

3 May 2019

Dear Members

## Meeting of the Sentencing Council – 10 May 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 10 May 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:

- |                                      |             |
|--------------------------------------|-------------|
| ▪ Agenda                             | SC(19)MAY00 |
| ▪ Minutes of meeting held on 5 April | SC(19)APR01 |
| ▪ Action Log                         | SC(19)MAY02 |
| ▪ Drugs                              | SC(19)MAY03 |
| ▪ Attempted murder                   | SC(19)MAY04 |
| ▪ Firearms                           | SC(19)MAY05 |
| ▪ Public Order                       | SC(19)MAY06 |
| ▪ Immigration and modern slavery     | SC(19)MAY07 |
| ▪ Terrorism                          | SC(19)MAY08 |

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

**10 May 2019**  
**Royal Courts of Justice**  
**Queen's Building**

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|---------------|--|
| 09:45 – 10:00 | Minutes of the last meeting and matters arising (papers 1 & 2)           |
| 10:00 – 11:00 | Drugs – presented by Eleanor Nicholls (paper 3)                          |
| 11:00 – 12:00 | Attempted murder – presented by Lisa Frost (paper 4)                     |
| 12:00 – 13:00 | Firearms – presented by Ruth Pope (paper 5)                              |
| 13:00 – 13:45 | Lunch (extended for photos of members)                                   |
| 13:45 – 14:30 | Public Order – presented by Lisa Frost (paper 6)                         |
| 14:30 – 15:00 | Immigration and modern slavery – presented by Eleanor Nicholls (paper 7) |
| 15:00 – 15:30 | Terrorism – presented by Ruth Pope (paper 8)                             |

# Sentencing Council

## **COUNCIL MEETING AGENDA**

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## MEETING OF THE SENTENCING COUNCIL

5 APRIL 2019

## MINUTES

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Members present:

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

Apologies:

Sarah Munro

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  
Sophie Klinger  
Amber Isaac  
Mandy Banks  
Eleanor Nicholls

## **1. MINUTES OF LAST MEETING**

- 1.1. The minutes from the meeting of 1 March 2019 were agreed.

## **2. MATTERS ARISING**

- 2.1 The Chairman welcomed Diana Fawcett to her first Council meeting since her recent appointment as Council member with specific responsibility for promoting the welfare of victims of crime. He recorded the Council's gratitude to the outgoing victims' representative, Mark Castle, for his contributions during his extended term of service.

## **3. DISCUSSION ON ARSON/CRIMINAL DAMAGE – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL**

- 3.1 This was the final discussion of the offences before publication of the definitive guideline later this year. The Council reviewed all the changes that have been made post consultation and made some minor amendments to the wording around requesting reports in cases relating to the threats to destroy, or bomb property, offence.
- 3.2 The Council also reviewed the sentence ranges for the threats offence, and the guideline for criminal damage cases over £5000, and decided that there should be more alignment between the two.

## **4. DISCUSSION ON FIREARMS – PRESENTED BY SOPHIE KLINGER, OFFICE OF THE SENTENCING COUNCIL**

- 4.1 The Council considered revisions to the possession with intent and transfer/manufacture guidelines following the meeting of the Firearms Working Group in March. Several changes were agreed to the wording of factors in harm and a change in culpability to clarify the applicability of certain factors to imitation firearms.
- 4.2 The Council also agreed several minor changes to aggravating and mitigating factors. The factors have been reordered across the guidelines to a more logical sequence, which was approved.
- 4.3 The Council also discussed sentence levels for possession guidelines and transfer/manufacture. The Council agreed that the Firearms Working Group should consider the detail of the sentence tables and issues about relativity between levels in between guidelines before these are discussed by the full Council at a later meeting.

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

- 5.1 The Council considered consultation responses and research findings for the s4, s4A and s5 Public Order offences relating to disorderly behaviour. Based on these, minor amendments to culpability and harm factors were agreed. Some adjustment to s4 sentences were agreed to

provide for relativity with the common assault sentences in the draft revised assault guideline, given the overlap between these two offences.

- 5.2 The Council discussed the approach to sentencing racially and religiously aggravated offences and, in light of research findings, it was decided to adopt the approach previously agreed for the aggravated forms of other offences. This would ensure a consistent approach across guidelines.

## **6. DISCUSSION ON NEW ANALYSIS TO SUPPORT DRUGS GUIDELINE – PRESENTED BY AMBER ISAAC, OFFICE OF THE SENTENCING COUNCIL**

- 6.1 The Council was given a presentation on progress with a new piece of analysis investigating the factors that influence sentences imposed at the Crown Court for drug offences. This analysis includes culpability, harm, aggravating and mitigating factors, information on guilty pleas and demographic factors.

- 6.2 The Council considered and discussed the analysis, and aims to publish it when completed, alongside the launch of the guideline consultation.

## **7. DISCUSSION ON DRUGS – PRESENTED BY ELEANOR NICHOLLS, OFFICE OF THE SENTENCING COUNCIL**

- 7.1 The Council considered the assessment of harm for the main Misuse of Drugs Act 1971 offences and agreed to make some changes to the drugs listed in the harm tables, to take account of changes in the way these offences are committed and of new drugs coming into the market. The Council decided not to revise the indicative quantities in the current guideline, but agreed changes to wording for the highest quantities of drugs above those set out in Category 1 harm.

- 7.2 The Council also agreed an approach to the assessment of harm for the main Psychoactive Substances Act 2016 offences, which can cover a very wide range of substances. The Council decided to consult on an approach based on quantity of drug, also taking into account any evidence of particular harm caused by the substance in question.

## **8. DISCUSSION ON ASSAULT – PRESENTED BY LISA FROST, OFFICE OF THE SENTENCING COUNCIL**

- 8.1 The Council considered findings from early research with Crown Court judges on the revised draft ABH guideline and for the early revised draft GBH guidelines.

- 8.2 The Council agreed some minor amendments to factors within the draft guidelines based on the research findings. Final approval of the draft guidelines will be made at a later date once the draft resource assessment has been prepared and reviewed.

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## ACTION AND ACTIVITY LOG – as at 3 May 2019

	Topic	What	Who	Actions to date	Outcome
<b>SENTENCING COUNCIL MEETING 27 July 2018</b>					
1	Mental Health	Claire agreed to check the data held in relation to probation reports, specifically, what percentage of reports (oral and written) suggested that psychiatric reports were ordered.	Pamela Jooman	<b>ACTION ONGOING-</b> It has been determined that any information available in the reports is likely to be limited (in terms of both coverage and detail), and would require a large amount of resource to extract. SC A&R are instead investigating other sources of data and working with MoJ colleagues to determine what information may be available.	
<b>SENTENCING COUNCIL MEETING 5 April 2019</b>					
2	Firearms	Firearms Working Group to consider issues arising from April Council meeting.	Sophie Klinger/ Ruth Pope		<b>ACTION CLOSED:</b> Meeting held on 29 April.
3	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 Nichols	<b>ACTION ONGOING-</b> Further analysis is underway. The results of this and a proposed action plan will be presented to Council at the June meeting.	

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**Sentencing Council meeting:** 10 May 2019  
**Paper:** SC(19)MAY03 – Drug Offences  
**Lead officials:** Eleanor Nicholls  
**Lead Council members:** Rebecca Crane  
Sarah Munro

## **1 ISSUE**

1.1 This paper covers sentence levels for the offences covered by these guidelines, including offences under the Misuse of Drugs Act 1971 and the Psychoactive Substances Act 2016. These are based on decisions on structure of the guidelines and factors already agreed.

## **2 RECOMMENDATION**

2.1 That the Council agrees:

- the proposed sentence levels for these offences; and
- some changes to quantities and harm factors for these offences.

## **3 CONSIDERATION**

### *Sentence levels - general*

3.1 In September, you agreed that you did not wish to make any significant changes to sentencing practice overall. I have therefore reviewed available data and information, in the context of the decisions already taken on the structure of these guidelines, to work out whether any change is needed to the sentence levels in the current guidelines in order to maintain current sentencing practice. In particular, I have reviewed the conclusions of the evaluation into the operation of the current guideline and those areas where it appeared that the current guideline had changed sentencing practice.

### *Importation/Exportation offences (Misuse of Drugs Act 1971) – Annex A*

3.2 Current starting points and ranges for these offences are as follows:

CLASS A	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	<b>Starting point</b> 14 years' custody <b>Category range</b> 12 – 16 years' custody	<b>Starting point</b> 10 years' custody <b>Category range</b> 9 – 12 years' custody	<b>Starting point</b> 8 years' custody <b>Category range</b> 6 – 9 years' custody
Category 2	<b>Starting point</b> 11 years' custody <b>Category range</b> 9 – 13 years' custody	<b>Starting point</b> 8 years' custody <b>Category range</b> 6 years 6 months' – 10 years' custody	<b>Starting point</b> 6 years' custody <b>Category range</b> 5 – 7 years' custody
Category 3	<b>Starting point</b> 8 years 6 months' custody <b>Category range</b> 6 years 6 months' – 10 years' custody	<b>Starting point</b> 6 years' custody <b>Category range</b> 5 – 7 years' custody	<b>Starting point</b> 4 years 6 months' custody <b>Category range</b> 3 years 6 months' – 5 years' custody
Category 4	<b>Where the quantity falls below the indicative amount set out for category 4 on the previous page, first identify the role for the importation offence, then refer to the starting point and ranges for possession or supply offences, depending on intent. Where the quantity is significantly larger than the indicative amounts for category 4 but below category 3 amounts, refer to the category 3 ranges in the importation guideline.</b>		

CLASS B	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	<b>Starting point</b> 8 years' custody <b>Category range</b> 7 – 10 years' custody	<b>Starting point</b> 5 years 6 months' custody <b>Category range</b> 5 – 7 years' custody	<b>Starting point</b> 4 years' custody <b>Category range</b> 2 years 6 months' – 5 years' custody
Category 2	<b>Starting point</b> 6 years' custody <b>Category range</b> 4 years 6 months' – 8 years' custody	<b>Starting point</b> 4 years' custody <b>Category range</b> 2 years 6 months' – 5 years' custody	<b>Starting point</b> 2 years' custody <b>Category range</b> 18 months' – 3 years' custody
Category 3	<b>Starting point</b> 4 years' custody <b>Category range</b> 2 years 6 months' – 5 years' custody	<b>Starting point</b> 2 years' custody <b>Category range</b> 18 months' – 3 years' custody	<b>Starting point</b> 1 year's custody <b>Category range</b> 12 weeks' – 18 months' custody
Category 4	<b>Where the quantity falls below the indicative amount set out for category 4 on the previous page, first identify the role for the importation offence, then refer to the starting point and ranges for possession or supply offences, depending on intent. Where the quantity is significantly larger than the indicative amounts for category 4 but below category 3 amounts, refer to the category 3 ranges in the importation guideline.</b>		

CLASS C	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	<b>Starting point</b> 5 years' custody <b>Category range</b> 4 - 8 years' custody	<b>Starting point</b> 3 years' custody <b>Category range</b> 2 – 5 years' custody	<b>Starting point</b> 18 months' custody <b>Category range</b> 1 – 3 years' custody
Category 2	<b>Starting point</b> 3 years 6 months' custody <b>Category range</b> 2 - 5 years' custody	<b>Starting point</b> 18 months' custody <b>Category range</b> 1 – 3 years' custody	<b>Starting point</b> 26 weeks' custody <b>Category range</b> 12 weeks' – 18 months' custody
Category 3	<b>Starting point</b> 18 months' custody <b>Category range</b> 1 – 3 years' custody	<b>Starting point</b> 26 weeks' custody <b>Category range</b> 12 weeks' – 18 months' custody	<b>Starting point</b> High level community order <b>Category range</b> Medium level community order - 12 weeks' custody

<b>Category 4</b>	<b>Where the quantity falls below the indicative amount set out for category 4 on the previous page, first identify the role for the importation offence, then refer to the starting point and ranges for possession or supply offences, depending on intent. Where the quantity is significantly larger than the indicative amounts for category 4 but below category 3 amounts, refer to the category 3 ranges in the importation guideline.</b>
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3.3 The evaluation shows that, as expected, there was an immediate decrease in sentencing severity for these offences following implementation of these guidelines, followed by a gradual increase. The decrease is likely to be caused by the lowering of sentences for so called “drug mules” as intended by the Council. The slight increase thereafter may be due to changes in the seriousness of the offences coming before the courts; survey data suggests that, for example, there has been an increase in the purity of drugs involved in these offences. Analysis of data from 2016 and 2017 shows that sentence severity has remained relatively stable over the last few years.

3.4 The only concerns expressed by judges we have spoken to in relation to these offences related to those at the very top end, and whether any additional category was needed for the handful of cases involving very large quantities of drugs. You discussed this at the last meeting and agreed not to introduce an additional higher category, but to amend wording. Judges reported no further concerns about sentence levels for these offences.

3.5 Analysis of transcripts of these offences suggests that judges are not finding difficulties with the sentence levels, perhaps in part because of the flexible approach to quantity and the ability of a judge to place a case on the borderline between categories where (for example) they are balancing culpability factors from both significant and lesser role categories. Where sentencers were going outside the range, this was clearly based on either a very large quantity of drugs justifying a very high sentence, or a very low culpability justifying a lower level of sentence than that indicated by the range in the guideline.

3.6 Evidence does not therefore suggest that changes to the sentence levels for the importation offences are needed, and I therefore propose to keep them as they are in the current guideline. The exception to this is the way in which sentence levels are given for Category 4 harm cases, those involving a very small quantity of drugs. The current guideline states that these should be dealt with using the possession guideline. When considering the possession guideline, we found that magistrates are often confused by reference to importation within the possession guideline and you decided to remove the reference from the possession guideline and change the wording in the importation guideline. In the digital version of the guideline, the

references to the possession or supply guideline (in bold below) would be linked directly to those guidelines. I have therefore redrafted the category 4 sections of the table as follows:

Where the quantity falls below the indicative amount set out for category 4 ~~on the previous page above~~, first identify the role for the importation offence, then refer to the starting point and ranges for **possession** or **supply** offences, depending on intent, and consider the importation as an aggravating factor.

Where the quantity is significantly larger than the indicative amounts for category 4 but below category 3 amounts, refer to the category 3 ranges above.

**Question 1: Does the Council agree to retaining the sentence levels given in the current guideline for importation offences under the MDA?**

**Question 2: Does the Council agree to the changes to the sections of the tables relating to category 4 harm, set out above?**

*Supply/PWITS offences (Misuse of Drugs Act 1971) – Annex B*

3.7 The current sentence level tables for these offences are as follows:

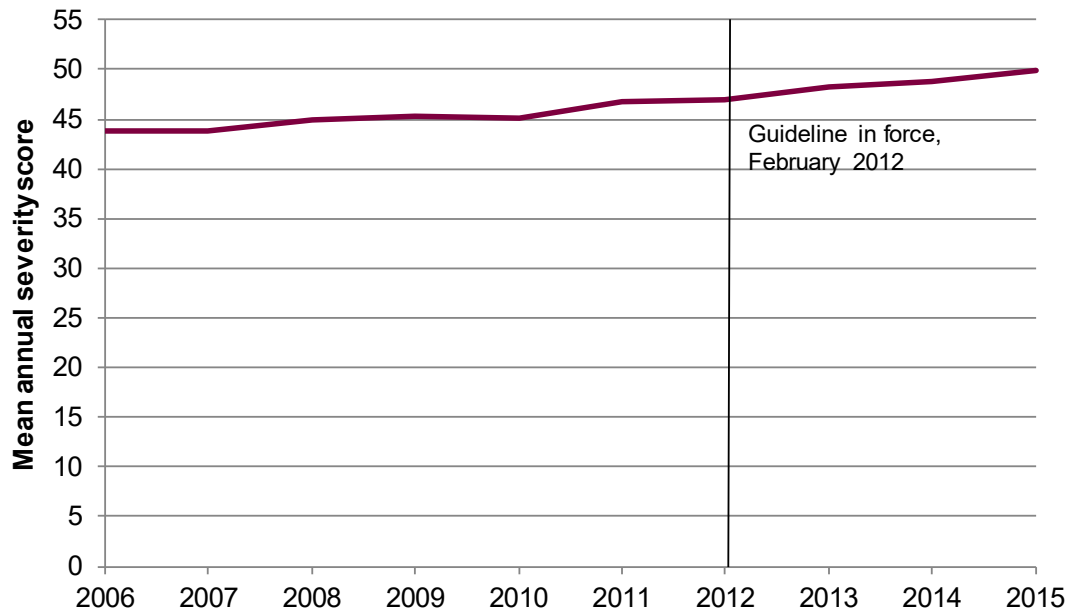
CLASS A	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	<b>Starting point</b> 14 years' custody <b>Category range</b> 12 – 16 years' custody	<b>Starting point</b> 10 years' custody <b>Category range</b> 9 – 12 years' custody	<b>Starting point</b> 7 years' custody <b>Category range</b> 6 – 9 years'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

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

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

3.8 The evaluation indicated that for supply/PWITS Class A, there was a small but nevertheless statistically significant change in the sentencing severity trend a short while after the guideline was introduced.

**Figure 1: Sentencing severity for supply and possession with intent to supply class A, across Crown and magistrates' courts, 2006 to 2015**



3.9 This trend may be connected with the expansion of SSOs in LASPO 2012, which came into force around the same time as the current guideline; the evaluation showed an increase in the use of SSOs and decrease in use of Community Orders. However, there was also an increase in average custodial sentence lengths, something which should not be affected by the change to SSOs. Analysis of the Crown Court Sentencing Survey data suggests that the guideline may have had an unintended impact on sentencing practice, perhaps caused by the introduction in the guideline of a clear distinction between sentencing for Class A and Class B drugs. However, some of the increase in severity may have been caused by the offences before the courts actually becoming more serious; CCSS analysis of cases in 2013 and 2014 showed an increase in the proportion of cases classified as “significant” role and a corresponding reduction in the proportion of cases classed as “lesser” role.

3.10 Analysis of the 2016 and 2017 data (analysed since the evaluation), however, shows that sentencing severity for supply offences has remained stable since 2015. For PWITS offences, severity has continued to increase slightly.

3.11 Similar factors as described above may be in play in relation to supply/PWITS Class B offences, where there was an initial drop in sentencing severity when the guideline came into force, caused perhaps by the introduction of the clear distinction between classes A and B. Thereafter, there was a slight increase in sentencing severity, perhaps related to the introduction of SSOs (which may have more impact



on Class B offences for which sentences are more likely to be suspended) and change in the actual seriousness of offences.

3.12 Analysis of more recent sentencing data shows that the trend of increasing sentence severity for supply Class B continued up until 2016, and has since remained stable. For PWITS, which is by far the larger number of offences, severity has remained relatively stable since 2015. Overall, therefore, severity for these offences has remained fairly constant in the last two years.

3.13 Given the above analysis, I had not thought that any change to sentence levels in the supply/PWITS guidelines would be necessary. However, we should consider the changes already suggested to the culpability factors and whether these risk affecting sentence levels, and, if so, whether you wish to change the levels in the tables to maintain current sentence levels overall. I have considered where factors added to the “Leading” role category (see Annex B) may potentially lead to additional cases being placed in this category and receiving higher sentences than they currently receive. This risk could be mitigated by reducing the starting point and/or range for Leading role cases, but this could then reduce sentences for all cases in these categories, not just those additionally placed here. I have therefore concluded that we should not make any changes for these reasons.

3.14 Analysis of transcripts of supply, conspiracy to supply and PWITS cases does not show that judges are having difficulties in using the sentence levels given in the current guideline, or finding themselves having to go outside the given ranges other than when there is a very large quantity of drugs, or particularly high culpability factors, such as the offender being a police officer stealing confiscated drugs to sell on.

3.15 Reviewing all the evidence we have, I do not believe there is a need to make changes to the levels in the current guideline.

