has recently been undertaking analysis on race and drugs and the fact that Council hopes to respond to this in the Autumn.
- 3.4 In relation to risk 7, Alpa Parmar (AP) asked if there was any way for us to make the data used for the race analysis accessible to academics. EM and AI advised that they are speaking to the UK Statistics Authority and to the data protection team at MoJ to see what is possible to share, and how. They advised that the team will do what it can, but that there are some data protection requirements (e.g. around disclosure) that, of necessity, limit this.

Action: Risk register to be reviewed at the next A&R subgroup meeting (September); EM to update risk 7 as discussed above, and EM and AI to investigate data sharing possibilities as discussed above.

Budget

- 3.5 CNM confirmed that we have not yet received our budget allocation from MoJ for the next financial year. It is anticipated that we will receive this in June.
- 3.6 CNM explained that OSC is working on the basis that the budget for analysis and research in 2019/20 will be £63,000 out of a total expected OSC budget of £1.42m. Out of this, £8,000 of the budget is for transcripts of judges' sentencing remarks, £5,000 is for another data collection in 2020/21, and some of the budget is expected to be used for the potential analytical projects that the Sentencing Council might commission for the 10-year anniversary (these projects were discussed further as agenda items later in the meeting). The cost of the venue for the 10-year anniversary will also be covered by the A&R budget.
- 3.7 AP asked if we would be able to get a free venue for the anniversary event. EM explained that this has been looked into, but the free options available either are not in London (which could result in lower attendance), or they involve hosting with partners (e.g. law firms), which may risk the event not being viewed as impartial.

4 COLLABORATION WITH ACADEMICS

- 4.1 EM reiterated the benefits of the Council working with academics, and introduced three potential projects suggested by the A&R team (noting that there are likely to

be more projects to consider in the future). EM also flagged that although these projects will not cost the Council any money, they will require some internal resource and therefore it is recommended that we focus only on three projects for the time being.

- 4.2 AI explained that the first project involves looking at sentence outcomes for offenders sentenced for multiple offences, to see whether this might aid our understanding of current sentencing practice (at present, the sentencing data used relates to principal offences only). The subgroup agreed that this project would be a useful piece of work to do.
- 4.3 The second project involves examining the issue of "role", and whether the Council's current approach to "role" ensures consistency and proportionality of approach. EM highlighted this is likely to be a largely qualitative project using data from sentencing transcripts. The subgroup agreed that this is an important and useful project to undertake. AP suggested it might be worthwhile to also look at the effect of race and gender alongside "role".
- 4.4 The third project is more communications focussed, and involves examining whether there are any improvements the Council could make to its digital guidelines to ensure they meet their aims, and also whether the move to digital guidelines has affected sentencing behaviour in any way. The subgroup agreed that this is an important piece of work, and noted that little has been done in this area to date.
- 4.5 AP recommended that the Council includes a clause in its service-level agreement (SLA) with the relevant contractor, stating that the Council must be acknowledged in any work which is published. This is an important way in which the Council can demonstrate its collaboration with academics.
- 4.6 EM also flagged that any work involving transcripts would need permission from HMCTS to pass these onto the academics. EM is currently pursuing this.

Action: EM will circulate these projects to the wider Council for their comments and will continue to explore permissions for supplying sentencing transcripts to academics.

5 ANALYTICAL IDEAS FOR 10-YEAR ANNIVERSARY

- 5.1 EM introduced three potential analytical projects to support the Council's 10-year anniversary plans and that could be presented at the event due to be held in April 2020. The first and third projects would be undertaken by externally commissioned contractors, and the second would be conducted internally by the Analysis and Research (A&R) team. There is around £30-£35k available in the budget to cover the two external projects and it was noted that agreement to proceed with these would be needed relatively quickly because the procurement process can take 8-10 weeks.
- 5.2 The first project involves a review of the evidence on consistency of sentencing, to get a better understanding of how the Council may have met one of its key aims (to promote greater consistency). This should provide a better understanding of the studies that have been conducted, their findings and the methodologies used. This will augment work that has already been undertaken to develop a methodology to measure consistency of approach to sentencing, and to apply the chosen method to data for three of the Council's guidelines. A report summarising the findings from this will be circulated to the subgroup and then to the full Council over the next couple of months, with the aim of publishing in the

summer. It is proposed that the findings of this study be incorporated into the proposed wider review of evidence on consistency.