***Question 3: Is the Council content to retain the sentence levels in the current guideline for the supply and PWITS offences?***

*Production/cultivation offences (Misuse of Drugs Act 1971) – Annex C*

3.16 Volumes of the production offences for Classes A and C drugs are lower than those of the supply offences, making analysis more difficult. Volumes of Class B production/cultivation are high, however, with most offences being cannabis cultivation. For these offences, the evaluation showed that sentencing severity

appeared to stabilise following the introduction of the guideline, and remained flat between 2012 and 2015. This appeared to be because more cases were falling into the lower harm categories than had been expected. Analysis of 2016 and 2017 data shows that this overall trend has continued, though there has been a slight increase in severity in 2017.

3.17 We have not spoken to magistrates and judges about the cultivation offences, so have no additional information on any concerns about the sentence level tables in the current guideline.

3.18 As with other offences, analysis of transcripts has not shown any significant concerns with current levels in the tables at step 2. Sentencers seemed to use the tables as intended, moving between categories where necessary, or outside them in cases with, for example, particularly large numbers of cannabis plants, or particularly low level of role.

3.19 Given the above evidence, I am not proposing to change the sentence levels within the current guideline for the production/cultivation offences.

***Question 4: Is the Council content to retain the sentence levels in the current guideline for the production and cultivation offences?***

*Permitting premises to be used for drug-related activity - Annex D*

3.20 The current sentence level tables for this offence, put into the standard format as agreed at the November meeting, are as follows:

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

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

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

3.21 These offences are very low volume (only around 260 offenders were sentenced in 2017 across all classes) which makes analysis of sentencing data difficult. The evaluation and consideration of more recent data on these offences suggests that mean sentencing severity fell on the introduction of the guideline, which is likely to be caused by the guideline narrowing the range of sentences given for an uncommon offence for which sentencing severity was previously widely dispersed. Since then, sentencing severity has remained fairly stable for class B, although there has been a very small increase in 2017 for class A.

3.22 In November, you agreed that, especially as the introduction of this guideline appears to have narrowed the range of sentences across this offence, you wished to revise the guideline as little as possible, so as to maintain this trend rather than disrupt it. Analysis of transcripts does not suggest that judges in the Crown Court are experiencing any difficulties with current sentencing starting points or ranges.

3.23 In the absence of evidence that current sentence levels in the guideline are causing problems, I am therefore proposing to retain current sentence levels as in the table above.

**Question 5: Is the Council content to retain the starting points and ranges in the current guideline for these offences?**

3.24 At the November meeting, you agreed to make some changes to the quantities given in the Harm table, removing reference to specific quantities, and instead referring to categories in the supply/PWITS offences. We have therefore made some changes to the Harm table, as follows:

<b>Harm</b> 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	
<b>Category 1</b>	<ul style="list-style-type: none"> <li>• <del>Regular drug-related activity</del> <u>Premises used for drug activity over a long duration</u></li> <li>• Higher quantity of drugs, <u>amounting to category 3 and above [link to supply guideline]</u> <del>for example:</del> <ul style="list-style-type: none"> <li>• <del>Heroin, cocaine – more than 5g</del></li> <li>• <del>Cannabis – more than 50g</del></li> </ul> </li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• <del>Infrequent drug-related activity</del> <u>Premises used for drug activity over a short duration</u></li> <li>• Lower quantity of drugs, <u>amounting to category 4 [link to supply guideline]</u> <del>for example</del> <ul style="list-style-type: none"> <li>• <del>Heroin, cocaine – up to 5g</del></li> <li>• <del>Cannabis – up to 50g</del></li> </ul> </li> </ul>

**Question 6: Does the Council agree with the changes to wording of harm factors relating to quantity in the above table?**

*Psychoactive Substances Act 2016 (PSA) offences – Annex E*

3.25 In April you agreed the culpability and harm factors for offences under the PSA. Setting appropriate starting points and ranges for these offences is difficult, as there are few cases and the range of potential substances is broad. We have reviewed existing sentencing data for these offences since they came into force in 2016, and have considered transcripts for some of these cases. The statutory maximum penalty for the production/cultivation, supply/PWITS and importation offences is 7 years, half that of the equivalent drug offences. Nevertheless, the sentence level tables for drug offences help to suggest starting points and ranges for these offences.

3.26 Transcripts also suggest that judges are using starting points and ranges set out in the current Drug Offences guideline to frame their thinking when sentencing the equivalent psychoactive substances offences, but taking into account the lower

statutory maximum. This is leading to sentences somewhat similar to those for equivalent class C offences, though slightly lower.

3.27 In keeping with the approach taken to the equivalent MDA offences, I propose setting the same starting points and ranges for all of the importation/exportation, supply/PWITS and production offences, given the common statutory maximum (seven years). With the low number of offences currently having been sentenced, and the variation in types of substance, any starting points and ranges are likely to be somewhat arbitrary.

3.28 As sentence levels for the PSA importation, supply and production offences are similar to those for equivalent Class C drug offences, I initially considered using the lower sections of the Class C drug offences sentencing tables for the PSA offences. However, there are some differences in the current sentence levels, particularly for custodial sentence lengths, which suggest that some elements of the Class C table would risk increasing sentences. In particular, Class C offences more frequently receive a sentence of around 18 months, whereas sentences of 12 months are more common for the PSA offences. I therefore suggest that for the PSA offences, we consult on starting points and ranges which are, at the upper end, slightly lower than those for Class C offences, giving the following sentence level table:

	<b>LEADING ROLE</b>	<b>SIGNIFICANT ROLE</b>	<b>LESSER ROLE</b>
<b>Category 1</b>	<b>Starting point</b> 3 years' custody <b>Category range</b> 2 – 5 years' custody	<b>Starting point</b> 12 months' custody <b>Category range</b> 9 months' – 3 years' custody	<b>Starting point</b> 26 weeks' custody <b>Category range</b> 12 weeks' – 18 months' custody
<b>Category 2</b>	<b>Starting point</b> 12 months' custody <b>Category range</b> 9 months' – 3 years' custody	<b>Starting point</b> 26 weeks' custody <b>Category range</b> 12 weeks' – 18 months' custody	<b>Starting point</b> High level community order <b>Category range</b> Low level community order – 12 weeks' custody
<b>Category 3</b>	<b>Starting point</b> 26 weeks' custody <b>Category range</b> High level community order – 18 months' custody	<b>Starting point</b> High level community order <b>Category range</b> Low level community order – 12 weeks' custody	<b>Starting point</b> Low level community order <b>Category range</b> Band A fine – medium level community order

***Question 7: Are you content to consult on the above starting points and ranges for these PSA offences? Are you content to consult on the same starting***

***points and ranges across the importation/exportation, supply/offer to supply/PWITS and production offences under the PSA?***

*Quantities – MDMA and synthetic cannabinoid receptor agonists*

3.29 At the April meeting you discussed approach to quantities, and there were several outstanding questions, including those relating to quantities of MDMA/ecstasy and synthetic cannabinoid receptor agonists (SCRAs). We have now had some additional information on these from experts at the National Crime Agency which helps to suggest quantities we can use in the Harm tables for the main MDA offences. On MDMA, you decided to include both numbers of ecstasy tablets and weights of MDMA in the table. Your approach is supported by the evidence from the NCA, who say that it is very difficult to equate the two, not only because of wide variation in the purity of ecstasy tablets (in terms of quantity of MDMA per tablet) but also because the two operate in separate markets. It is not the case that MDMA powder is imported in order to be made into tablets in the UK; instead, it is sold in powder or crystal form to the end users, or even sometimes in a tablet form but not known or marketed as “ecstasy” (and may be “cut” with different adulterants). The NCA suggest that MDMA in its powder or crystal form should be treated as any other Class A drug, and the weights given should be those of cocaine and heroin. This also has the advantage of simplicity, for us and for the courts. For ecstasy tablets, as discussed at your April meeting, I propose to retain the current quantities.

***Question 8: Do you agree to consulting on using the same weights of MDMA as are used for cocaine and heroin, and retaining the current quantities of ecstasy tablets?***

3.30 On SCRAs, the picture is less clear. The NCA state that giving a standard weight to use in a guideline is going to be very difficult, because of the variety of ways in which the drugs can be produced and sold. The drug is normally imported/produced as a powder, which is then dissolved and then sprayed onto a carrier substance, which could be herbal matter, paper or something else, which can then be smoked. Not only can the initial dilution vary, but the amount of herbal matter/paper covered by the given quantity of solution also varies. Given this uncertainty, there are two options:

- a) Do not provide weights, but use the approach to quantities which you agreed for Psychoactive Substances Offences 2016, describing quantities as “Large quantity indicative of commercial scale operation”, “Supply directly to users” and “Very small quantity”.

- b) Consult on some suggested quantities, perhaps fixing them between those for cannabis and those for ketamine, also a Class B drug. These levels are arbitrary, and may not be those which will most assist sentencers, but would give us something to work with. The indicative quantities could be as follows:

Category 1	100kg
Category 2	20kg
Category 3	1kg
Category 4	50g

3.31 At this consultation stage, I propose to take the latter approach, suggesting quantities and seeking respondents' views on how appropriate those quantities are. If this does not lead to clear information on which to base the definitive guideline for SCRA's, we can revert to the approach taken for psychoactive substances, but at least consulting on it gives us a chance to gather additional views and information on how this might work in practice.

***Question 9: Does the Council agree to consulting on proposed quantities as set out under option b) above?***

#### **4. IMPACT AND RISKS**

4.1 Some of the changes proposed above may have resource impacts and risks. A resource assessment will be carried out prior to consultation, including some analysis of 2018 sentencing data which will become available in late May. Further information will be available to the Council when these guidelines are signed off for consultation.

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## **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 the most~~ 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.

<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 5kg</li> <li>• Ecstasy – 10,000 tablets</li> <li>• MDMA – <u>5kg</u></li> <li>• LSD – 250,000 squares</li> <li>• Amphetamine – 20kg</li> <li>• Cannabis – 200kg</li> <li>• Ketamine – 5kg</li> <li>• Synthetic cannabinoid receptor agonists – <u>100kg</u></li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 1kg</li> <li>• Ecstasy – 2,000 tablets</li> <li>• MDMA – <u>1kg</u></li> <li>• LSD – 25,000 squares</li> <li>• Amphetamine – 4kg</li> <li>• Cannabis – 40kg</li> <li>• Ketamine – 1kg</li> <li>• Synthetic cannabinoid receptor agonists – <u>20kg</u></li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 150g</li> <li>• Ecstasy – 300 tablets</li> <li>• MDMA – <u>150g</u></li> <li>• LSD – 2,500 squares</li> <li>• Amphetamine – 750g</li> <li>• Cannabis – 6kg</li> <li>• Ketamine – 150g</li> <li>• Synthetic cannabinoid receptor agonists – <u>1kg</u></li> </ul>
<b>Category 4</b>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 5g</li> <li>• Ecstasy – 20 tablets</li> <li>• MDMA – <u>5g</u></li> <li>• LSD – 170 squares</li> <li>• Amphetamine – 20g</li> <li>• Cannabis – 100g</li> <li>• Ketamine – 5g</li> <li>• Synthetic cannabinoid receptor agonists – <u>50g</u></li> </ul>

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	<b>Starting point</b> 14 years' custody <b>Category range</b> 12 – 16 years' custody	<b>Starting point</b> 10 years' custody <b>Category range</b> 9 – 12 years' custody	<b>Starting point</b> 8 years' custody <b>Category range</b> 6 – 9 years' custody
Category 2	<b>Starting point</b> 11 years' custody <b>Category range</b> 9 – 13 years' custody	<b>Starting point</b> 8 years' custody <b>Category range</b> 6 years 6 months' – 10 years' custody	<b>Starting point</b> 6 years' custody <b>Category range</b> 5 – 7 years' custody
Category 3	<b>Starting point</b> 8 years 6 months' custody <b>Category range</b> 6 years 6 months' – 10 years' custody	<b>Starting point</b> 6 years' custody <b>Category range</b> 5 – 7 years' custody	<b>Starting point</b> 4 years 6 months' custody <b>Category range</b> 3 years 6 months' – 5 years' custody
Category 4	Where the quantity falls below the indicative amount set out for category 4 <del>on the previous page above</del> , first identify the role for the importation offence, then refer to the starting point and ranges for possession or supply offences, <u>and consider the importation as an aggravating factor</u> . Where the quantity is significantly larger than the indicative amounts for category 4 but below category 3 amounts, refer to the category 3 ranges in the importation guideline.		

CLASS B	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	<b>Starting point</b> 8 years' custody <b>Category range</b> 7 – 10 years' custody	<b>Starting point</b> 5 years 6 months' custody <b>Category range</b> 5 – 7 years' custody	<b>Starting point</b> 4 years' custody <b>Category range</b> 2 years 6 months' – 5 years' custody
Category 2	<b>Starting point</b> 6 years' custody <b>Category range</b> 4 years 6 months' – 8 years' custody	<b>Starting point</b> 4 years' custody <b>Category range</b> 2 years 6 months' – 5 years' custody	<b>Starting point</b> 2 years' custody <b>Category range</b> 18 months' – 3 years' custody
Category 3	<b>Starting point</b> 4 years' custody <b>Category range</b> 2 years 6 months' – 5 years' custody	<b>Starting point</b> 2 years' custody <b>Category range</b> 18 months' – 3 years' custody	<b>Starting point</b> 1 year's custody <b>Category range</b> 12 weeks' – 18 months' custody

<b>Category 4</b>	<p>Where the quantity falls below the indicative amount set out for category 4 <del>on the previous page above</del>, first identify the role for the importation offence, then refer to the starting point and ranges for possession or supply offences, <u>and consider the importation as an aggravating factor</u>.</p> <p>Where the quantity is <del>significantly</del> larger than the indicative amounts for category 4 but below category 3 amounts, refer to the category 3 ranges in the importation guideline.</p>
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CLASS C	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
<b>Category 1</b>	<p><b>Starting point</b> 5 years' custody <b>Category range</b> 4 - 8 years' custody</p>	<p><b>Starting point</b> 3 years' custody <b>Category range</b> 2 – 5 years' custody</p>	<p><b>Starting point</b> 18 months' custody <b>Category range</b> 1 – 3 years' custody</p>
<b>Category 2</b>	<p><b>Starting point</b> 3 years 6 months' custody <b>Category range</b> 2 - 5 years' custody</p>	<p><b>Starting point</b> 18 months' custody <b>Category range</b> 1 – 3 years' custody</p>	<p><b>Starting point</b> 26 weeks' custody <b>Category range</b> 12 weeks' – 18 months' custody</p>
<b>Category 3</b>	<p><b>Starting point</b> 18 months' custody <b>Category range</b> 1 – 3 years' custody</p>	<p><b>Starting point</b> 26 weeks' custody <b>Category range</b> 12 weeks' – 18 months' custody</p>	<p><b>Starting point</b> High level community order <b>Category range</b> Medium level community order - 12 weeks' custody</p>
<b>Category 4</b>	<p>Where the quantity falls below the indicative amount set out for category 4 <del>on the previous page above</del>, first identify the role for the importation offence, then refer to the starting point and ranges for possession or supply offences, <u>and consider the importation as an aggravating factor</u>.</p> <p>Where the quantity is <del>significantly</del> larger than the indicative amounts for category 4 but below category 3 amounts, refer to the category 3 ranges in the importation guideline.</p>		

*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

*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

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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 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.

<p><b>Category 1</b></p>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 5kg</li> <li>• Ecstasy – 10,000 tablets</li> <li>• MDMA – <u>5kg</u></li> <li>• LSD – 250,000 squares</li> <li>• Amphetamine – 20kg</li> <li>• Cannabis – 200kg</li> <li>• Ketamine – 5kg</li> <li>• Synthetic cannabinoid receptor agonists – <u>100kg</u></li> </ul>
<p><b>Category 2</b></p>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 1kg</li> <li>• Ecstasy – 2,000 tablets</li> <li>• MDMA – <u>1kg</u></li> <li>• LSD – 25,000 squares</li> <li>• Amphetamine – 4kg</li> <li>• Cannabis – 40kg</li> <li>• Ketamine – 1kg</li> <li>• Synthetic cannabinoid receptor agonists – <u>20kg</u></li> </ul>
<p><b>Category 3</b></p>	<p>Selling directly to users OR Supply of drugs in prison OR</p> <ul style="list-style-type: none"> <li>• Heroin, cocaine – 150g</li> <li>• Ecstasy – 300 tablets</li> <li>• MDMA – <u>150g</u></li> <li>• LSD – 2,500 squares</li> <li>• Amphetamine – 750g</li> <li>• Cannabis – 6kg</li> <li>• Ketamine – 150g</li> <li>• Synthetic cannabinoid receptor agonists – <u>1kg</u></li> </ul>
<p><b>Category 4</b></p>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 5g</li> <li>• Ecstasy – 20 tablets</li> </ul>



	<ul style="list-style-type: none"> <li>• MDMA – <u>5g</u></li> <li>• LSD – 170 squares</li> <li>• Amphetamine – 20g</li> <li>• Cannabis – 100g</li> <li>• Ketamine – 5g</li> <li>• Synthetic cannabinoid receptor agonists – <u>50g</u></li> </ul> <p>Note – where the offence is selling directly to users or supply in prison the starting point is not based on quantity – go to category 3</p>
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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
<b>Category 1</b>	<p><b>Starting point</b> 14 years' custody <b>Category range</b> 12 – 16 years' custody</p>	<p><b>Starting point</b> 10 years' custody <b>Category range</b> 9 – 12 years' custody</p>	<p><b>Starting point</b> 7 years' custody <b>Category range</b> 6 – 9 years' custody</p>
<b>Category 2</b>	<p><b>Starting point</b> 11 years' custody <b>Category range</b> 9 – 13 years' custody</p>	<p><b>Starting point</b> 8 years' custody <b>Category range</b> 6 years 6 months' – 10 years' custody</p>	<p><b>Starting point</b> 5 years' custody <b>Category range</b> 3 years 6 months' – 7 years' custody</p>
<b>Category 3</b>	<p><b>Starting point</b> 8 years 6 months' custody <b>Category range</b> 6 years 6 months' – 10 years' custody</p>	<p><b>Starting point</b> 4 years 6 months' custody <b>Category range</b> 3 years 6 months' – 7 years' custody</p>	<p><b>Starting point</b> 3 years' custody <b>Category range</b> 2 – 4 years 6 months' custody</p>
<b>Category 4</b>	<p><b>Starting point</b> 5 years 6 months' custody <b>Category range</b> 4 years 6 months' – 7 years 6 months' custody</p>	<p><b>Starting point</b> 3 years 6 months' custody <b>Category range</b> 2 – 5 years' custody</p>	<p><b>Starting point</b> 18 months' custody <b>Category range</b> High level community order – 3 years' custody</p>

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

CLASS C	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	<b>Starting point</b> 5 years' custody <b>Category range</b> 4 – 8 years' custody	<b>Starting point</b> 3 years' custody <b>Category range</b> 2 – 5 years' custody	<b>Starting point</b> 18 months' custody <b>Category range</b> 1 – 3 years' custody
Category 2	<b>Starting point</b> 3 years 6 months' custody <b>Category range</b> 2 – 5 years' custody	<b>Starting point</b> 18 months' custody <b>Category range</b> 1 – 3 years' custody	<b>Starting point</b> 26 weeks' custody <b>Category range</b> 12 weeks' – 18 months' custody
Category 3	<b>Starting point</b> 18 months' custody <b>Category range</b> 1 – 3 years' custody	<b>Starting point</b> 26 weeks' custody <b>Category range</b> 12 weeks' – 18 months' custody	<b>Starting point</b> High level community order <b>Category range</b> Low level community order – 12 weeks' custody
Category 4	<b>Starting point</b> 26 weeks' custody <b>Category range</b> High level community order – 18 months' custody	<b>Starting point</b> High level community order <b>Category range</b> Low level community order – 12 weeks' custody	<b>Starting point</b> Low level community order <b>Category range</b> 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

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**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 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
- 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.

<p><b>Category 1</b></p>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 5kg</li> <li>• Ecstasy – 10,000 tablets</li> <li>• MDMA – <u>5kg</u></li> <li>• LSD – 250,000 squares</li> <li>• Amphetamine – 20kg</li> <li>• Cannabis – 200kg</li> <li>• Ketamine – 5kg</li> <li>• Synthetic cannabinoid receptor agonists – <u>100kg</u></li> </ul>
<p><b>Category 2</b></p>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 1kg</li> <li>• Ecstasy – 2,000 tablets</li> <li>• MDMA – <u>1kg</u></li> <li>• LSD – 25,000 squares</li> <li>• Amphetamine – 4kg</li> <li>• Cannabis – 40kg</li> <li>• Ketamine – 1kg</li> <li>• Synthetic cannabinoid receptor agonists – <u>20kg</u></li> </ul>
<p><b>Category 3</b></p>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 150g</li> <li>• Ecstasy – 300 tablets</li> <li>• MDMA – <u>150g</u></li> <li>• LSD – 2,500 squares</li> <li>• Amphetamine – 750g</li> <li>• Cannabis – 6kg</li> <li>• Ketamine – 150g</li> <li>• Synthetic cannabinoid receptor agonists – <u>1kg</u></li> </ul>

<b>Category 4</b>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 5g</li> <li>• Ecstasy – 20 tablets</li> <li>• MDMA – <u>5g</u></li> <li>• LSD – 170 squares</li> <li>• Amphetamine – 20g</li> <li>• Cannabis – 100g</li> <li>• Ketamine – 5g</li> <li>• Synthetic cannabinoid receptor agonists – <u>50g</u></li> </ul>
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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
<b>Category 1</b>	<b>Starting point</b> 14 years' custody <b>Category range</b> 12 – 16 years' custody	<b>Starting point</b> 10 years' custody <b>Category range</b> 9 – 12 years' custody	<b>Starting point</b> 7 years' custody <b>Category range</b> 6 – 9 years' custody
<b>Category 2</b>	<b>Starting point</b> 11 years' custody <b>Category range</b> 9 – 13 years' custody	<b>Starting point</b> 8 years' custody <b>Category range</b> 6 years 6 months' – 10 years' custody	<b>Starting point</b> 5 years' custody <b>Category range</b> 3 years 6 months' – 7 years' custody
<b>Category 3</b>	<b>Starting point</b> 8 years 6 months' custody <b>Category range</b> 6 years 6 months' – 10 years' custody	<b>Starting point</b> 4 years 6 months' custody <b>Category range</b> 3 years 6 months' – 7 years' custody	<b>Starting point</b> 3 years' custody <b>Category range</b> 2 – 4 years 6 months' custody
<b>Category 4</b>	<b>Starting point</b> 5 years 6 months' custody <b>Category range</b> 4 years 6 months' – 7 years 6 months' custody	<b>Starting point</b> 3 years 6 months' custody <b>Category range</b> 2 – 5 years' custody	<b>Starting point</b> 18 months' custody <b>Category range</b> High level community order – 3 years' custody

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

CLASS C	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	<b>Starting point</b> 5 years' custody <b>Category range</b> 4 – 8 years' custody	<b>Starting point</b> 3 years' custody <b>Category range</b> 2 – 5 years' custody	<b>Starting point</b> 18 months' custody <b>Category range</b> 1 – 3 years' custody
Category 2	<b>Starting point</b> 3 years 6 months' custody <b>Category range</b> 2 – 5 years' custody	<b>Starting point</b> 18 months' custody <b>Category range</b> 1 – 3 years' custody	<b>Starting point</b> 26 weeks' custody <b>Category range</b> 12 weeks' – 18 months' custody
Category 3	<b>Starting point</b> 18 months' custody <b>Category range</b> 1 – 3 years' custody	<b>Starting point</b> 26 weeks' custody <b>Category range</b> 12 weeks' – 18 months' custody	<b>Starting point</b> High level community order <b>Category range</b> Low level community order – 12 weeks' custody
Category 4	<b>Starting point</b> 26 weeks' custody <b>Category range</b> High level community order – 18 months' custody	<b>Starting point</b> High level community order <b>Category range</b> Low level community order – 12 weeks' custody	<b>Starting point</b> Low level community order <b>Category range</b> 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 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 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**.

**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.

**A - Higher culpability:**

- 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

**B – Lower culpability**

- Permits use for limited or no financial gain
- No active role in drug activity taking place
- Involved due to ~~pressure~~, intimidation or coercion ~~falling just short of duress~~
- Offender’s vulnerability has been exploited

**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

**Category 1**

- ~~Regular drug-related activity~~ Premises used for drug activity over a long duration
- Higher quantity of drugs, ~~for example~~ amounting to category 3 and above (link to supply guideline)
  - ~~Heroin, cocaine – more than 5g~~
  - ~~Cannabis – more than 50g/100g or 9 plants~~

**Category 2**

- ~~Infrequent drug-related activity~~ Premises used for drug activity over a short duration
- Lower quantity of drugs, ~~for example~~ amounting to category 4 (link to supply guideline)
  - ~~Heroin, cocaine – up to 5g~~
  - ~~Cannabis – up to 50g/100g or 9 plants~~

## 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><b>Starting point</b> 2 years 6 months' custody</p> <p><b>Category range</b> 18 months' – 4 years' custody</p>	<p><b>Starting point</b> 36 weeks' custody</p> <p><b>Category range</b> High level community order - 18 months' custody</p>
Harm 2	<p><b>Starting point</b> 36 weeks' custody</p> <p><b>Category range</b> High level community order - 18 months' custody</p>	<p><b>Starting point</b> Medium level community order</p> <p><b>Category range</b> Low level community order - High level community order</p>

### Class B

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

## Class C

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

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"> <li>• Large quantity indicative of commercial-scale operation</li> <li>• Supply in a custodial institution</li> </ul>
Category 2	<ul style="list-style-type: none"> <li>• Supply directly to users</li> </ul>
Category 3	<ul style="list-style-type: none"> <li>• Very small quantity</li> </ul>

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?



	<b>LEADING ROLE</b>	<b>SIGNIFICANT ROLE</b>	<b>LESSER ROLE</b>
<b>Category 1</b>	<b>Starting point</b> 3 years' custody <b>Category range</b> 2 – 5 years' custody	<b>Starting point</b> 12 months' custody <b>Category range</b> 9 months' – 3 years' custody	<b>Starting point</b> 26 weeks' custody <b>Category range</b> 12 weeks' – 18 months' custody
<b>Category 2</b>	<b>Starting point</b> 12 months' custody <b>Category range</b> 9 months' – 3 years' custody	<b>Starting point</b> 26 weeks' custody <b>Category range</b> 12 weeks' – 18 months' custody	<b>Starting point</b> High level community order <b>Category range</b> Low level community order – 12 weeks' custody
<b>Category 3</b>	<b>Starting point</b> 26 weeks' custody <b>Category range</b> High level community order – 18 months' custody	<b>Starting point</b> High level community order <b>Category range</b> Low level community order – 12 weeks' custody	<b>Starting point</b> Low level community order <b>Category range</b> 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
- 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

**Sentencing Council meeting:**  
**Paper number:**

**10 May 2019**  
**SC(19)MAY04 – Assault/Attempted  
Murder**

**Lead Council member:**  
**Lead official:**

**Julian Goose**  
**Lisa Frost**  
**0207 071 5784**

## **1 ISSUE**

1.1 This meeting requires consideration of the offence of Attempted Murder. It was previously agreed that the existing guideline should be updated and included in the revised Assault guideline. The Council will be asked to consider changes which may be required to the guideline format and content.

## **2 RECOMMENDATION**

2.1 That the Council:

- considers potential approaches to assessing harm and culpability in a revised guideline and;
- agrees principles relating to sentences which should be included in the revised guideline.

## **3 CONSIDERATION**

3.1 In agreeing the scope of the revised Assault guideline it was agreed that the offence of attempted murder should be included, as this represents the most serious assault offence not resulting in the death of a victim.

3.2 There is an existing SGC guideline for Attempted Murder. This is included at **Annex A**. The Council will be asked to consider options for revising this guideline and to agree the preferred format.

## Attempted Murder

3.3 For the offence of attempted murder to be made out it must be proved that the offender intended to kill the victim. This differs to murder where the intention can be broader and include the intention to kill or to inflict grievous bodily harm upon the victim. Attempted murder therefore requires a higher level of culpability. As the statutory definition of harm provides for harm caused or intended, even attempted murder with little or no impact upon a victim will always be extremely serious.

## Legislation

3.4 Attempted murder is provided for by s1(1) Criminal Attempts Act 1981. The maximum sentence is life imprisonment. Schedule 15B Part 1 of the Criminal Justice Act 2003 provides that attempted murder is an offence for which an automatic life sentence must be passed where specified criteria are met, and in other cases a life sentence or an extended sentence may be passed.

3.5 The existing guideline and sentences are naturally heavily influenced by sentences for murder, which is the offence which would be charged were the attempt successful. The Council will be aware that the offence of murder carries a mandatory sentence of life imprisonment and guidance on the minimum custodial term is provided for by Schedule 21 of the Criminal Justice Act 2003. The schedule includes a number of factors which set out the most serious examples of murder, and sets minimum custodial terms for these offences. The existing guideline provides for the most serious examples of attempted murder to reflect those included in paragraphs 4 and 5 of Schedule 21. The full schedule including factors is included at **Annex B**. A summary of the indicated minimum terms for murder is as follows:

### Para 4 Schedule 21 (exceptionally high seriousness)

Whole life order

### Para 5 Schedule 21 (particularly high seriousness)

Minimum term of 30 years

### Para 5A Schedule 21 (offences involving knife taken to scene)

Minimum term 25 years

### Para 6 Schedule 21 (all other offences where offender is 18 or over)

Minimum term 15 years

### Para 7 Schedule 21 (all other offences where offender is under 18 at time of offence)

Minimum term 12 years

### Existing guideline serious assessment

3.6 The existing attempted murder guideline provides for an offence which, had the charge have been murder falling within para 4 or 5 of Schedule 21, to be assessed as category 1 seriousness. Category 2 then provides for other planned attempts to kill and category 3 other spontaneous attempts to kill. Starting points vary according to the level of harm found.

3.7 The Court of Appeal have noted in a number of cases reviewed that the schedule should be treated as guidance, given the qualification that the legislation specifies the factors are 'normally' of the type to which the minimum sentences apply, and cases often include complex and varying factors which may influence the seriousness assessment. It is important to note that the schedule applies to offences of murder only and not to attempts. However, it would be difficult to justify the schedule not being reflected in a guideline providing for unsuccessful murder attempts, given the intent that is present.

3.8 Developing specific factors and sentences for a revised attempted murder guideline is therefore complex if factors and sentences reflecting seriousness specified by Parliament are included in a revised guideline. There is a risk that specifying factors may undermine the factors Parliament considered important in murder offences, and too much flexibility in assessing seriousness could result in a sentence which is higher or much lower than an equivalent minimum term murder sentence.

3.9 A number of options are available to consider how factors in a revised guideline should be constructed. It is important to note the potential impact of any approach on subsequent sentences which may be developed.

### **Option 1**

3.10 One option would be to retain the approach in the existing guideline for assessing culpability. As noted earlier this provides for paragraph 4 and 5 offences to be assessed at category 1, and premeditated and spontaneous attempts to be assessed respectively:

High culpability	Offences which had the charge have been murder would fall within para.4 or para.5 of schedule 21 of the Criminal Justice Act 2003
Medium culpability	Other planned attempted murder
Lesser culpability	Other spontaneous attempted murder

3.11 Ultimately culpability in attempted murder, as in many offences, is more serious where the offence has been planned, and the distinction in the existing guideline between premeditated and spontaneous attempted murder may be considered appropriate. This ensures the offences Parliament intended in respect of substantive murder offences are treated most seriously, as is the current position.

3.12 Since the existing guideline was developed an additional minimum term category has been introduced at para 5A of Schedule 21 for offences where a knife or other weapon is taken to a scene and used in an offence. For murder this offence carries a 25 year minimum term, so it would be necessary to decide if these should fall within high or medium culpability, and determine how best to reflect the murder minimum term range of whole life to 25 years for the various offences specified in the schedule.

## **Option 2**

3.13 An alternative option is that the factors included in the schedule could be translated into culpability factors. However, not all would be suitable for inclusion. This is because some Schedule 21 factors relate to multiple offences, and guidelines apply to individual offences. Other problematic schedule factors relate to an offender's previous convictions or age. As well as these not strictly speaking to culpability, guidelines assess offender specific factors such as previous convictions and age and maturity at step two, so this could cause the factors to be double counted. A disadvantage of this option is therefore that not all of the factors specified by Parliament in Schedule 21 could be properly reflected in the culpability assessment, and may not provide for a relative sentence to a similar circumstances murder to be achieved. A further disadvantage of listing specific factors is that Parliament may amend the schedule which could then render the guideline outdated, as with the existing due to the post guideline inclusion of para 5A in the schedule.

3.14 However, advantages of this option are that the guideline may provide greater flexibility for sentencers than the existing guideline and specify which of the schedule factors, and other factors, should increase the seriousness of an attempted murder offence. Some cases analysed have included comments from Judges which indicate that Schedule 21 factors and minimum terms should not be considered exhaustive, as other cases may involve various factors which also deem them exceptionally or particularly serious.

3.15 The schedule includes two starting points for murder offences which are of exceptionally high seriousness and particularly high seriousness. These offences are included in paras 4 and 5 of the schedule and attract whole life and 30 year minimum term sentences respectively, and the existing guideline provides for offences in both to be captured in the highest category of seriousness. It may be possible to extract aspects of

these factors and include them in the highest category of culpability in the attempted murder guideline. A suggested format and factors which could be included is as follows;

A - High culpability	<ul style="list-style-type: none"> <li>• Substantial degree of premeditation or planning of murder</li> <li>• Abduction of the victim with intent to murder</li> <li>• Offence motivated by or involves sexual or sadistic conduct</li> <li>• Attempted murder of a police officer or prison officer in the course of their duty</li> <li>• Offence committed for the purpose of advancing a political, religious, racial or ideological cause</li> <li>• Offence involves the use of a firearm or explosive</li> <li>• Offence committed for financial gain</li> <li>• Offence intended to obstruct or interfere with the course of justice</li> <li>• Offence racially or religiously aggravated or aggravated by sexual orientation, disability or transgender identity</li> <li>• Offender took a knife or other weapon to the scene intending to and using that knife or other weapon in committing the offence</li> </ul>
B - Medium culpability	<ul style="list-style-type: none"> <li>• Other planned attempt to kill not captured in category A</li> </ul>
C - Lesser culpability	<ul style="list-style-type: none"> <li>• Other spontaneous attempt to kill not captured in category A</li> </ul>

3.16 The Council will note that the high culpability factors rephrase and combine some of the factors in paragraphs 4, 5 and 5A of Schedule 21, although similar circumstances murder offences range from whole life sentences to 25 year minimum terms. If the factors in the schedule are translated into culpability factors it would be difficult to separate them into separate categories, as some schedule offences share similar features, such as murders involving sexual and sadistic conduct.

**Question 1: Which option for the approach to assessing culpability in attempted murder does the Council prefer?**

3.17 Consideration has been given to whether some or all of the agreed s18 culpability factors should be included, as there will be cases where an attempted murder charge is reduced to a s18 GBH. The agreed s18 factors are as follows:

**Culpability** demonstrated by one or more of the following:

**A - High culpability**

- Significant degree of planning or premeditation
- Victim obviously vulnerable due to age, personal characteristics or circumstances
- Use of a highly dangerous weapon or weapon equivalent\*
- Leading role in group activity
- Prolonged assault
- Revenge

**B – Medium culpability**

- Use of a weapon or weapon equivalent which does not fall within category A
- Lesser role in group activity
- Cases falling between category high and low culpability because:
  - Factors in both high and lesser categories are present which balance each other out; **and/or**
  - The offender's culpability falls between the factors as described in high and lesser culpability

**C – Lesser culpability**

- No weapon used
- Excessive self defence
- Offender acted in response to prolonged or extreme violence or abuse by victim
- Mental disorder or learning disability, where linked to the commission of the offence

Some of the lesser culpability factors could be particularly relevant, such as excessive self defence and the abused offender factor. However, given that the intent in the offence is to kill it may be thought that it would be inappropriate to widen the culpability assessment outside of schedule 21 factors and when the intent was formed.

**Question 2: If the Council agrees to a model describing culpability factors, does the Council think any s18 factors should be included in the culpability assessment?**



## Harm Factors

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

3.19 Analysis of cases has identified that the majority of cases involve serious injuries and/or a significant psychological impact upon victims. Currently it is thought that very few cases would be captured within little or no physical or psychological harm, as even in cases where little or no physical harm is caused, victims are often severely psychologically affected by an attempt having been planned or made on their life.

3.20 The Council has noted in considering harm in GBH offences that often it is sheer luck that the death of the victim is not caused in those offences. In a case where causing death is fully intended, the offence is of the utmost seriousness. However, the harm assessment in the existing guideline gradates actual harm caused in the harm assessment, and it is proposed that this approach should be maintained in the revised guideline. While sentences for the offence will reflect the fact that causing death was intended by the offence, if the factors provide only for harm intended there could only be one harm category.

3.21 It is thought that a more descriptive approach as agreed for the GBH draft revised guidelines may provide for an improved assessment of harm than the existing approach. Potential harm in the offences is similar at the higher and medium levels, although the threshold for lesser harm is higher in a GBH offence as really serious harm must be caused in the offence. The factors agreed for GBH are as follows;

<b>Category 1</b>	Particularly grave or life-threatening injury caused  Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment  Offence results in a permanent, irreversible injury or condition which has a substantial and long term effect on the victim's ability to carry out normal day to day activities or on their ability to work
<b>Category 2</b>	Grave injury  Offence results in a permanent, irreversible injury or condition not falling within category 1
<b>Category 3</b>	All other cases

**Question 3: Does the Council agree that the GBH harm model including descriptive factors is suitable for assessing harm in attempted murder offences?**

Sentences

3.22 The existing sentences and starting points for the offence can be seen at **Annex A**. No life sentences are included in the guideline, but where a life sentence is imposed the determinate sentence for the relevant category should be used as the basis for the setting of a minimum term.

3.23 Statistics illustrating current sentence volumes and the estimated pre-guilty plea distribution of sentences are included below. It will be noted that considerably fewer indeterminate sentences were imposed post 2012 (with the exception of a ‘spike’ in 2016), which is likely to be attributable to LASPO<sup>1</sup> and the removal of IPP<sup>2</sup> provisions, so the indeterminate sentences from 2013 onwards will be life sentences:

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

3.24 Discussions with Judges when developing the Manslaughter guideline gave some indication that sentences for attempted murder are currently considered to be too low in comparison to sentences for murder. As only half, or two thirds if an offender is assessed as dangerous, of a determinate sentence will be served in custody, some Judges have concerns that attempted murder sentences do not reflect the gravity of an offence where death is intended but is narrowly avoided, often through pure chance or skilled medical intervention. A para 4 or 5 type offence where death results will attract life and a minimum custodial term of 30 years, whereas an attempted murder in the highest category of seriousness would result in a starting point of a 30 year determinate sentence, with only 15 or 20 years custody served depending on whether the offender is assessed as dangerous.

3.25 To assist in developing sentence levels, the Council is asked to consider if sentences in the existing guideline should be revised. In particular the Council is asked to

<sup>1</sup> Legal Aid and Punishment of Offenders Act 2012  
<sup>2</sup> Indeterminate sentences for public protection

confirm if life sentences should be included within the revised guideline. It is important to note that in all cases of attempted murder where the automatic life ('two strikes') provisions or the dangerous provisions apply legislation provides life sentences which are considered at step 5 of all relevant Sentencing Council guidelines. Currently the only Council guideline explicitly including life sentences in the sentencing table is Terrorism offences, but there is some parity with attempted murder in the harm intended by some of these offences.

3.26 The approach agreed to assessing culpability and harm is an important consideration, given that the seriousness categorisation will determine the starting point. Relativity will be required to minimum murder terms if life sentences and minimum terms are included, and this may affect the number of culpability categories included. For example, using a knife taken to the scene in a murder has a lower minimum term than the murder of a prison or police officer in the course of duty, so if this distinction is maintained in sentences for attempted offences the factors will need to be in different culpability categories, or attract the same minimum terms.