- 5.3 AP commented that this would be a useful opportunity to interrogate the idea of what “consistency” really means, and the extent to which it aligns with the concept of fairness. The subgroup agreed that this is an important project to undertake.
- 5.4 The second project involves measuring the cumulative impact of the Council’s guidelines on sentencing, including the extent to which changes in sentencing practice following the introduction of guidelines can be attributed to the guidelines, the impact of the guidelines on sentencing severity, and any possible subsequent impacts on prison, probation and youth justice services.
- 5.5 The subgroup agreed that this would be a useful project, and that the 10-year anniversary presented the Council with an ideal opportunity to do this. Rebecca Crane (RC) commented that the Council would need to be prepared for the findings of this (as well as the other projects), as the findings might not show what the Council would hope them to. However, EM noted that there is likely to be an expectation at the event that the Council comments on its overall impact over the last 10 years and so if it is not able to do this, others at the event might instead draw their own conclusions (which may or may not be accurate).
- 5.6 Maura McGowan (MM) also noted that there should have been a decrease in successful appeals of sentence following the introduction of guidelines, so this is something that should be explored as part of this project. PJ noted that a data sharing agreement has been organised with the Court of Appeal so we should be able to examine any impact on appeals.
- 5.7 The third project involves conducting research to explore sentencers’ and other interested parties’ views on sentencing guidelines, particularly how their views have changed from before the guidelines’ introduction, to now. This might involve a representative online survey with judges and magistrates and then follow-up interviews or focus groups, and for other interested parties, may involve more informal discussions.
- 5.8 Subgroup members agreed that this is an important piece of work and that it is important that this is commissioned externally in order that it is conducted by independent researchers. MM and AP suggested that it would be useful to include the public’s awareness and understanding of guidelines as part of this project. SP noted that this is already covered by the recent work on public confidence, which could be highlighted at the event. Selected findings from the public confidence work could also be updated and the discussion could include public as well as sentencers’ and other interested parties’ views.
- 5.9 AP commented that these projects would be a good opportunity for the Council to publicise its impact, and that the projects with academic involvement underline the collaborative premise of what the Council is aiming to do.
- 5.10 EM explained that the three project outlines would be sent around to all Council members, and then once approved, the team would start the process of procuring them.

Action: A&R team to explore trends in appeals as part of Project 2; EM to circulate the project outlines to the full Council.

6. SURVEY OF THE THEFT PUBLICATION DATA

- 6.1 AI reminded the group that it was agreed at the January subgroup meeting to publish a user feedback survey to inform future data publications. This agenda item was to discuss the draft survey questions. AI explained that these are very much in draft form as we need to discuss what types of data we can publish with the data protection team. She noted that publishing the survey alongside the theft data (which is due to be published this year to help with an ongoing project) is a good opportunity, as users will then have data to explore whilst responding to the survey.
- 6.2 In relation to the future publication of data, AP asked what would be included in the datasets and whether any summary analysis of the data would accompany it. AI gave some examples of the factors (e.g. culpability factors, harm factors, aggravating and mitigating factors) and explained that only analysis conducted as part of the assessment of the theft guideline would be available online (published in February 2019). EM noted that in the past (when we published data from the Crown Court Sentencing Survey) we have received feedback which said that users didn't use the summary analytical report published alongside the data as their primary interest was conducting their own analysis using the data. AI suggested that if users respond to the survey saying that they want an analysis report (spontaneously, rather than being asked as a question) then this is something we can consider, although there would have to be a very strong demand for this due to limited resource in the A&R team.
- 6.3 In relation to the need to ensure that any published data do not breach data protection requirements, and therefore that offenders' identities are protected, AP asked whether there is a time limit on this protection (i.e. whether after a certain period of time has elapsed, we could publish more detailed data where offenders could be identified). EM said this is likely to be indefinite but this is something we can check with the data protection team. AP also asked if the survey would capture the views of judges and AI explained that the survey is designed to capture views of those who are intending to use the data.
- 6.4 The subgroup was happy with the draft survey questions and AP commented on its merit and that the open-ended questions at the end are useful. AP also mentioned that this may be a good way to capture international interest particularly for US/UK comparative analysis. EM suggested to AP that it would be helpful if AP could publicise the survey amongst her colleagues.

Action: A&R team to discuss the theft data with the data protection team and prepare the data, ready for publication.

7 DATE OF NEXT MEETING/AOB

- 7.1 EM said that she would look to arrange to next meeting for mid-September, because then the outcome of that meeting can be fed back to the next Governance subgroup meeting in October.

Action: EM to liaise with members to confirm the date of the next meeting.

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Confidence and Communication sub-group

Sub-group meeting:

24 May 2019

Lead official:

Phil Hodgson 020 7071 5788

Meeting note

Attendees

Council: Julian Goose (Chair), Sarah Munro, Rob Butler

OSC: Phil Hodgson, Kathryn Montague, Gareth Sweny

Aim of meeting

To consider:

i Preparations for 10th anniversary activities:

Anniversary event

Publishing opportunities

Sentencing competition

ii Proposals for reaching young people

iii Risk register, items 4 and 6

i Preparations for 10th anniversary activities

1 Anniversary event

Sub-group members were content with the proposed:

- venue, budget and two-part structure of the event, and
- A&R sub-group suggestions for research projects to provide content for the event.