**Question 4: Does the Council think that sentences should be revised in the attempted murder guideline, and if so should life sentences and minimum terms be included in the sentencing table?**

#### **4 IMPACT /RISKS**

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

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

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Sentencing Guidelines Council

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# **Attempted Murder**

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**Definitive Guideline**



## FOREWORD

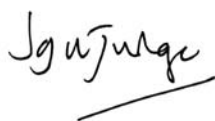
In accordance with section 170(9) of the Criminal Justice Act (CJA) 2003, the Sentencing Guidelines Council issues this guideline as a definitive guideline.

By virtue of section 172 of the CJA 2003, every court must have regard to relevant guidelines. This guideline applies to the sentencing of offenders convicted of any of the offences dealt with herein who are sentenced on or after **27 July 2009**.

This guideline applies only to the sentencing of offenders aged 18 and older. The legislative provisions relating to the sentencing of youths are different; the younger the age, the greater the difference. A separate guideline setting out general principles relating to the sentencing of youths is planned.

The Council has appreciated the work of the Sentencing Advisory Panel in preparing the advice (published June 2007) on which this guideline is based and is grateful to those who responded to the consultation of both the Panel and Council.

The advice and this guideline are available on [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk) or can be obtained from the Sentencing Guidelines Secretariat at 4th Floor, 8–10 Great George Street, London SW1P 3AE.



Chairman of the Council  
July 2009





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## Introduction

1. This guideline covers the single offence of attempted murder. The Council has published a separate definitive guideline for offences of assault which do not result in the death of the victim.<sup>1</sup>
2. There are critical differences between murder and attempted murder; not only is the intended result not achieved but also, for attempted murder, there must have been an intention to kill whereas a charge of murder may arise where the intention was to inflict grievous bodily harm. These differences are reflected in the approach set out below which supersedes previous guidance from the Court of Appeal in *Ford*<sup>2</sup> and other judgments.

## A. Assessing seriousness

### (i) Culpability and harm

3. The culpability of the offender is the initial factor in determining the seriousness of an offence. It is an essential element of the offence of attempted murder that the offender had an intention to kill; accordingly an offender convicted of this offence will have demonstrated a high level of culpability. Even so, the precise level of culpability will vary in line with the circumstances of the offence and whether the offence was planned or spontaneous. The use of a weapon may influence this assessment.
4. In common with all offences against the person, this offence has the potential to contain an imbalance between culpability and harm.<sup>3</sup>
5. Where the degree of harm actually caused to the victim of an attempted murder is negligible, it is inevitable that this will impact on the overall assessment of offence seriousness.
6. However, although the degree of (or lack of) physical or psychological harm suffered by a victim may generally influence sentence, the statutory definition of harm encompasses not only the harm actually caused by an offence but also any harm that the offence was intended to cause or might foreseeably have caused; since the offence can only be committed where there is an intention to kill, an offence of attempted murder will always involve, in principle, the most serious level of harm.

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<sup>1</sup> *Assault and other offences against the person*, published 20 February 2008, [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

<sup>2</sup> [2005] EWCA Crim 1358

<sup>3</sup> see *Overarching Principles: Seriousness*, para. 1.17, published 16 December 2004, [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

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**(ii) Aggravating and mitigating factors**

7. The most serious offences of attempted murder will include those which encompass the factors set out in schedule 21 to the Criminal Justice Act 2003, paragraphs 4 and 5 that, had the offence been murder, would make the seriousness of the offence “exceptionally high” or “particularly high”. For ease of reference, these provisions are reproduced at [Annex A](#).
8. The particular facts of the offence will identify the appropriate level. In all cases, the aggravating and mitigating factors that will influence the identification of the provisional sentence within the range follow those set out in schedule 21 with suitable adjustments. These factors are included in the guideline at page 7.
9. The *Seriousness* guideline<sup>4</sup> sets out aggravating and mitigating factors that are applicable to a wide range of cases; an extract is provided at [Annex B](#). Some are already reflected in the factors referred to above. Care needs to be taken to ensure that there is no double counting where an essential element of the offence charged might, in other circumstances, be an aggravating factor. An additional statutory aggravating factor has been introduced by the Counter-Terrorism Act 2008 for prescribed offences which include attempted murder.<sup>5</sup>
10. This guideline is not intended to provide for an offence found to be based on a genuine belief that the murder would have been an act of mercy. Whilst the approach to assessing the seriousness of the offence may be similar, there are likely to be other factors present (relating to the offence and the offender) that would have to be taken into account and reflected in the sentence.

**B. Ancillary orders****Compensation orders**

11. A court must consider making a compensation order in respect of any personal injury, loss or damage occasioned. There is no limit to the amount of compensation that may be awarded in the Crown Court.

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<sup>4</sup> *Overarching Principles: Seriousness*, paras. 1.20–1.27 published on 16 December 2004; [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

<sup>5</sup> s.30 and schedule 2. If a court determines that the offence has a terrorist connection, it must treat that as an aggravating factor, and state in open court that the offence was so aggravated.

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### C. Sentencing ranges and starting points

12. Typically, a guideline will apply to an offence that can be committed in a variety of circumstances with different levels of seriousness. The starting points and ranges are based upon an adult “*first time offender*” who has been **convicted after a trial**. Within the guidelines, a “*first time offender*” is a person who does not have a conviction which, by virtue of section 143(2) of the Criminal Justice Act 2003, must be treated as an aggravating factor.
13. As an aid to consistency of approach, the guideline describes a number of levels or types of activity which would fall within the broad definition of the offence.
14. The expected approach is for a court to identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed. This will identify a **starting point** from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the offence (beyond those contained within the column describing the nature of the offence) to reach a **provisional sentence**.
15. The **sentencing range** is the bracket into which the provisional sentence will normally fall after having regard to factors which aggravate or mitigate the seriousness of the offence. The particular circumstances may, however, make it appropriate that the provisional sentence falls outside the range.
16. Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the provisional sentence beyond the range given particularly where there are significant other aggravating factors present.
17. Once the provisional sentence has been identified by reference to those factors affecting the seriousness of the offence, the court will take into account any relevant factors of personal mitigation, which may take the sentence below the range given.
18. Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. This reduction may take the sentence below the range provided.
19. A court must give its reasons for imposing a sentence of a different kind or outside the range provided in the guidelines.

## D. Factors to take into consideration

1. Attempted murder is a serious offence for the purposes of the provisions in the Criminal Justice Act 2003<sup>6</sup> for dealing with dangerous offenders. When sentencing an offender convicted of this offence, in many circumstances a court may need to consider imposing a discretionary life sentence or one of the sentences for public protection prescribed in the Act.
2. The starting points and ranges are based upon a first time adult offender convicted after a trial (see paragraphs 12–19 above). They will be relevant when imposing a determinate sentence and when fixing any minimum term that may be necessary. When setting the minimum term to be served within an indeterminate sentence, in accordance with normal practice that term will usually be half the equivalent determinate sentence.<sup>7</sup>
3. Attempted murder requires an intention to kill. Accordingly, an offender convicted of this offence will have demonstrated a high level of culpability. Even so, the precise level of culpability will vary in line with the circumstances of the offence and whether the offence was planned or spontaneous. The use of a weapon may influence this assessment.
4. The level of injury or harm sustained by the victim as well as any harm that the offence was intended to cause or might foreseeably have caused, must be taken into account and reflected in the sentence imposed.
5. The degree of harm will vary greatly. Where there is low harm and high culpability, culpability is more significant.<sup>8</sup> Even in cases where a low level of injury (or no injury) has been caused, an offence of attempted murder will be extremely serious.
6. The most serious offences will include those which encompass the factors set out in schedule 21 to the Criminal Justice Act 2003, paragraphs 4 and 5 that, had the offence been murder, would make the seriousness of the offence “exceptionally high” or “particularly high”: see [Annex A](#).
7. The particular facts of the offence will identify the appropriate level. In all cases, the aggravating and mitigating factors that will influence the identification of the provisional sentence within the range follow those set out in schedule 21 with suitable adjustments. This guideline is not intended to provide for an offence found to be based on a genuine belief that the murder would have been an act of mercy.
8. When assessing the seriousness of an offence, the court should also refer to the list of general aggravating and mitigating factors in the Council guideline on *Seriousness* (see [Annex B](#)). Care should be taken to ensure there is no double counting where an essential element of the offence charged might, in other circumstances, be an aggravating factor.

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<sup>6</sup> Sections 224–230 as amended

<sup>7</sup> *R v Szczerba* [2002] 2 Cr App R (S) 86

<sup>8</sup> *Overarching Principles: Seriousness*, para. 1.19, published on 16 December 2004; [www.sentencing.guidelines.gov.uk](http://www.sentencing.guidelines.gov.uk)

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## Attempted Murder

### Criminal Attempts Act 1981 (section 1(1))

#### THIS IS A SERIOUS OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003

**Maximum penalty: Life imprisonment**

Nature of offence	Starting point	Sentencing range
<p><b>Level 1</b> <i>The most serious offences including those which (if the charge had been murder) would come within para. 4 or para. 5 of schedule 21 to the Criminal Justice Act 2003</i></p> <ul style="list-style-type: none"> <li>• Serious and long term physical or psychological harm</li> <li>• Some physical or psychological harm</li> <li>• Little or no physical or psychological harm</li> </ul>	<p><b>30 years custody</b> <b>20 years custody</b> <b>15 years custody</b></p>	<p><b>27–35 years custody</b> <b>17–25 years custody</b> <b>12–20 years custody</b></p>
<p><b>Level 2</b> <i>Other planned attempt to kill</i></p> <ul style="list-style-type: none"> <li>• Serious and long term physical or psychological harm</li> <li>• Some physical or psychological harm</li> <li>• Little or no physical or psychological harm</li> </ul>	<p><b>20 years custody</b> <b>15 years custody</b> <b>10 years custody</b></p>	<p><b>17–25 years custody</b> <b>12–20 years custody</b> <b>7–15 years custody</b></p>
<p><b>Level 3</b> <i>Other spontaneous attempt to kill</i></p> <ul style="list-style-type: none"> <li>• Serious and long term physical or psychological harm</li> <li>• Some physical or psychological harm</li> <li>• Little or no physical or psychological harm</li> </ul>	<p><b>15 years custody</b> <b>12 years custody</b> <b>9 years custody</b></p>	<p><b>12–20 years custody</b> <b>9–17 years custody</b> <b>6–14 years custody</b></p>

Specific aggravating factors	Specific mitigating factors
<p>(a) the fact that the victim was particularly vulnerable, for example, because of age or disability</p> <p>(b) mental or physical suffering inflicted on the victim</p> <p>(c) the abuse of a position of trust</p> <p>(d) the use of duress or threats against another person to facilitate the commission of the offence</p> <p>(e) the fact that the victim was providing a public service or performing a public duty</p>	<p>(a) the fact that the offender suffered from any mental disorder or mental disability which lowered his degree of culpability</p> <p>(b) the fact that the offender was provoked (for example, by prolonged stress)</p> <p>(c) the fact that the offender acted to any extent in self-defence</p> <p>(d) the age of the offender</p>

**The presence of one or more aggravating features will indicate a more severe sentence within the suggested range and, if the aggravating feature(s) are exceptionally serious, the case will move up to the next level.**

## **Annex A: Extract from the Criminal Justice Act 2003, schedule 21\***

### **Determination of minimum term in relation to mandatory life sentence**

#### **Starting points**

#### 4 (1) If—

- (a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and
- (b) the offender was aged 21 or over when he committed the offence, the appropriate starting point is a whole life order.

#### (2) Cases that would normally fall within sub-paragraph (1)(a) include—

- (a) the murder of two or more persons, where each murder involves any of the following—
  - (i) a substantial degree of premeditation or planning,
  - (ii) the abduction of the victim, or
  - (iii) sexual or sadistic conduct,
- (b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,
- (c) a murder done for the purpose of advancing a political, religious or ideological cause, or
- (d) a murder by an offender previously convicted of murder.

#### 5 (1) If—

- (a) the case does not fall within paragraph 4(1) but the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is particularly high, and
- (b) the offender was aged 18 or over when he committed the offence, the appropriate starting point, in determining the minimum term, is 30 years.

#### (2) Cases that (if not falling within paragraph 4(1)) would normally fall within sub-paragraph (1)(a) include—

- (a) the murder of a police officer or prison officer in the course of his duty,
- (b) a murder involving the use of a firearm or explosive,
- (c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),
- (d) a murder intended to obstruct or interfere with the course of justice,
- (e) a murder involving sexual or sadistic conduct,
- (f) the murder of two or more persons,
- (g) a murder that is racially or religiously aggravated or aggravated by sexual orientation, or
- (h) a murder falling within paragraph 4(2) committed by an offender who was aged under 21 when he committed the offence.

\* As at June 2009



## **Annex B: General aggravating and mitigating factors identified in the Council guideline *Overarching Principles: Seriousness***

**The factors below apply to a wide range of offences.**

**Not all will be relevant to attempted murder.**

### **Factors indicating higher culpability:**

- Offence committed whilst on bail for other offences
- Failure to respond to previous sentences
- Offence was racially or religiously aggravated
- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
- Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)
- Previous conviction(s), particularly where a pattern of repeat offending is disclosed
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
- Offenders operating in groups or gangs
- 'Professional' offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it
- Deliberate targeting of vulnerable victim(s)
- Commission of an offence while under the influence of alcohol or drugs
- Use of a weapon to frighten or injure victim
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- Abuse of power
- Abuse of a position of trust

**Factors indicating a more than usually serious degree of harm:**

- Multiple victims
- An especially serious physical or psychological effect on the victim, even if unintended
- A sustained assault or repeated assaults on the same victim
- Victim is particularly vulnerable
- Location of the offence (for example, in an isolated place)
- Offence is committed against those working in the public sector or providing a service to the public
- Presence of others e.g. relatives, especially children or partner of the victim
- Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
- In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)

**Factors indicating significantly lower culpability:**

- A greater degree of provocation than normally expected
- Mental illness or disability
- Youth or age, where it affects the responsibility of the individual defendant
- The fact that the offender played only a minor role in the offence

**Personal mitigation**

Section 166(1) Criminal Justice Act 2003 makes provision for a sentencer to take account of any matters that 'in the opinion of the court, are relevant in mitigation of sentence'.

When the court has formed an initial assessment of the seriousness of the offence, then it should consider any offender mitigation. The issue of remorse should be taken into account at this point along with other mitigating features such as admissions to the police in interview.





## Criminal Justice Act 2003 c. 44

### Schedule 21 DETERMINATION OF MINIMUM TERM IN RELATION TO MANDATORY LIFE SENTENCE

#### Interpretation

This version in force from: **December 18, 2003 to present**

#### 1

In this Schedule—

*“child”* means a person under 18 years;

*“mandatory life sentence”* means a life sentence passed in circumstances where the sentence is fixed by law;

*“minimum term”*, in relation to a mandatory life sentence, means the part of the sentence to be specified in an order under [section 269\(2\)](#);

*“whole life order”* means an order under [subsection \(4\) of section 269](#).

Status:  Law In Force

#### 2

[Section 28](#) of the [Crime and Disorder Act 1998 \(c. 37\)](#) (meaning of “racially or religiously aggravated”) applies for the purposes of this Schedule as it applies for the purposes of [sections 29 to 32](#) of that Act.

This version in force from: **December 3, 2012 to present**

#### [3

For the purposes of this Schedule—

(a) an offence is aggravated by sexual orientation if it is committed in circumstances mentioned in [section 146\(2\)\(a\)\(i\)](#) or [\(b\)\(i\)](#);

(b) an offence is aggravated by disability if it is committed in circumstances mentioned in [section 146\(2\)\(a\)\(ii\)](#) or [\(b\)\(ii\)](#);

(c) an offence is aggravated by transgender identity if it is committed in circumstances mentioned in [section 146\(2\)\(a\)\(iii\)](#) or [\(b\)\(iii\)](#).

#### Starting points

This version in force from: **April 13, 2015 to present**

#### 4

(1) If—

(a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and

(b) the offender was aged 21 or over when he committed the offence,

the appropriate starting point is a whole life order.

(2) Cases that would normally fall within sub-paragraph (1)(a) include—

(a) the murder of two or more persons, where each murder involves any of the following—

- (i) a substantial degree of premeditation or planning,
- (ii) the abduction of the victim, or
- (iii) sexual or sadistic conduct,

(b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,

[(ba) the murder of a police officer or prison officer in the course of his or her duty,]<sup>1</sup>

(c) a murder done for the purpose of advancing a political, religious [, racial]<sup>2</sup> or ideological cause, or

(d) a murder by an offender previously convicted of murder.

## 5

(1) If—

(a) the case does not fall within [paragraph 4\(1\)](#) but the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is particularly high, and

(b) the offender was aged 18 or over when he committed the offence,

the appropriate starting point, in determining the minimum term, is 30 years.

(2) Cases that (if not falling within [paragraph 4\(1\)](#)) would normally fall within sub-paragraph (1)(a) include—

[...] <sup>1</sup>

(b) a murder involving the use of a firearm or explosive,

(c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),

(d) a murder intended to obstruct or interfere with the course of justice,

(e) a murder involving sexual or sadistic conduct,

(f) the murder of two or more persons,

(g) a murder that is racially or religiously aggravated or aggravated by sexual orientation [, disability or transgender identity]<sup>2</sup>, or

(h) a murder falling within [paragraph 4\(2\)](#) committed by an offender who was aged under 21 when he committed the offence.

This version in force from: **March 2, 2010 to present**

**[5A.—**

(1) If—

- (a) the case does not fall within [paragraph 4\(1\)](#) or [5\(1\)](#),
- (b) the offence falls within sub-paragraph (2), and
- (c) the offender was aged 18 or over when the offender committed the offence,

the offence is normally to be regarded as sufficiently serious for the appropriate starting point, in determining the minimum term, to be 25 years.

(2) The offence falls within this sub-paragraph if the offender took a knife or other weapon to the scene intending to—

- (a) commit any offence, or
- (b) have it available to use as a weapon,

and used that knife or other weapon in committing the murder.] <sup>1</sup>

This version in force from: **March 2, 2010 to present**

**6**

If the offender was aged 18 or over when he committed the offence and the case does not fall [within [paragraph 4\(1\)](#), [5\(1\)](#) or [5A\(1\)](#)] <sup>1</sup>, the appropriate starting point, in determining the minimum term, is 15 years.

This version in force from: **December 18, 2003 to present**

**7**

If the offender was aged under 18 when he committed the offence, the appropriate starting point, in determining the minimum term, is 12 years.

**Aggravating and mitigating factors**

This version in force from: **December 18, 2003 to present**

**8**

Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point.

**9**

Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order.

This version in force from: **March 2, 2010 to present**

**10**

Aggravating factors (additional to those mentioned in [[paragraph 4\(2\)](#), [5\(2\)](#) and [5A\(2\)](#)] <sup>1</sup>) that may be relevant to the offence of murder include—

- (a) a significant degree of planning or premeditation,
- (b) the fact that the victim was particularly vulnerable because of age or disability,
- (c) mental or physical suffering inflicted on the victim before death,
- (d) the abuse of a position of trust,
- (e) the use of duress or threats against another person to facilitate the commission of the offence,
- (f) the fact that the victim was providing a public service or performing a public duty, and
- (g) concealment, destruction or dismemberment of the body.

This version in force from: **October 4, 2010 to present**

**11**

Mitigating factors that may be relevant to the offence of murder include—

- (a) an intention to cause serious bodily harm rather than to kill,
- (b) lack of premeditation,
- (c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within [section 2\(1\)](#) of the [Homicide Act 1957 \(c. 11\)](#)), lowered his degree of culpability,
- (d) the fact that the offender was provoked (for example, by prolonged stress) [...] <sup>1</sup>
- (e) the fact that the offender acted to any extent in self-defence [ or in fear of violence] <sup>2</sup>
- (f) a belief by the offender that the murder was an act of mercy, and
- (g) the age of the offender.

This version in force from: **October 31, 2009 to present**

**12**

Nothing in this Schedule restricts the application of—

- (a) [section 143\(2\)](#) (previous convictions),
- (b) [section 143\(3\)](#) (bail), or
- (c) [section 144](#) (guilty plea) [,] <sup>1</sup>  
[or of [section 238\(1\)\(b\) or \(c\)](#) or [239](#) of the [Armed Forces Act 2006](#).]  
] <sup>1</sup>



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

**10 May 2019**  
**SC(19)MAY05 – Firearms paper**  
**Maura McGowan**  
**Ruth Pope**  
**0207 071 5781**

## **1 ISSUE**

1.1 This is the eighth meeting to consider the firearms guideline. This paper asks the Council to consider the guidance on minimum term and exceptional circumstances at step three and the content of steps four to nine. The Council is also asked to confirm its intention that the guidelines should broadly reflect current sentencing practice and to consider the issue of totality.

1.2 There is just one further meeting scheduled to discuss the firearms guideline in July when the aim is to confirm sentence levels and sign off the consultation version, with the consultation planned for launch in September. The resource assessment will be available at the July meeting.

1.3 The Firearms Working Group is meeting on 13 May to resolve some of the drafting issues raised at the April Council meeting and to look in detail at the sentence levels.

## **2 RECOMMENDATION**

2.1 It is recommended that the Council:

- Agrees the guidance on minimum terms and exceptional circumstances
- Clarifies its position on the risk of sentence inflation in disguised stun gun cases
- Confirms its position regarding sentence levels generally
- Agrees the content of steps four to nine

## **3 CONSIDERATION**

### *Minimum term guidance*

3.1 The draft guidance is shown in **Annex A** at step three (page 7). Once finalised it will also be relevant to guidelines 4-8 (the possession with intent and manufacture/transfer guidelines).

3.2 The Council last considered the minimum term guidance in December 2018, including guidance on exceptional circumstances. The changes that the Council required at that meeting have been made. Regard has also been had to the judgment in a recent case (R v Nancarrow [2019] EWCA 470) on disguised stun guns which sets out a summary of principles on the minimum term and exceptional circumstances at [19]:

19. The authorities in this court establish the following principles as to the application of section 51A(2):

- (1) The purpose of the mandatory minimum term is to act as a deterrent (R v Zakir Rehman and Wood) [2005] EWCA Crim 2056; [2006] 1 Cr App R 77 at paragraph 12.
- (2) Circumstances are *exceptional* for the purposes of subsection (2) if to impose five years' imprisonment would amount to an arbitrary and disproportionate sentence (Rehman at paragraph 16).
- (3) It is important that the courts do not undermine the intention of Parliament by accepting too readily that the circumstances of a particular offence or offender are exceptional. In order to justify the disapplication of the five-year minimum, the circumstances of the case must be truly exceptional (R v Robert Dawson [2017] EWCA Crim 2244 at paragraphs 12 and 19).
- (4) It is necessary to look at all the circumstances of the case together, taking a holistic approach. It is not appropriate to look at each circumstance separately and conclude that, taken alone, it does not constitute an exceptional circumstance. There can be cases where no single factor by itself will amount to *exceptional circumstances*, but the collective impact of all the relevant circumstances makes the case exceptional (Rehman at paragraph 11).
- (5) The court should always have regard, amongst other things, to the four questions set out in R v Avis [1998] 2 Cr App R (S) 178, namely: (a) What sort of weapon was involved? (b) What use, if any, was made of it? (c) With what intention did the defendant possess it? (d) What is the defendant's record? (See, for example, R v McCleary [2014] EWCA Crim 302 at paragraph 11.)
- (6) The reference in the section to the *circumstances of the offender* is important. It is relevant that an offender is unfit to serve a five-year sentence or that such a sentence may have a significantly adverse effect on his health (Rehman at paragraph 15; R v Shaw [2011] EWCA Crim 167 at paragraphs 6-7).
- (7) Each case is fact-specific and the application of the principles dependent upon the particular circumstances of each individual case. Limited assistance is to be gained from referring the court to decisions in cases involving facts that are not materially identical (see, for example, R v Stoker [2013] EWCA Crim 1431 at paragraph 22).
- (8) Unless the judge is clearly wrong in identifying exceptional circumstances where they do not exist or clearly wrong in not identifying exceptional circumstances where they do exist, this Court will not readily interfere (Rehman at paragraph 14).

3.3 Guidance on sentencing under 18s subject to the minimum term has been added under a separate heading – this can appear as a drop-down box in the digital guideline as it will be relevant in only very few cases.

3.4 The other main suggested addition is paragraph 15 of the guidance which contains a suggestion for courts to look at the range of sentences under culpability A of Table 2 where exceptional circumstances had been found. The aim is to provide some guidance on sentence levels where exceptional circumstances are found while still recognising the highly individual nature of each case. Without any parameters there would be a large number of cases with sentences below the minimum term that would have no guidance on sentence levels.

3.5 The guidance at paragraph 15 would not apply to the other guidelines which do not have separate tables for offences not subject to the minimum term (and exceptional circumstances are raised less frequently).

### **Question 1: Is the Council content with the proposed wording of step three?**

#### *The Council's intention*

3.6 In December the Council was asked to confirm whether the intention was to change current sentencing practice, in light of the high proportion of cases where exceptional circumstances are found and consequently sentences of under five years imposed. The position reached in December was that the Council wished to reinforce the high bar for exceptional circumstances established by the Court of Appeal, but did not specifically seek to change current sentencing practice.

3.7 Firearms disguised as other objects fall under section 5(1A)(a). A stun gun that is disguised could be charged as a disguised firearm under 5(1A)(a) or as a weapon designed for the discharge of a noxious substance under 5(1)(b). The minimum term applies to 5(1A)(a) but not to 5(1)(b). Offences under 5(1A)(a) have much higher rates of exceptional circumstances than other section 5 offences to which the minimum term applies, at around 66% compared with 33% of prohibited weapons overall.

3.8 Currently the [CPS guidance](#) on firearms requires disguised weapons to be charged under 5(1A)(a): "Parliament has provided that disguised weapons fall within the provisions for a minimum sentence and so, an offence contrary to section 5(1A) should be charged rather than an offence contrary to section 5(1)(b) where a stun gun is disguised as another object and also meets the requirements of section 5(A1), (*R v Brereton* [2012] EWCA Crim 85)." *Brereton* emphasised that charging policy need to provide a consistent approach.

3.9 After discussion of this at the December Council meeting, Max Hill agreed that the CPS would consider reviewing the guidance on charging disguised stun guns with a view to making fewer charges under 5(1A)(a). It is understood that the CPS is giving active consideration reviewing the charging policy.

3.10 There is a strong possibility that the proposed guidance would result in exceptional circumstances being found in fewer cases – if courts follow the guidance (particularly paragraphs 10 and 13) it is difficult to see how exceptional circumstances could be justified in 66% of disguised weapon cases. Therefore, if the CPS charging practice does not change, the Council should be aware that sentencing severity is likely to increase significantly. Road testing will be carried out during the consultation to help assess the impact of the exceptional circumstances guidance.

3.11 More generally the Council is asked to confirm the position it took when work began on these guidelines, that the aim is broadly to reflect current sentencing practice. The working group will discuss sentence levels next week and these will be brought to the July meeting for the full Council to approve.

**Question 2: Does the Council wish broadly to reflect current sentencing practice?**

**Question 3: Subject to a change in charging practice does the Council accept that the step three guidance may lead to an increase in sentencing in disguised stun gun cases?**

*Steps four to nine.*

3.12 Except where indicated below, the content of these steps is standard wording used across guidelines.

3.13 Step five (guilty pleas) contains a reminder that where a minimum sentence has been imposed under section 51A of the Firearms Act 1968, the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than the required minimum term. This wording will be included in all guidelines except possession without a certificate and possession by person prohibited.

3.14 Step seven (ancillary orders) includes reference to forfeiture and destruction of firearms (which is very common), cancellation of certificate (less common) and Serious Crime Prevention Orders (SCPOs apply only to possession, manufacture and transfer of prohibited weapons and possession without a certificate). The forfeiture text draws on the CPS guidance.

**Question 4: Is the Council content with the proposed wording of steps four to nine?**

#### **4 IMPACT**

4.1 A draft resource assessment will be produced for the Council to consider at the July Council meeting.

#### **5 RISK**

5.1 The Offensive Weapons Bill is awaiting Royal Assent, a date for which is yet to be scheduled. As noted previously, the Bill will prohibit two further items: rapid firing rifles<sup>1</sup> and bump stock devices.<sup>2</sup> Both items will be subject to the minimum term. They will need to be incorporated into the type of weapon table in the possession guidelines once enacted.

5.2 The implementation of the firearms provisions is expected to be phased, to allow some time for people to surrender their rifles and claim compensation ahead of the prohibition on possession taking effect. We will continue to liaise with the Home Office on the timing of the implementation.

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<sup>1</sup> Certain chambered weapons from which cartridge cases are extracted by propellant gas. According to the Home Office, these fire at a rate that is significantly greater than a conventional bolt-action rifle, making them closer to self-loading rifles, which are already prohibited.

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

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# Firearms – Possession of prohibited weapon

## **Possession, purchase or acquisition of a prohibited weapon or ammunition**

Firearms Act 1968 (section 5(1), 5(1A))

Indictable only:

Section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af), (c)  
Section 5(1A)(a)

Triable either way:

Section 5(1)(b)  
Section 5(1A)(b), (c), (d), (e), (f), (g)

Maximum: 10 years' custody

Offence range: Discharge – 9 years' custody

This offence is subject to statutory minimum sentencing provisions.  
See STEPS TWO AND THREE for further details.

**STEP ONE**  
**Determining the offence category**

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

**Culpability A – Type of weapon**

Use the table below to identify an initial culpability category based on the **type of weapon** only. This assessment focuses on the nature of the weapon itself only, not whether the weapon was loaded or in working order.

The categorisations below are indicative only and should not be applied mechanistically. Courts should take care to ensure the categorisation is appropriate for the specific weapon by moving up or down a category where necessary. Where the weapon or ammunition does not fall squarely in one category, the court may need to adjust the starting point in STEP TWO.

References to weapon below include a component part of such a weapon.

<b>Type 1</b>	<p>Weapon that is capable of killing two or more people at the same time or in rapid succession</p> <ul style="list-style-type: none"> <li>• This would <b>normally</b> include a weapon under:             <ul style="list-style-type: none"> <li>○ section 5(1)(a)</li> <li>○ section 5(1)(ab)</li> <li>○ section 5(1)(aba)</li> <li>○ section 5(1)(ac)</li> <li>○ section 5(1)(ad)</li> <li>○ section 5(1)(ae)</li> <li>○ section 5(1A)(c)</li> </ul> </li> </ul>
<b>Type 2</b>	<p>All other weapons falling between Type 1 and Type 3</p> <ul style="list-style-type: none"> <li>• This would <b>normally</b> include a weapon under:             <ul style="list-style-type: none"> <li>○ section 5(1)(af)</li> <li>○ section 5(1A)(a)</li> </ul> </li> </ul> <p>Ammunition under section 5(1)(c), 5(1A)(b) and (d)-(g) (where not at Type 3)</p>
<b>Type 3</b>	<p>Weapon that is not designed to be lethal</p> <ul style="list-style-type: none"> <li>• This would <b>normally</b> include a weapon under section 5(1)(b)</li> </ul> <p>Very small quantity of ammunition</p>



**Culpability B – Other culpability factors**

The court should weigh all the factors set out below in determining the offender’s 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.**

<b>Culpability</b> demonstrated by one or more of the following:
<p><b>High culpability:</b></p> <ul style="list-style-type: none"> <li>• Firearm discharged</li> <li>• Firearm loaded</li> <li>• Firearm/ammunition used or intended for use for criminal purpose</li> </ul>
<p><b>Medium culpability:</b></p> <ul style="list-style-type: none"> <li>• Firearm/ammunition produced (where not at High culpability)</li> <li>• Firearm held with compatible ammunition or stun gun that is charged</li> <li>• Firearm/ammunition intended for use (where not at High culpability)</li> </ul>
<p><b>Lower culpability:</b></p> <ul style="list-style-type: none"> <li>• No use or intention to use</li> </ul>

**Culpability category**

Identify the final culpability category in the table below, considering both **A – Type of weapon** and **B – Other culpability factors**.

		<b>A – Type of weapon</b>		
		<b>1</b>	<b>2</b>	<b>3</b>
<b>B – Other culpability factors</b>	<b>High</b>	Culpability category A	Culpability category A	Culpability category B
	<b>Medium</b>	Culpability category A	Culpability category B	Culpability category C
	<b>Lower</b>	Culpability category B	Culpability category C	Culpability category C

<p><b>Harm</b></p> <p>The court should consider the steps set out below to determine the level of harm that has been <b>caused or was risked</b>.</p>	
<p>This step is assessed by reference to the <b>risk of harm</b> or <b>disorder</b> occurring and/or <b>actual alarm/distress</b> caused.</p> <p>When considering the risk of harm, relevant considerations may include the number and vulnerability of people exposed, especially children, accessibility and visibility of the weapon, and the location of the offence.</p>	
<p><b>Category 1</b></p>	<ul style="list-style-type: none"> <li>• Serious alarm/distress caused</li> <li>• High risk of serious harm or death</li> <li>• High risk of serious disorder</li> </ul>
<p><b>Category 2</b></p>	<ul style="list-style-type: none"> <li>• All other cases falling between category 1 and category 3 because:             <ul style="list-style-type: none"> <li>○ Factors in both 1 and 3 are present which balance each other out; and/or</li> <li>○ The harm falls between the factors as described in 1 and 3</li> </ul> </li> </ul>
<p><b>Category 3</b></p>	<ul style="list-style-type: none"> <li>• No/minimal alarm/distress caused</li> <li>• No/minimal risk of serious harm or death</li> <li>• No/minimal risk of serious disorder</li> </ul>

**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.**

<b>STEP TWO</b>			
<b>Starting point and category range</b>			
Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.			
Table 1 should be used if the offence is subject to statutory minimum sentencing provisions, unless there are exceptional circumstances. Table 2 should be used for all other cases. See STEP THREE for further details on the minimum sentencing provisions and exceptional circumstances.			
<b>TABLE 1</b>	<b>Offences subject to the statutory minimum sentence (Section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af), (c), section 5(1A)(a))</b>		
<b>Harm</b>	<b>Culpability</b>		
	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<b>Starting point</b> 8 years' custody <b>Category range</b> 7-9 years' custody	<b>Starting point</b> 7 years' custody <b>Category range</b> 6-8 years' custody	<b>Starting point</b> 6 years' custody <b>Category range</b> 5-7 years' custody
<b>Category 2</b>	<b>Starting point</b> 7 years' custody <b>Category range</b> 6-8 years' custody	<b>Starting point</b> 6 years' custody <b>Category range</b> 5-7 years' custody	<b>Starting point</b> 5 years 6 months' custody <b>Category range</b> 5-7 years' custody
<b>Category 3</b>	<b>Starting point</b> 6 years' custody <b>Category range</b> 5-7 years' custody	<b>Starting point</b> 5 years 6 months' custody <b>Category range</b> 5-7 years' custody	<b>Starting point</b> 5 years' custody <b>Category range</b> 5 – 6 years' custody
<b>TABLE 2</b>	<b>Offences not subject to the statutory minimum sentence</b>		
<b>Harm</b>	<b>Culpability</b>		
	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<b>Starting point</b> 3 years' custody <b>Category range</b> 2 – 5 years' custody	<b>Starting point</b> 2 years' custody <b>Category range</b> 1 – 3 years' custody	<b>Starting point</b> 6 months' custody <b>Category range</b> High level community order – 2 years' custody
<b>Category 2</b>	<b>Starting point</b> 2 years' custody <b>Category range</b> 1 – 3 years' custody	<b>Starting point</b> 6 months' custody <b>Category range</b> High level community order – 2 years' custody	<b>Starting point</b> Medium level community order <b>Category range</b> Band D fine – High level community order
<b>Category 3</b>	<b>Starting point</b> 6 months' custody <b>Category range</b> High level community order – 1 year's custody	<b>Starting point</b> Medium level community order <b>Category range</b> Band D fine – High level community order	<b>Starting point</b> Band C fine <b>Category range</b> Discharge – Low 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 sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

### Factors increasing seriousness

#### ***Statutory aggravating factors:***

- A1. Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- A2. Offence committed whilst on bail

#### ***Other aggravating factors:***

- A3. Firearm modified to make it more dangerous
- A4. Steps taken to disguise firearm (where not firearm under section 5(1A)(a))
- A5. Firearm/ammunition kept with multiple weapons and/or substantial quantity of ammunition (See step six on totality when sentencing for more than one offence.)
- A6. Offence was committed as part of a group (except where already taken into account at step one)
- A7. Offender has contact with criminal associates, including through the purchase or supply of drugs (except where already taken into account at step one)
- A8. Abuse of position as registered firearms dealer or certificate holder
- A9. Commission of offence whilst under the influence of alcohol or drugs
- A10. Offender prohibited from possessing weapon or ammunition because of previous conviction (See step six on totality when sentencing for more than one offence.)
- A11. Failure to comply with current court orders
- A12. Offence committed on licence or post sentence supervision

### Factors reducing seriousness or reflecting personal mitigation

- M1. No previous convictions **or** no relevant/recent convictions
- M2. Good character and/or exemplary conduct
- M3. Firearm incomplete or incapable of being discharged (including stun gun that is not charged and not held with a functioning charger)
- M4. No knowledge or suspicion that item possessed was firearm/ammunition
- M5. No knowledge or suspicion that firearm/ammunition is prohibited

- M6. Held on behalf of another through coercion, intimidation, or exploitation
- M7. Voluntary surrender of firearm/ammunition
- M8. Offender co-operated with investigation and/or made early admissions
- M9. Remorse
- M10. Serious medical condition requiring urgent, intensive or long-term treatment
- M11. Age and/or lack of maturity
- M12. Mental disorder or learning disability
- M13. Sole or primary carer for dependent relatives

**STEP THREE**

**Minimum Term**

1. Where the minimum term provisions under section 51A of the Firearms Act 1968 apply, a court must impose a sentence of at least five years' custody **unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so.**

Applicability

2. The minimum terms provisions apply when sentencing:
  - an offence under the Firearms Act 1968, section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af) or (c) or section 5(1A)(a); or
  - certain other offences committed in respect of a firearm or ammunition specified in the provisions above. [DROPDOWN BOX]

s51A(1) – (1A) Firearms Act 1968: The minimum term provisions also apply to the following offences in respect of a firearm or ammunition specified in section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af) or (c) or section 5(1A)(a):

- section 5(2A) (manufacture, sale or transfer of firearm, or possession etc for sale or transfer);
- section 16 (possession of firearm with intent to injure);
- section 16A (possession of firearm with intent to cause fear of violence);
- section 17 (use of firearm to resist arrest);
- section 18 (carrying firearm with criminal intent);
- section 19 (carrying a firearm in a public place);
- section 20(1) (trespassing in a building carrying a firearm).

3. The minimum term applies to *all* such offences including the first offence, and regardless of plea.
4. The minimum term of five years applies to offenders aged 18 or over at the date of conviction. See below for guidance when sentencing offenders aged under 18.
5. Where the minimum term applies, this should be stated expressly.

**Exceptional circumstances**

6. In considering whether there are exceptional circumstances that would justify not imposing the statutory minimum sentence, the court must have regard to:
  - the particular circumstances of the offence **and**
  - the particular circumstances of the offender.

7. Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see [Criminal Practice Directions](#) VII: Sentencing B.
8. Where the offender has sought to rely on exceptional circumstances, a clear justification should be given for why exceptional circumstances are found or not found.