Rob raised a concern as to whether there would be enough content for a whole-day event.

Phil agreed that this would be consideration in the planning, as final decisions are made on content.

Julian suggested the Council could also conduct research to investigate the impact of the guidelines on appeals, and whether there is any evidence of a change of pattern. The project could look at the number of sentence appeals each year and the proportion of those that were successful.

Actions

Phil to refer the suggestion for research on sentencing appeals to Emma Marshall, Head of A&R.

2 Publishing opportunity

Phil confirmed that:

- discussions were taking place with David Ormerod in relation to dedicating an issue of Criminal Law Review to sentencing to tie in with the anniversary, and
- other opportunities for anniversary features would be explored, for example with New Law Journal, Magistrate, The Times law pages.

Kathryn also recommended that we use the opportunity to pitch targeted interviews with Council members to regional press.

3 Sentencing competition

i Prizes

The sub-group agreed that a suite of prizes should be offered that would be relevant to both BPTC and LPC students. The winning student would select one option.

The suite would comprise:

- the mini-pupillage at Red Lion Chambers,
- a work-experience placement at a firm of criminal solicitors, and

- a marshalling opportunity.

Members agreed that:

- there should be a judicial contribution to the judging of entries before the semi-final stage
- certificates and a written record of the judging panel's comments should be given to the finalists,
- the Communication team should seek coverage for the finals event and, if possible, film it for use on the website and potentially elsewhere

The marshalling opportunity will, if possible, be arranged locally to the student. Phil proposed (post-meeting) that judges be approached nearer the time of the finals, when locations of potential winners are known.

Action

The Communication team will identify and approach likely donors for the work placement, for example the Criminal Law Solicitors' Association.

Communication team will:

- ensure the structure of the competition includes judicial input at an earlier stage
- provide certificates and make arrangements to record comments from the judging panel
- find out whether we will be permitted to film the finals event.

ii Judging panel

The group agreed that the judging panel should comprise:

- Lord Chief Justice or PQBD
- Tim Holroyde
- Maura McGowan

Action

Phil will discuss the makeup of the panel with Tim (proposed post-meeting).

ii Proposals for reaching young people

Rob stressed the importance of the Council having a clear aim for its work to reach young people, which would be to increase their confidence in the fairness of sentencing and the criminal justice system, including for young people.

1 Sentencing competition for schools/You be the Judge

The sub-group were content with the proposal that our approach to schools should be more focused, targeting areas of higher deprivation.

The group discussed which groups and organisations the Council might work with to take its competition and/or other materials into schools. Suggestions included the Home Office, police, youth groups, YOTs and, potentially, others outside the criminal justice system, eg the City livery companies.

Rob also suggested that the Home Office might be a potential source of funding, particularly if our approach focuses on knife crime.

It was agreed that the priority should be to create a package of appropriate materials, including, if possible, You be the Judge, after which a strategy can be developed on how we use the whole Council to reach young people.

Action

The Communication team will identify and approach individuals and organisations, for example the YJB Young People's Council, who can advise us on what materials would most resonate with young people.

Phil will continue to investigate the options for taking or sharing ownership of You be the Judge and the technical and financial implications.

Social media

The sub-group agreed that we should focus our efforts on Instagram.

Action

Phil will continue to assess the cost and resource implications of developing content for and running an Instagram account, and report back to the sub-group.

University competition

It was agreed that the Council could make its competition materials available to universities but that engaging further with university students should not be a priority.

School visits

It was agreed that this work would not be pursued for the time being.

iii Risk register, items 4 and 6

The sub-group discussed the risks identified on the register, and the action being taken by the Communication team and other teams in the OSC to mitigate the risks.

Rob recommended, with reference to risk 6, that the OSC should include the media when building relationships with stakeholders.

Rob also suggested that the likelihood of risk 4 could be reduced and the impact of risk 6 could be raised. The sub-group agreed changes as follows:

Risk 4

Likelihood reduced from 2 to 1, which will reduce the risk to “Low”.

The sub-group considered that the likelihood of this risk has been considerably reduced following the successful implementation of the Crown Court digital guidelines. The group will re-assess Risk 4 at its next meeting in light of the results of the Crown Court user survey being conducted in early June.

Risk 6

Impact raised from 4 to 5, which will increase the risk to “High”.

The sub-group agreed that loss of confidence in the Council and the sentencing guidelines among judiciary and/or government could have very serious consequences. The group will review this risk following the 28 June sub-group meeting, which will consider the implications for the Council of the ComRes public confidence research.

Action

Phil will make the necessary changes to the risk register, and refer them to the Governance sub-group.

The Communication team will include the media in the stakeholder strategy, and consider creative ways in which we can engage with them and improve their understanding of sentencing and the CJS.

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