#### Principles

9. Circumstances are exceptional if the imposition of the minimum term would result in an arbitrary and disproportionate sentence.
10. The circumstances must indeed be exceptional. It is important that courts do not undermine the intention of Parliament and the deterrent purpose of the minimum term provisions by too readily accepting exceptional circumstances.
11. The court should look at all of the circumstances of the case taken together. A single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances.
12. When considering the *circumstances of the offender* relevant considerations would include if an offender is unfit to serve a five-year sentence or that such a sentence may have a significantly adverse effect on the health of the offender.
13. The mere presence of one or more of the following should not *in itself* be regarded as exceptional:
  - One or more lower culpability factors
  - The type of weapon or ammunition falling under type 2 or 3
  - One or more mitigating factors
  - A plea of guilty

#### Where exceptional circumstances are found

14. If there are exceptional circumstances that justify not imposing the statutory minimum sentence then the court **must impose either a shorter custodial sentence than the statutory minimum provides or an alternative sentence.**
15. The court may find it useful to refer to the range of sentences under culpability A of Table 2 (Offences not subject to the statutory minimum sentence) in STEP TWO above. The court should impose a sentence that is appropriate to the individual case.

#### **Sentencing offenders aged under 18 [DROPDOWN BOX]**

1. Where the offender is aged 16 or 17 when the offence was committed, the minimum term is three years' custody. Where the offender is under 16 when the offence was committed, the minimum term does not apply.
2. Subject to the minimum term, the court should determine the sentence in accordance with the *Sentencing Children and Young People* guideline, particularly paragraphs 6.42-6.49 on custodial sentences.
3. This guidance states at paragraph 6.46: "When considering the relevant adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a

greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age.”

4. The considerations above on exceptional circumstances relating to the offence or offender apply equally when sentencing offenders aged 16 or 17.

#### **STEP FOUR**

##### **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 FIVE**

##### **Reduction for guilty pleas**

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

Where a **minimum sentence** has been imposed under section 51A of the Firearms Act 1968, the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than the required minimum term.

#### **STEP SIX**

##### **Totality principle**

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

#### **STEP SEVEN**

##### **Ancillary orders**

In all cases the court should consider whether to make ancillary orders.

##### **Forfeiture and destruction of firearms and cancellation of certificate**

The court should consider ordering forfeiture or disposal of any firearm or ammunition and the cancellation of any firearms certificate. Section 52 Firearms Act 1968 provides for the forfeiture and disposal of firearms and the cancellation of firearms and shotgun certificates where a person is convicted of one or more offence under the Firearms Act 1968 (other than an offence relating to an air weapon) and is given a custodial sentence or a community order containing a requirement not to possess, use or carry a firearm. The court may order the forfeiture or disposal of air weapons under paragraphs 7 and 8 of Part II to Schedule 6 of the Firearms Act 1968.

##### **Serious Crime Prevention Order**

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 EIGHT**

**Reasons**

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

**STEP NINE**

**Consideration for time spent on bail (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 meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**10 May 2019**  
**SC(19)MAY06 – Public Order**  
**Sarah Munro & Rebecca Crane**  
**Lisa Frost**  
**0207 071 5784**

## **1 ISSUE**

1.1 This meeting requires consideration of consultation responses for the draft guideline on hate crime offences.

## **2 RECOMMENDATION**

2.1 The Council is asked to;

- consider responses to the draft guideline for offences of stirring up racial hatred or hatred against persons on religious grounds or grounds of sexual orientation;
- consider whether revisions are required to any factors and sentences in the definitive version of the guideline.

## **3 CONSIDERATION**

3.1 The draft Public Order guideline includes a guideline for sentencing a number of hate crime offences provided for by the Public Order Act 1986. These include stirring up racial or religious hatred and hatred based on sexual orientation. Early consideration was given to some of these offences during the development of the terrorism guideline, with a particular focus on 'hate speech' type offences. The worst examples of cases share similarities with the offence of encouragement of terrorism, and racial hatred offences have been charged in a number of cases alongside soliciting to murder in a terrorism context. It was decided that as these offences are provided for by Public Order legislation, it would be appropriate to include them in the Public Order guideline.

3.2 Volumes of these offences are very low, and very few cases were available to analyse in development of the guideline. A case list which informed the draft guideline is included at

**Annex A.** A copy of the consultation document including the rationale for factors and sentences is included at **Annex B.**

3.3 It was agreed that while the various ways in which these offences can be committed are broad, one guideline could sufficiently capture all types of hatred offences. Although racial hatred activity can be broader and include abusive or insulting elements, the mischief of all offences is the incitement of hatred and potential harmful activity then being directed at particular groups.

#### Legislative provisions

3.4 Part 3 of the Public Order Act prohibits activities intended or likely to stir up racial hatred. Part 3A of the Act prohibits activities intended to stir up hatred against persons on religious grounds or grounds of sexual orientation.

3.5 The legislation prohibits a range of activity conducted with the intention or likelihood of stirring up hatred including:

use of words or behaviour or display of written material; publishing or distributing written material; public performance of play; distributing, showing or playing a recording; broadcasting or including programme in cable programme service; and possession of racially inflammatory material. All offences carry a 7 year statutory maximum sentence.

It should be noted that the racial hatred offences can be committed recklessly as can extend to acts *likely* to stir up hatred as well as those *intended* to, whereas the threshold is higher for activities prohibited in relation to religion or sexual orientation as these must be intended to stir up hatred.

3.6 The offences also contain an important distinction in that the racial hatred offences can include use of threatening, abusive or insulting words or behaviour, while the offences relating to hatred against persons on religious grounds or grounds of sexual orientation provide for threatening words or behaviour only, and do not extend to activity which is abusive or insulting. This was due to Parliament, and in particular the House of Lords, proposing amendments to the original bill to limit prohibited activities for hatred of religious or sexual orientation to threats. This was based on concerns that criminalising insults and abuse of a belief held regarding religion or sexual orientation would constitute a fundamental restriction of free speech, and wholly differs from abuse and insults based on an individual's race.

## Consultation responses

3.7 This guideline elicited the majority of responses to the Public order consultation. The vast majority were from individual members of the public, with almost 40 being an identical template response from members of a far-right organisation in protest at the inclusion of the guideline.

3.8 Some responses wholly misunderstood the purpose of the guideline and thought that new laws were being created. Others did not appreciate the nuances of the offences and the threshold of threats being the basis of some of the offences, and responses referred to censorship of speech, the undermining of democracy and saw the guideline as an interference with political considerations. Extracts of some of these responses are included below;

*“Whoever drafted this obscenity should be dismissed - scrap it and start again from the perspective that the CJS has no business interfering with political discussions”* - Individual response

*I consider these proposals a nations attempt to build a control structure around political activities in this country. I reject all of these proposals. I view these proposals with absolute horror because I can see them being used to ‘manage’ the political scene in Britain. -*  
Individual response

*“Criticism is not hate. But hate is a legitimate emotion and people have every right to express it, regardless of who has a vested interest in silencing them. You cannot criminalise emotions. In natural law, real law, not government decree, people are as free to hate as they are to love. There are things deserving of hatred. Hatred is not always a negative emotion, just as love is not always a positive emotion. There are people who love torturing, raping and killing other people. Hatred of an evil can hardly be described as wrong, yet the state would prosecute people for expressing hatred of evil. That makes the state evil. I hope I have made clear my utter contempt for this travesty of law and everyone involved in enforcing it.”* -  
Individual response

*This is not a game and there is a tremendous public backlash fermenting in the background. I am now of the opinion that the quicker this backlash happens the better so we can better purge our institutions of fruitcakes that treat the rest of us like morons and then hide behind bureaucracy and threats to avoid liability. Actually, I have changed my mind.....bring in this sentencing and jail anyone with an opinion that opposes the current political trends. Encourage an army of professional scam merchants and victims and make sure they cause as much damage as possible and alienate themselves and their communities even more than they already are. Give the police even more powers to jail anyone they don't like or who is white or male or Christian or criticises the police or government so that they lose even the slim amount of credibility they have remaining. Make more laws banning things. Ban all opinion. Empower certain groups over other groups. Make it law that indigenous people must doff the cap to anyone who identifies as BAME or an immigrant. men must prostrate themselves before women and beg for forgiveness for having a penis. Ban the internet. Bring back slavery. Bring back corporal punishment and build lots and plots of gulags for dissidents. Create a new Inquisition. All thought crime will be severely punished. Elevate fear*

*levels such that people are terrified to voice anything other than what they are permitted to say. Give corporations more rights than silly humans. The bigger the corporation, the more power and standing and rights. Burn books. All books that counter the current narrative must be torched and banned. Let's start with everything written by Winston Churchill, Robert Louis Stevenson, Mark Twain, Shakespeare and everything written prior to 1962. Let's ban the Royal Protestant Oath as being a hate crime. Oh, just ban everything. Embrace the power and ban a fair and equitable justice system. All courts should be political courts policed by political officers to ensure that the party line must be obeyed. - Individual response*

*In the circumstances, whilst we have nothing to say about the more serious offences involving violence or the threat of violence, we strongly object to your unaccountable body seeking to impose stiffer sentences on those whose exercise of free speech is only treated as a crime if what is said offends Left/Liberal Internationalist/Globalist anti-nationalist/multi-culturalist, anti-English, politically correct opinion. Conversely when patriots and nationalists are viciously smeared we are told that this must be accepted as legitimate expressions of Free Speech. The lack of balance and equivalence between these approaches demonstrates that you are seeking to do nothing more than to further politicise the criminal justice system in support of the British Political Establishment rather than on the basis of rationality or dispassionate objectivity. – English Democrats*

*"This is a blatant attempt to enshrine Islamic Sharia blasphemy "laws" into UK Law" - Individual response*

*This is highly politically motivated and designed to prevent political organisation against the Cultural Marxist philosophies. 1. Group activity: this is designed to prevent right-wing political parties from engaging in activism. If you wish to abolish democracy, this would be the way to go. 2. The volume of dissemination: you mean that a small Youtube channel pointing the excessive involvement of black people in crime, say, would lead to a lower sentence, than a popular Youtube channel -- when no real offence other than engagement in politics had taken place. 3. Using multiple social media platforms? Well, in a democracy, online activism involves attempting to disseminate views widely. 4. History of failure to comply with court orders: what if those orders directly contravene the Queen's Coronation Oath and judges' Judicial Oaths? - Individual response*

*1984 was not an instruction manual. - Individual response*

*Please put me on your hate speech list because i will condemn those that will not stand up for the culture of my heritage. I will speak out and speak the truth. I will not be intimidated by some spineless speech monitor whether they be in Britain or anywhere else. Cower in fear you spineless perpetrators of cultural genocide. Damn you, damn all of you! Your judgement will come! (Please consider my speech threatening because I consider your behavior as genocide.) - Individual response*

3.9 The Council have previously noted that in the current social climate there is the potential for the Public Order guideline to appear to be politically influenced or motivated. In development it was noted this was a potential risk of including the guideline for hate crime

offences. The guideline was included predominantly to provide for the terrorism related offences and serious examples of hate crime, and not the types of activity referred to in responses. However, the consultation document did not include examples of the types of cases relevant to this to avoid creating perceptions that particular groups were the focus of the guideline.

3.10 It is not proposed that the guideline is excluded from the definitive version based on the critical responses. The consultation response document will be clear on the breadth of activity captured and could include examples of cases. Proposed guideline revisions take into account concerns raised in consultation and seek to ensure a proportionate approach to lower level offences.

**Question 1: Does the Council agree that the definitive Public Order guideline should retain the offences related to stirring up hatred?**

Culpability factors

3.11 It was agreed that culpability factors should relate to the intention to stir up hatred and the objective of such activity, as this is the essence of these offences, rather than the level or content of threats, abuse or insults which are captured as aggravating factors. Given the similarities which exist between hatred offences and some terrorism related incitement offences, some culpability and harm factors in the encouragement of terrorism guideline were adapted and included.

3.12 The first high culpability factor relates to person in position of trust, authority or influence. This factor is included in the Terrorism guideline, and was relevant in the case of Abul Aba Hamza, the Iman who incited jihadist activity among those attending the mosque at which he preached. This was the type of offence this factor sought to capture. However, some respondents thought this was specifically drafted to capture individuals such as Tommy Robinson and Nigel Farage, and spokespeople or activists of right wing groups. Others questioned how the status of the individual would be determined or measured;

*What exactly do you mean by position of trust, authority and influence? The Nolan principles on public life already set a series of standards for those in public service (even if honoured in the breach of the same by many, particularly politicians who frequently breach these).*

*If we are talking outside of people in public service, how are you defining a position of trust, authority and influence? Are you looking at YouTube views? - Individual respondent*

There were observations that this factor could extend to politicians and members of the press. It is not proposed the factor be removed or revised as the Council considered that influential figures bear a greater responsibility not to abuse their position to incite criminal

activity against particular groups. This will be clarified in the consultation response document.

**Question 2: Does the Council wish to retain the high culpability factor relating to offenders in a position of trust, authority or influence?**

3.13 There was little dissent specifically directed at the other two high culpability factors, and no further amendments are proposed.

3.14 The lesser culpability factor 'reckless as to whether hatred would be stirred up' would only be relevant to the racial hatred offences, as the other offences must be intended. It was envisaged this would be relevant where an offender may have recklessly shared or added commentary to a social media post which included threats or encouragement of violence towards particular groups. The factor attracted significant criticism that it could be too far reaching and difficult to objectively assess;

*Given that the internet has billions of potential viewers how can a person when discussing a controversial subject on a website, or YouTube video not be "reckless" as to the reaction from some viewers? If the controversial subject is also emotive, then recklessness has to be acknowledged as non-culpable unless this is about censoring free speech and opinion on controversial subjects. Would the Council view a documentary or commentary on US police shootings of black people and Black Lives Matter in the same way as a documentary on Julius Malema (Economic Freedom Fighters Party) and the plight of white South African farmers? In my view both are controversial subjects that need discussion, but inevitably anyone posting such a video must be reckless of the consequences because of the emotive nature of the subject matter.- Individual respondent*

*I find the penalties for 'reckless sharing' utterly absurd and an affront against justice. You are asking a Judge to decide how careful people should be about sharing information and to imagine if some unidentified persons may feel a strong emotion and to imagine what the consequence of that could be on society. This goes beyond what a Judge should be expected or allowed to decide.- Individual response*

While it is thought that reckless behaviour should be provided for at a lower level than intended behaviour, further consideration of the factor has highlighted that distinction in its applicability to racial hatred offences (intention is required in stirring up other types of hatred) only is not clear in the guideline as drafted. Given the nuances and different criteria for offences this could be misleading for sentencers. If one guideline is to be provided for all offences, there are two options to address this. One option would be to have only two culpability categories, with the existing high culpability category retained and a lesser culpability factor of 'all other cases'. Sentence starting points and ranges could then be adjusted accordingly. An alternative option would be to retain the factors as drafted, but qualify the reckless factor with 'applicable to racial hatred offences only'. This does mean

that as there must be intention to commit the offences relating to hatred based on religion or sexual orientation, only two levels of culpability are available in the assessment.

**Question 3: Does the Council wish to remove the recklessness factor from culpability, or qualify with ‘applicable to racial hatred offences only’?**

3.15 The Campaign against Anti-Semitism response made the following point regarding culpability factors;

*‘The assessment of culpability should include the persistent use of social media to disseminate to a wide audience hateful slurs about the behaviour of specific racial or religious groups. Such slanders would include the use of inaccurate stereotypes to portray the targeted group as a threat to society. For example, antisemitic conspiracy theories such as Jews exerting a control of global finance that allows them to profit at the expense of others is clearly designed to encourage hatred of Jewish people. In the same vein, slanders that Jews are allowed to kill non-Jews and are permitted to engage in paedophilia are widely disseminated across social media, and are clearly designed to incite hatred’.*

The persistent activity high culpability factor would capture persistent dissemination of hatred type material, and this will be clarified in the consultation response document. The guideline includes a high harm factor included relating to widespread dissemination which will be discussed later in this paper.

#### Harm factors

3.16 There were few issues raised with the category 1 harm factor relating to encouragement of activity threatening or endangering life. However, concerns were raised regarding the second high harm factor relating to ‘widespread dissemination’. Specific concerns related to the threshold of ‘widespread’ and how this could be assessed in the digital age. Some respondents thought that an individual may not intend for a statement, publication or broadcast to be widely shared but this may occur anyway. A number of responses cited the case of *R v Meechan* as an example, which involved the offender posting a video on You Tube of a dog he had taught to respond to nazi commands which he said he intended as a joke to challenge perceptions of the animal as ‘cute’, and it went viral;

*In R V Meechan (2018), Meechan made a video aimed at a small group of around 10 people, but which went viral subsequently obtaining several million views outside Meechan’s control. Even then the public did not make a complaint directly to the police, who with the support of the CPS took it upon themselves to prosecute the matter.*- Individual respondent

In developing the guideline the cases that influenced the inclusion of this factor were *R v Burns* and *R v Sheppard and Whittle*. In each case information intending to stir up hatred was shared on the internet and potentially reached a wide audience.

The MA thought the factor should be separated into two points;

*The second limb of Category 1 is: 'Widespread dissemination of statement/publication/performance or broadcast and/or strong likelihood that many would be influenced'— this phrasing seems unclear, and we query whether the 'influence' needs to be tied to intention to stir up racial hatred or cause harm. We suggest that this limb be broken down into two separate points, firstly the widespread dissemination, and secondly the strong likelihood of influence.- MA*

However, they also raised concerns regarding a risk of double counting if the factor was applied where high culpability is present;

*We have some concern that the high culpability factor 'in position of trust, authority or influence and abuses their position' may, if considered together with the high harm factor relating to widespread dissemination, result in double counting for the purposes of determining the sentencing starting point. It is probably easiest to illustrate our concern by way of example: someone may be considered to fall into the high culpability factor as holding a position of influence because they have a large social media following, and any comment that person makes on social media is thereby disseminated widely. This would then automatically mean that the person falls into the A1 sentencing range, as having fulfilled the Category A culpability requirement and Category 1 harm. – MA*

3.17 It is thought that offenders publishing items online do so in the knowledge that it may be viewed widely, and this would be more obvious to an offender with a large social media following, and the factor does require widespread dissemination of hatred based material. However, there is some force in the argument that this factor could potentially capture a high volume of cases where information is shared digitally, and it could appear disproportionate to the harm involved in the other category 1 high harm factor which captures encouragement of activity endangering life. However, intention is required in all offences other than racial hatred offences, so a high threshold is required to prove the offence.

3.18 There are two aggravating factors already included relating to significant volumes of publications published or disseminated and use of multiple social media platforms to reach a wider audience. These factors could be redundant if widespread dissemination is included as a high harm factor. It may be preferable to have the second limb of the factor regarding influence as necessary for the factor to apply by removing the 'or' from 'and/or', which would address the point the MA raised while retaining the factor at high harm. It should also be noted that the response from the Campaign Against Anti-Semitism discussed at paragraph 3.15 specifically noted the widespread dissemination as a highly relevant factor.



**Question 4: Does the Council wish to revise the category 1 harm factor relating to widespread dissemination so strong likelihood of widespread influence is necessary, or for widespread dissemination to be captured at Step 2?**

#### Sentence levels

3.19 Sentence levels were based on a limited number of cases which were available for review, and intended to be relative to sentences agreed for the offence of encouragement of terrorism in the Terrorism guideline.

3.20 Unsurprisingly the majority of responses considered the sentences far too high, although the highest starting point in the guideline is considerably lower than the 7 years statutory maximum sentence.

3.21 If the lowest category of culpability is retained, the Council may wish to consider if the lowest starting point in the guideline should provide for a high level community order starting point rather than a custodial sentence. These offences would be reckless offences applicable to racial hatred offences involving lower levels of harm, and it may be thought a high level community order starting point still allowing for an increase if aggravating factors are present would be proportionate.

**Question 5: Does the Council wish to revise the starting point of a category C2 offence?**

#### Aggravating and mitigating factors

3.22 Factors which were noted as particularly aggravating in sentencing comments were included in the draft guideline, and some relevant factors from the encouragement of terrorism guideline adapted. This was also the case for some mitigating factors. It is not proposed any be removed.

**Question 6: Does the Council wish to retain the aggravating and mitigating factors included in the draft guideline?**

## **4 RISKS & ISSUES**

4.1 Given the strength of feeling of a number of respondents there is a risk that the Council will be criticised for including the hate crime guideline in the definitive version of the guideline. However while a high volume of responses were from groups with particular views, these are minority groups that do not share the majority view that such offences are abhorrent and against the principles of an inclusive society. The consultation response document will be clear

on the rationale for the content of the guideline, and clarify that the guideline applies to offences determined by Parliament and is not politically motivated.

R v Burns [2017] EWCA Crim 1466

Convicted of stirring up racial hatred by publishing written material, contrary to section 19(1) of the Public Order Act 1986 (count 1); and of stirring up racial hatred through words or behaviour, contrary to section 18(1) of the same Act (count 2). On 10th March 2017, sentenced to three years' imprisonment on the first count and to a consecutive term of one year's imprisonment on the second count. The total custodial sentence was, therefore, four years' imprisonment. D was a member of National Action, a far-right white supremacist group, and was an avowed racist. Between August and September 2014, when he was aged 20, he posted a series of virulently racist updates, comments and links to a Facebook account he operated under an alias. Those posts gave rise to count 1. The comments contained many vile and deeply offensive comments directed at, in particular, the Jewish and Afro-Caribbean communities. The gist of the messages was to promote militant action against them, with the aim that they should be eliminated, with a view to protecting what the applicant described as "an advanced warrior race consisting of white men and women". If there is any doubt about the appellant's state of mind and intention, it was dispelled by material found on electronic media belonging to him, including e-books, expressing extreme anti-semitic views and extolling Adolf Hitler as "the ultimate being",

The Facebook page could be readily accessed by any user of the internet.

Count 2 related to a speech made by the applicant on 23rd May 2015, whilst he was aged 21 and whilst he was on bail for the offence charged in the first count. During a demonstration staged outside the United States Embassy, the appellant spoke, using highly inflammatory language directed towards non-white immigrants and Jews. He alleged that the former were "rapists, robbers and murderers" and that the latter were "parasites and bankers" who wanted to create a "mongrelised" race. The speech was filmed. Video was to be posted on YouTube. Defence at trial was that postings on Facebook were intended to be "private banter" and that his speech, whilst not banter, was not intended to stir up racial hatred and was unlikely to do so. Rejected, but sentence reduced due to age and immaturity, and comparing to other authorities where similar sentences were imposed for significantly greater number of offences and previous convictions for similar offences. Sentence on Ct 1 reduced to 18 mths and Ct 2 sentence remained. Total sentence two and a half years.

R v Sheppard and Whittle [2010] EWCA Crim 65

Whittle was convicted of four counts of publishing racially inflammatory material (counts 4, 5, 7 and 8). Sheppard was convicted of 10 counts of publishing racially inflammatory material, four counts of possessing racially inflammatory material and one count of distributing racially inflammatory material. Whittle composed material which he submitted by e-mail to Sheppard. Sheppard edited the material on his computer and then uploaded it to a website called heretical.com which was set up by him. When posted on the website the material was available for access via the internet by visitors to the website. Pamphlets also posted. Whittle's involvement was less than that of Sheppard and over a shorter period, and he had no previous convictions. On the other hand he was the "brains" behind the construction of the offensive material which he fed to Sheppard.

Offences related to publishing and distributing a pamphlet called Tales of the Holofoax in hard copy and on a website called heretical.com. It was a publication in the form of a comic book, the central theme of which was to cast doubt on the existence of the Holocaust. The publication also suggested that the Jewish people had a history of inventing stories of the commission of atrocities against them and it portrayed the Jewish people in a way that, as was alleged, made it likely that racial hatred would be stirred up against them if the pamphlet was distributed. Number of other articles written by Whittle, edited by Sheppard and published by Sheppard on the website. All the articles were alleged to contain derogatory remarks about Jewish people and black people. A number of other documents which were likewise alleged to contain material that was threatening, abusive or insulting towards various racial groups, distribution by Sheppard of a pamphlet called "Don't be Sheeple"

which was likewise alleged to be racially inflammatory. The Crown Prosecution Service decided that Tales of the Holohoax contained words which were abusive, insulting and possibly threatening towards a racial group, namely Jewish people. No evidence of how many people saw the material or of the consequences of their having seen it, although there were several thousand "hits" or visits to heretical.com per day. There was no evidence of any individual having been corrupted, although the court noted such evidence would be unlikely to be forthcoming.

Shepherd- 4½ years in total reduced on appeal to 3½ years.

Whittle- Sentences of 2 years reduced to 18 months

#### R v Saleem and others [2007] EWCA Crim 2692

Convicted of stirring up racial hatred during demonstration held in central London to protest against the republication in a number of countries, although not in the United Kingdom, of cartoons depicting the Prophet Mohammed which had originally been published in Denmark. Many posters and placards saying things like: 'Massacre Those who Insult Islam'; 'Be Prepared for the Real Holocaust'; 'Osama Is On His Way'; 'Europe You Will Pay' and 'The Fantastic Four Are On Their Way'. As the march moved off, it grew in size considerably. A public address system was used. Things were said continuously such as: 'Bomb, bomb the UK'; 'Bomb, bomb Denmark'; 'Democracy Hypocrisy'; 'Queen Elizabeth go to hell!'; 'Tony Blair go to hell!' and also Arabic words including 'Zakari' and 'Bin Laden'

Saleem held microphone and addressed the crowd through a public address system. He chants: 'There is no God but Allah!' 'Mohammed is his messenger!' 'Hands up messenger of Allah!' 'Hands up dearest to Allah!' He then leads the chants which are repeated by the crowd: 'There is no God but Allah!' 'Mohammed is the messenger!' 'Hands up messenger of Allah!' 'Hands up dearest to Allah!' 'Democracy, hypocrisy!' 'Democracy, go to hell!' 'Freedom, go to hell!' 'Democracy, go to hell!' 'UK, you must pay!' 'Muslims are on their way!' 'UK, you will pay!' 'Islam is on its way!' 'UK, you will pay!' 'Sharia is on its way!' 'Denmark you will pay!' 'Muslims are on their way'. 'Denmark you will pay!' 'Islam is on its way!' 'Denmark you must pay!' 'Sharia is on its way!'. Saleem addresses large crowd outside Embassy and says: 'There will come a day we will stand inside this Embassy. There will come a day when we remove that flag. There will come a day when we will raise the flag of Islam. Outside every Parliament of every nation whether you like it or not. Islam is superior and can never be surpassed'. He then leads the chants: 'Down, down UK!' 'Down, down Norway!' 'Down, down Denmark!' 'Denmark, you will pay!' 'With your blood, with your blood!' 'Norway, you will pay!' 'With your blood, with your blood.' 'Europe, you must pay!' 'With your blood, with your blood!' After every phrase, the crowd chanted the same words back.

Umran Javed; seen chanting in the crowd and later took over the microphone. Used words to effect of: 'The infidels attack the Muslim nation. They are one group. We will not stand for what Denmark did, for what France did. The whole of the infidels and the Western world are united. You have declared war against Allah and the Muslim nations for which you will pay a heavy price. Take a lesson from Theo Van Gogh and take a lesson from the Jews of Khyber from what you can see, or you will pay with your blood.'

Abdul Saleem was sentenced to four years' imprisonment. Javed was sentenced to three years' imprisonment for stirring up racial hatred (concurrent to six years for soliciting to murder).

Sentences quashed - replaced with 30 months' imprisonment for Saleem and two years' imprisonment for Javed.

#### El Faisal [2004] EWCA Crim 343

Two counts of using threatening, abusive words or behaviour with intent to stir up racial hatred contrary to section 18(1) of the 1986 Act, for each of which he was sentenced to one year's imprisonment; and one count of distributing threatening, abusive or insulting recordings of sound with intent to stir up racial hatred contrary to section 21(1) of the 1986

Act, for which he was sentenced to two years' imprisonment. The appellant was a minister of Islam. He held a series of public meetings at which he addressed audiences of predominantly young Muslim males. At these he encouraged Jihad, involving the killing of those who did not believe in Islam. Suicide bombings and the use of chemical weapons were recommended. Some of these meetings were recorded and the resultant tapes distributed to a number of specialist bookshops. The offences charged related to meetings that had been recorded in this way.

Abu Hamza [2006] EWCA Crim 2918

Abu Hamza was the Imam of the Finsbury Park Mosque. On 7 February 2006 he was convicted of six counts of soliciting to murder and, inter alia, three counts of using threatening, abusive or insulting words or behaviour with intent to stir up racial hatred. The inflammatory speeches that formed the subject matter of these offences spanned a period of about three years between 1997 and 2000. They also were recorded and the tape recordings distributed. The former counts attracted sentences of seven years' imprisonment and the latter sentences of 21 months' imprisonment, all to be served concurrently.

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# Section seven: Racial hatred offences and hatred against persons on religious grounds or grounds of sexual orientation

There are a number of other hate crime offences provided for by the Public Order Act.

Part 3 of the Public Order Act prohibits activities intended or likely to stir up racial hatred. Part 3A of the Act prohibits activities based on hatred against persons on religious grounds or grounds of sexual orientation. The legislation prohibits a range of activity including: use of words or behaviour or display of written material; publishing or distributing written material; public performance of play; distributing, showing or playing a recording; broadcasting or including in a programme service; and possession of racially inflammatory material where the offender intends to stir up racial hatred, and in some cases having regard to all the circumstances, racial hatred is likely to be stirred up. All offences carry a 7 year statutory maximum sentence.

The essence of each offence is the intention to stir up hatred. However, the offences contain an important distinction in that the racial hatred offences can include use of threatening, abusive or insulting words or behaviour, while the offences relating to hatred against persons on religious grounds or grounds of sexual orientation provide for threatening words or behaviour only, and do not extend to activity which is abusive or insulting.

It is proposed that one guideline could sufficiently capture all types of hatred offences. Although racial hatred activity can be broader and include abusive or insulting elements, the mischief of all offences is the incitement of hatred and potential harmful activity then being directed at particular groups.

Volumes of these offences are extremely low and there have been no offenders sentenced for some offences. However, given the recent social climate and an enhanced focus on this type of offending, the Council considers it would be useful for sentencers to be equipped with guidance on sentencing these offences.

## STEP ONE

The first step of the guideline is to consider the culpability level of the offender and the harm caused by the offence by the assessment of a series of factors.

### STEP ONE

#### Determining the offence category

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

**Culpability** demonstrated by one or more of the following:

<b>A – High culpability</b>	<ul style="list-style-type: none"> <li>• Offender in position of trust, authority or influence and abuses their position to stir up hatred</li> <li>• Intention to incite serious violence</li> <li>• Persistent activity</li> </ul>
<b>B – Medium culpability</b>	<ul style="list-style-type: none"> <li>• Other cases falling between categories A and C</li> </ul>
<b>C – Lesser culpability</b>	<ul style="list-style-type: none"> <li>• Reckless as to whether hatred would be stirred up</li> </ul>

### High culpability

The factors proposed were identified as factors increasing seriousness of offences in the limited numbers of cases available for analysis. Among the cases analysed there were a number of ‘hate speech’ type offences, where inflammatory speeches were given by influential figures with the intention of stirring up racial hatred. Other cases involved publication on YouTube of content inciting serious violence towards particular racial or religious groups, websites being published including abusive and insulting content, with some activity continuing over a long period of time and intended to reach global audiences. The Council considers that activities of the type listed represent the highest level of culpability for these offences, as they demonstrate a serious intention to stir up hatred towards particular groups.

### Medium culpability

This category is intended to capture cases where culpability falls between a serious intention and reckless behaviour.

### Low culpability

This factor provides for those who may have been reckless as to stirring up hatred. While no cases involving such activity were identified, an example of such a case may be the reckless sharing and adding commentary to a social media post directing threats towards particular groups.

Q37

**Do you agree with the proposed approach to the assessment of culpability? Please give reasons where you do not agree.**

### Harm factors

Once the court has determined the level of culpability the next step is to consider the harm caused or intended to be caused by the offence. There are two categories proposed;

#### Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Statement/publication/performance or broadcast directly encourages activity which threatens or endangers life</li> <li>• Widespread dissemination of statement/publication/performance or broadcast and/or strong likelihood that many would be influenced</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• All other cases</li> </ul>



### Harm category 1 factors

The proposed factors are intended to reflect the most serious harm which could be caused by this offence. The ways in which these offences can be committed are wide ranging, which the factors reflect.

The Council considers that the most serious harm present in these offences would be cases where activity is encouraged which threatens or endangers life, as well as cases involving widespread dissemination of material and/or a strong likelihood that many would be influenced.

### Harm category 2 factors

This is a catch all category and provides for cases where a lower level of harm is present in an offence.

Q38

Do you agree with the proposed approach to the assessment of harm? Please give reasons where you do not agree.

## STEP TWO

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point.

### Sentence levels

The starting points and ranges have been based on statistical data from the Court Proceedings Database and analysis of first-instance transcripts and Court of Appeal sentencing remarks.

## STEP TWO

### Starting point and category range

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

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

Q39

**Do you have any comments on the sentence ranges and starting points?**

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

#### Factors increasing seriousness

##### *Statutory aggravating factors:*

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

Offence committed whilst on bail

##### *Other aggravating factors:*

Planning of event or campaign designed to stir up hatred

Leading role where offending is part of group activity

Timing of incident – particularly sensitive social climate

Vulnerable/impressionable audience

Significant volume of publications published or disseminated (where not taken into account at step one)

Used multiple social media platforms to reach a wider audience (where not taken into account at step one)

Offence committed whilst on licence or subject to post sentence supervision

History of failure to comply with court orders

#### Factors reducing seriousness or reflecting personal mitigation

Minor/peripheral role in group activity

Previous good character

No previous convictions or no relevant/recent convictions

Remorse

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

Mental disorder or learning disability where linked to the commission of the offence

Sole or primary carer for dependent relatives

Q40

**Do you agree with the aggravating and mitigating factors? Please state which, if any, should be removed or added.**

Q41

**Do you have any other comments on the structure and content of the draft guideline?**

**Sentencing Council meeting:**  
**Paper number:**

**10 May 2019**  
**SC(19)MAY07 – Immigration and Modern  
Slavery**

**Lead Council member:**  
**Lead official:**

**Rosina Cottage**  
**Eleanor Nicholls – 020 7071 5799**

## **1 ISSUE**

1.1 This is the first paper on the Immigration and Modern Slavery Offences guidelines and covers the scope of the project.

1.2 There are currently five meetings scheduled to discuss these guidelines, with sign-off in January next year. Consultation is currently scheduled for February to May 2020, with publication of the definitive guideline in early 2021.

1.3 Initial evidence to support the development of the new guideline is set out in the Annex. This annex contains volumes over time, sentence outcomes, and ACSLs for adult offenders for some of the offences discussed below, and a full list of all immigration offences currently in force, including those which we are not proposing to include.

## **2 RECOMMENDATION**

2.1 That the Council agrees:

- the main offences to include within these guidelines;
- initial proposals for grouping the offences; and
- approach to the Modern Slavery Act offences guidelines, given the low numbers of current prosecutions and sentences.

## **3 CONSIDERATION**

3.1 There are currently no definitive guidelines for immigration offences or for offences under the Modern Slavery Act 2015, other than limited guidance on trafficking for the purpose of sexual exploitation within the Sexual Offences guideline (revised in 2017). There are over 125 separate immigration offences, most of which are never or very rarely sentenced. These offences cover such areas as seeking to obtain leave to enter the UK by deception, facilitating acts which breach UK immigration law, entering the UK without a passport, providing immigration services/advice when not qualified to do so, or in contravention of a prohibition, and failure to take action to enforce immigration decisions. There are only seven of these

offences for which more than 10 offenders have been sentenced in any year over the past five years. The maximum penalties for these offences range from 2 to 14 years, with some triable either way and others indictable only.

### *Immigration offences*

3.2 The enforcement of most immigration rules is dealt with administratively by the Border Force, with relatively few individuals being charged with criminal offences, as can be seen from the numbers below. In December last year, the government published a white paper on new immigration arrangements after Brexit. Much of the white paper focuses on changes relating to EU citizens who will require permission to enter and remain in the UK in the same way as non-EU citizens. At the moment, whilst this will affect immigration offences to some extent, it appears as though these changes would mainly affect who can commit offences, rather than the substance of the offences themselves. I therefore propose to continue development of guidelines for these offences, but to review the situation when more information is available on the Brexit timetable and any resulting changes to immigration offences.

#### ***Question 1: Does the Council agree to commence work on guidelines for immigration offences and to keep Brexit-related developments under review?***

3.3 As mentioned above, there are over 125 immigration or immigration-related offences, most of which are never prosecuted or sentenced. In the absence of evidence of difficulty in sentencing any particular offences, I propose to focus on developing guidelines for those offences which have been most commonly sentenced over the last five years, which are:

<b>Legislation</b>	<b>Offence</b>	<b>Stat Max</b>	<b>2017 volume</b>
1. Immigration Act 1971 s25(1) and (6)	Do an act to facilitate the commission of a breach of UK immigration law by a non-EU person.	14 yrs	237
2. Immigration Act 1971 s24A(1)(a), s24A(1)(b) and (3)	Seek / obtain leave to enter / remain in UK by deceptive means - immigration. Secure avoidance of enforcement action by deceptive means - immigration.	2 yrs	22
3. Immigration and Asylum Act 1999 s91(1)	Provide an immigration service in contravention of a prohibition. Provide an immigration service in contravention of a restraining order.	2 yrs	3

4. Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s35(3) and (4)	Deportation / removal - fail to take action as required by Secretary of State	2 yrs	9
5. Immigration Act 1971 s24(1)(a)	Enter United Kingdom in breach of a deportation order	6 mths	8
6. Identity Documents Act 2010 s4	Possessing or controlling identity documents with intent	10 yrs	625
7. Identity Documents Act 2010 s6	Possessing or controlling a false or improperly obtained or another person's identity document	2 yrs	131

3.4 Based on volumes, offences 1 and 2 above seem, of all the immigration offences, the most likely candidates for inclusion in the guideline. Offences 3, 4 and 5 have been included because whilst there are fewer offenders sentenced in 2017, there have been a higher number of offenders sentenced in the last three years (see tables on page 1 of Annex A). In addition, for offence 3, we understand from the Office of the Immigration Services Commissioner, which prosecutes these offences, that they are prosecuting some of these cases as Fraud offences, in part because of a lack of a sentencing guideline and a concern about inconsistent sentencing, so there is a stronger case for including it in the guideline.

3.5 In addition to the above, the offence of entering the UK without a passport (Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s2(1) and (9)) has seen higher volumes in 2013 and 2014, but volumes have recently dropped dramatically, to only 6 cases in 2016 and 1 case in 2017. I therefore propose not to include this offence within the guidelines, unless we receive further information from the Home Office/Border Force that such a guideline is needed, or see an increase in case numbers in 2018 sentencing data due out in late May.

3.6 The last two offences on the above list relate to identity documents. There are guidelines in the Magistrates Courts Sentencing Guidelines for the now repealed offences relating to identity cards which the above offences replace, but no guidelines for these specific offences in the magistrates' or Crown courts. Some aspects of the offending may be similar to immigration offences relating to deception and to modern slavery cases and when considering the remaining triable either-way offences without a guideline in July last year, the Council agreed that these offences should be revised as part of the work on immigration offences. The volumes of these offences remain relatively high and I intend to include them within the scope of this guideline.

**Question 2: Is the Council content to include the offences in the above table within the guidelines? Are there any additional offences which should be covered?**

3.7 Initial review discussions with Home Office officials suggest that some of the above offences share some common aspects, not least a statutory maximum penalty, and could perhaps be dealt with in one guideline. However, I propose to deal with them in separate guidelines at this stage, bringing them together if it seems when we have considered transcript and factors in greater detail later in the development of the guidelines. In addition, there are many other less frequently sentenced offences which share maximum penalties and other aspects with the above offences. Where this is the case, I propose to develop a list of “analogous offences” similar to that used in the Breach guideline, setting out where elements of a guideline may be useful to judges in sentencing several of the less frequently seen offences.

***Question 3: Is the Council content to develop separate guidelines for the above offences at this stage, and to develop a list of analogous offences alongside the guidelines?***

#### *Other offences committed by migrants*

3.8 In addition to the immigration offences per se, there may be scope (and therefore calls at consultation) for this guideline to include overarching principles for sentencing offenders for any offence who have some sort of irregular immigration status, or are at the time of sentencing in the process of applying for leave to remain or asylum in the UK. We have not had specific calls for this yet, however, and there is already guidance for the courts in dealing with migrants, refugees and asylum seekers in the Equal Treatment Bench Book. I believe it could greatly extend the scope of what is already a broad set of guidelines, and be difficult to develop overarching principles for such a disparate group of offenders, so do not propose to include this within the scope of the current guideline.

***Question 4: Does the Council agree not to include overarching principles on sentencing migrants convicted of other offences within the scope of this guideline?***

#### *Modern Slavery*

3.9 The Modern Slavery Act 2015 repealed and replaced several pre-existing trafficking and slavery offences which had existed in other Acts, including the Sexual Offences Act 2003 and the Coroners and Justice Act 2009. It covers offences of trafficking for various purposes, holding someone in servitude, and forced labour offences. In addition to the offences, it provides for various orders, including trafficking and slavery reparation orders and prevention orders. Although the provisions relating to offences only came into force in July 2015, its

implementation has already been subject of two reviews, partly in response to concern about the low level of successful prosecutions for offences under the Act. The first of these reviews, by Caroline Haughey in 2016, recommended the development of guidelines for these offences. The second review, led by Baroness Elizabeth Butler-Sloss, has also made a recommendation in March this year relating to sentencing guidelines. There has been continued concern that the Act has not brought about a significant increase in prosecutions and, crucially, convictions, and that offences are being committed in new ways, such as county lines drug activity. Discussions with the Home Office reveal concerns about cases where the offender is him/herself a victim of a modern slavery or other offence, and the overlap with immigration cases, in which a victim of a modern slavery offence does not have leave to remain in the UK. These are matters which I intend to consider carefully during the development of the guideline.

3.10 Since the implementation of the Act, there have been very few successful prosecutions. No-one was sentenced for any of these offences until 2017, when the numbers of offenders sentenced were as follows:

<b>Offence</b>	<b>Description</b>	<b>No.</b>	<b>Stat Max</b>
S 1(1)(a)	Hold person in slavery or servitude	0	Life
S 1(1)(b)	Require person to perform forced or compulsory labour	7	Life
S 2(1)	Arrange or facilitate travel of another person with a view to exploitation	8	Life
S 4	Commit offence of kidnapping or false imprisonment with intention of committing human trafficking offence	0	Life
S 4	Commit offence other than kidnapping or false imprisonment with intent to commit human trafficking offence	3	10yrs
S 30(1)	Breach a slavery and trafficking risk or prevention order	2	5yrs
S 30(2)(a)	Failure to comply with requirement to surrender a passport	0	5 yrs
S 30(2)(b)	Failure to comply with requirement to provide a full name and address	2	5 yrs
<b>Total</b>		<b>22</b>	

3.11 Given that there are so few offences in the Act, I propose to explore developing guidelines for all the above offences in order that the guideline be as complete as possible. This approach would not, of course, be consistent with the approach proposed for immigration, of considering only the most commonly sentenced offences, but I believe it is justified on the basis of completeness, and because there are so few Modern Slavery Act 2015 offences overall.

***Question 5: Is the Council content to develop guidelines for all the offences referred to above?***

3.12 As with the immigration offences, inclusion of all the above offences does not necessarily require each to be subject of a separate guideline. Some consideration of transcripts and initial discussions with the Home Office have suggested that there is sufficient overlap between the s1(1) offences of holding a person in servitude and requiring a person to perform forced labour that they may be appropriate candidates for combining into one guideline. The two s4 offences of committing other offences with the intent to commit a human trafficking offence could also be covered by one guideline, as could the two s30(2) offences (failure to surrender passports/provide names and addresses). I therefore propose to group these offences together initially, and review the approach as the guidelines are developed.

***Question 6: Does the Council agree to covering some of the Modern Slavery Act offences within the same guideline, as set out above?***

*Modern Slavery – sources of information and approach*

3.13 Although very few cases have been sentenced, so we have little information and evidence of current sentencing practice, the Act replaces older offences which have been sentenced. Whilst these must be treated with caution, particularly where the statutory maximum penalty has been increased, they will nevertheless provide valuable information on the culpability, harm, aggravating and mitigating factors for these offences. Early discussions with the Home Office suggests that, especially for the forced labour and arranging travel offences, evidence from the older cases could be particularly valuable. I therefore propose to consider sentence levels and case transcripts for these older cases as evidence which will assist us in developing these guidelines. In addition, the one existing guideline for trafficking for the purpose of sexual exploitation, currently part of the Sexual Offences guideline, will provide a useful template for developing these guidelines.

***Question 7: Is the Council content to use evidence from the repealed offences, and the previous sexual exploitation trafficking offence guideline, as part of the evidence base as we start to develop the guidelines for the modern slavery offences?***

## **4 IMPACT AND RISKS**

4.1 Impacts of these guidelines will be difficult to assess, particularly for the lower volume offences. A resource assessment will be carried out prior to consultation, and we will share further information as the guideline is developed.



**Table 1: Number of adult offenders sentenced for specified immigration offences, 2013-2017<sup>1</sup>**

Offence	Legislation	Number of adult offenders sentenced				
		2013	2014	2015	2016	2017
Seek / obtain leave to enter / remain in UK by deceptive means - immigration. Secure avoidance of enforcement action by deceptive means - immigration.	Immigration Act 1971 s24A(1)(a) and (3) Immigration Act 1971 s 24A(1)(b) and (3)	53	40	20	30	22
Provide an immigration service in contravention of a prohibition. Provide an immigration service in contravention of a restraining order. Includes providing immigration advice.	Immigration and Asylum Act 1999 s91(1)	7	13	9	13	3
Do an act to facilitate the commission of a breach of UK immigration law by a non EU person. Conspire to do an act to facilitate the commission of a breach of UK immigration law by a non EU person	Immigration Act 1971 s25(1) and (6) Criminal Law Act 1977 s1(1)	209	232	236	264	237
Enter United Kingdom without a passport	Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s2(1) and (9)	43	33	27	6	1
Traffic a person into the United Kingdom for exploitation	Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s4(1) and (5)	5	18	5	11	9
Deportation / removal - fail to take action as required by Secretary of State	Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s35(3) and (4)	1	2	13	10	9
Enter United Kingdom in breach of a deportation order	Immigration Act 1971 s24(1)(a)	4	8	5	10	8

Source: Court Proceedings Database, Ministry of Justice

Note:

1) The time period 2013-2017 has been chosen to give the number of offenders sentenced over the past 5 years

**Table 2: Number of adult offenders sentenced for specified identity document offences, 2011-2017<sup>2</sup>**

Offence	Number of adult offenders sentenced						
	2011	2012	2013	2014	2015	2016	2017
Possessing or controlling identity documents with intent	608	865	858	720	680	670	625
Possessing or controlling a false or improperly obtained or another person's identity document	240	238	218	191	156	165	131

Source: Court Proceedings Database, Ministry of Justice

Note:

2) The identity document offences came into force in January 2011 and therefore sentencing statistics have been provided from 2011 onwards

**Table 3: Number of adult offenders sentenced for specified modern slavery offences, 2017<sup>3,4</sup>**

Offence	Number of adult offenders sentenced
	<b>2017</b>
Hold person in slavery or servitude	0
Require person to perform forced or compulsory labour	7
UK national arrange or facilitate travel of another person with a view to exploitation	8
Commit offence other than kidnapping or false imprisonment with intention of arranging travel with view to exploitation	3
Commit offence of kidnapping or false imprisonment with intention of arranging travel with view to exploitation	0
Do act prohibited by slavery and trafficking risk or prevention order	2
Fail to comply with requirement to surrender passport under Modern Slavery Act 2015	0
Fail to comply with requirement to provide name and address under Modern Slavery Act 2015	2

Source: Court Proceedings Database, Ministry of Justice

Notes:

3) The Modern Slavery Act 2015 offences came into force in July 2015 and the first offenders sentenced for these offences were sentenced in 2017. Therefore the statistics for Modern Slavery are only provided for calendar year 2017.

4) Due to a data quality issue, volumes for the Modern Slavery offences may be an undercount. The issue is not believed to have a large effect on these figures, and revised statistics will be available from May 16 2019.

Table 4: Sentence outcomes for adult offenders sentenced for specified immigration, identity document and modern slavery offences, 2017

Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with <sup>1</sup>	Total
<b>Immigration offences</b>								
Seek / obtain leave to enter / remain in UK by deceptive means - immigration.								
Secure avoidance of enforcement action by deceptive means - immigration.	0	0	0	1	5	16	0	22
Provide an immigration service in contravention of a prohibition. Provide an immigration service in contravention of a restraining order. Includes providing immigration advice.	0	0	0	0	2	1	0	3
Do an act to facilitate the commission of a breach of UK immigration law by a non EU person. Conspire to do an act to facilitate the commission of a breach of UK immigration law by a non EU person	0	0	0	0	31	201	5	237
Enter United Kingdom without a passport	0	0	0	0	1	0	0	1
Traffic a person into the United Kingdom for exploitation	0	0	0	0	0	9	0	9
Deportation / removal - fail to take action as required by Secretary of State	0	0	0	0	0	9	0	9
Enter United Kingdom in breach of a deportation order	0	0	0	0	1	7	0	8
<b>Identity document offences</b>								
Possessing or controlling identity documents with intent	0	3	1	11	121	485	4	625
Possessing or controlling a false or improperly obtained or another person's identity document	1	3	23	23	25	54	2	131
<b>Modern slavery offences<sup>2</sup></b>								
Hold person in slavery or servitude	0	0	0	0	0	0	0	0
Require person to perform forced or compulsory labour	0	0	0	0	0	7	0	7
UK national arrange or facilitate travel of another person with a view to exploitation	0	0	0	0	0	8	0	8
Commit offence other than kidnapping or false imprisonment with intention of arranging travel with view to exploitation	0	0	0	0	0	3	0	3
Commit offence of kidnapping or false imprisonment with intention of arranging travel with view to exploitation	0	0	0	0	0	0	0	0
Do act prohibited by slavery and trafficking risk or prevention order	0	0	0	0	0	2	0	2
Fail to comply with requirement to surrender passport under Modern Slavery Act 2015	0	0	0	0	0	0	0	0
Fail to comply with requirement to provide name and address under Modern Slavery Act 2015	0	0	1	0	0	0	1	2

Source: Court Proceedings Database, Ministry of Justice

Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with <sup>1</sup>	Total
<b>Immigration offences</b>								
Seek / obtain leave to enter / remain in UK by deceptive means - immigration.	0%	0%	0%	5%	23%	73%	0%	100%
Provide an immigration service in contravention of a prohibition. Provide an immigration service in contravention of a restraining order. Includes providing immigration advice.	0%	0%	0%	0%	67%	33%	0%	100%
Do an act to facilitate the commission of a breach of UK immigration law by a non EU person. Conspire to do an act to facilitate the commission of a breach of UK immigration law by a non EU person	0%	0%	0%	0%	13%	85%	2%	100%
Enter United Kingdom without a passport	0%	0%	0%	0%	100%	0%	0%	100%
Traffic a person into the United Kingdom for exploitation	0%	0%	0%	0%	0%	100%	0%	100%
Deportation / removal - fail to take action as required by Secretary of State	0%	0%	0%	0%	0%	100%	0%	100%
Enter United Kingdom in breach of a deportation order	0%	0%	0%	0%	13%	88%	0%	100%
<b>Identity document offences</b>								
Possessing or controlling identity documents with intent	0%	<0.5%	<0.5%	2%	19%	78%	1%	100%
Possessing or controlling a false or improperly obtained or another person's identity document	1%	2%	18%	18%	19%	41%	2%	100%
<b>Modern slavery offences<sup>2</sup></b>								
Hold person in slavery or servitude	-	-	-	-	-	-	-	-
Require person to perform forced or compulsory labour	0%	0%	0%	0%	0%	100%	0%	100%
UK national arrange or facilitate travel of another person with a view to exploitation	0%	0%	0%	0%	0%	100%	0%	100%
Commit offence other than kidnapping or false imprisonment with intention of arranging travel with view to exploitation	0%	0%	0%	0%	0%	100%	0%	100%
Commit offence of kidnapping or false imprisonment with intention of arranging travel with view to exploitation	-	-	-	-	-	-	-	-
Do act prohibited by slavery and trafficking risk or prevention order	0%	0%	0%	0%	0%	100%	0%	100%
Fail to comply with requirement to surrender passport under Modern Slavery Act 2015	-	-	-	-	-	-	-	-
Fail to comply with requirement to provide name and address under Modern Slavery Act 2015	0%	0%	50%	0%	0%	0%	50%	100%

Source: Court Proceedings Database, Ministry of Justice

## Notes:

1) Includes a number of orders, for example hospital orders, confiscation orders and compensation orders

2) Due to a data quality issue, volumes for the Modern Slavery offences may be an undercount. The issue is not believed to have a large effect on these figures, and revised statistics will be available from May 16 2019.

**Table 5: Average and maximum custodial sentence lengths for adult offenders sentenced to immediate custody for specified immigration, identity document and modern slavery offences, 2017**

Offence	Post guilty plea		
	Mean sentence length (in years) <sup>1</sup>	Median sentence length (in years) <sup>2</sup>	Maximum sentence length (in years)
<b>Immigration offences</b>			
Seek / obtain leave to enter / remain in UK by deceptive means - immigration. Secure avoidance of enforcement action by deceptive means - immigration.	0.7	0.7	1.8
Provide an immigration service in contravention of a prohibition. Provide an immigration service in contravention of a restraining order. Includes providing immigration advice.	0.4	0.4	0.4
Do an act to facilitate the commission of a breach of UK immigration law by a non EU person. Conspire to do an act to facilitate the commission of a breach of UK immigration law by a non EU person	2.8	2.1	9.5
Enter United Kingdom without a passport	-	-	-
Traffic a person into the United Kingdom for exploitation	3.9	4.5	6.3
Deportation / removal - fail to take action as required by Secretary of State	0.9	0.8	1.5
Enter United Kingdom in breach of a deportation order	0.1	0.1	0.3
<b>Identity document offences</b>			
Possessing or controlling identity documents with intent	0.7	0.7	3
Possessing or controlling a false or improperly obtained or another person's identity document	0.5	0.5	1.5
<b>Modern slavery offences<sup>3,4</sup></b>			
Hold person in slavery or servitude	-	-	-
Require person to perform forced or compulsory labour	5.2	5.8	6
UK national arrange or facilitate travel of another person with a view to exploitation	4.1	4.5	8
Commit offence other than kidnapping or false imprisonment with intention of arranging travel with view to exploitation	4.1	3.8	5.3
Commit offence of kidnapping or false imprisonment with intention of arranging travel with view to exploitation	-	-	-
Do act prohibited by slavery and trafficking risk or prevention order	1.8	1.8	2
Fail to comply with requirement to surrender passport under Modern Slavery Act 2015	-	-	-
Fail to comply with requirement to provide name and address under Modern Slavery Act 2015	-	-	-

Source: Court Proceedings Database, Ministry of Justice

- Where no offenders were sentenced to immediate custody in 2017, average custodial sentence lengths are not available. Offences for which this applies to have been represented by a dash "-" in the table above.

Notes:

- 1) The mean is calculated by taking the sum of all values and then dividing by the number of value:
- 2) The median is the value which lies in the middle of a set of numbers when those numbers are placed in ascending or descending order
- 3) Mean and median should be treated with caution, due to the low number of offenders sentenced to immediate custody for these offences:
- 4) Due to a data quality issue, figures for the Modern Slavery offences may not include some cases. The issue is not believed to have a large effect on these figures, and revised statistics will be available from May 16 2019.

Legislation	Section	Title	Mode Of Trial	Stat Max
Asylum & Immigration (Treatment of Claimants, etc.) Act 2004	2(1)&(9)	Enter United Kingdom without a passport	EITHER WAY	2 yrs
Asylum & Immigration (Treatment of Claimants, etc.) Act 2004	2(2)&(9)	Enter United Kingdom without a passport for a dependent child	EITHER WAY	2 yrs
Asylum & Immigration (Treatment of Claimants, etc.) Act 2004	35(1),(3)&(5)	Deportation / removal - fail to take action as required by Secretary of State	EITHER WAY	2 yrs
UK Borders Act 2007	3(1)(a) &(2)	Abscond from a designated immigration officer having been detained under section 2 - UK Borders Act 2007	SUMMARY IMPRISONABLE	51 weeks
UK Borders Act 2007	3(1)(b) &(2)	Assault a designated immigration officer at a port exercising a power of detention - UK Borders Act 2007	SUMMARY IMPRISONABLE	51 weeks
UK Borders Act 2007	3(1)(c) &(3)	Obstruct a designated immigration officer at a port exercising a power of detention - UK Borders Act 2007	SUMMARY IMPRISONABLE	51 weeks
UK Borders Act 2007	22	Assault an immigration officer - UK Borders Act 2007	SUMMARY IMPRISONABLE	51 weeks
UK Borders Act 2007	42	Disclose information in breach of section 41 confidentiality re identity of a person - UK Borders Act 2007	EITHER WAY	2 yrs
Immigration, Asylum & Nationality Act 2006	21	Employ adult subject to control who had not been granted leave to enter / remain in UK	EITHER WAY	2 yrs
Immigration, Asylum & Nationality Act 2006	32(2) & 34	Owner / agent of ship / aircraft fail to comply with immigration requirement to provide passenger / service information	SUMMARY IMPRISONABLE	51 weeks
Immigration, Asylum & Nationality Act 2006	32(3) & 34	Passenger / crew fail provide to owner / agent of ship / aircraft information	SUMMARY IMPRISONABLE	51 weeks
Immigration, Asylum & Nationality Act 2006	34(1) &(3)	Owner / agent of ship / aircraft etc fail to provide freight information	SUMMARY IMPRISONABLE	51 weeks
Immigration, Asylum & Nationality Act 2006	41(6)(a) &(8)	Abscond from detention under s.40(7)(c) - Immigration, Asylum and Nationality Act 2006	SUMMARY IMPRISONABLE	51 weeks
Immigration, Asylum & Nationality Act 2006	41(6)(b) &(8)	Abscond from detention under s.40(7)(d) - Immigration, Asylum and Nationality Act 2006	SUMMARY IMPRISONABLE	51 weeks
Immigration, Asylum & Nationality Act 2006	41(6)(c) &(8)	Obstructs authorised person in the exercise of a search power under s.40 - Immigration, Asylum and Nationality Act 2006	SUMMARY IMPRISONABLE	51 weeks
Immigration, Asylum & Nationality Act 2006	41(6)(d) &(8)	Assault authorised person exercising a search power under s.40 - Immigration, Asylum and Nationality Act 2006	SUMMARY IMPRISONABLE	51 weeks
Immigration and Asylum Act 1999	92A(5) &(6)	Obstruct Immigration Services Commissioner in entry / search of premises under a warrant	SUMMARY IMPRISONABLE	6 mths

Immigration and Asylum Act 1999	92B(1) & (3)	Offer / advertise to provide immigration advice / services	SUMMARY NON-IMPRISONABLE	Fine
Immigration and Asylum Act 1999	91(1)	Provide an immigration service in contravention of a prohibition	EITHER WAY	2 yrs
Immigration and Asylum Act 1999	91(1)	Provide an immigration service in contravention of a restraining order	EITHER WAY	2 yrs
Immigration and Asylum Act 1999	105(1) & (2)	Make a false statement / representation - immigration	SUMMARY IMPRISONABLE	3 mths
Immigration and Asylum Act 1999	105(1) & (2)	Produce / give false document / information - immigration	SUMMARY IMPRISONABLE	3 mths
Immigration and Asylum Act 1999	105(1) & (2)	Knowingly cause / allow false document to be produced - immigration	SUMMARY IMPRISONABLE	3 mths
Immigration and Asylum Act 1999	105(1) & (2)	Fail to notify change of circumstances - immigration	SUMMARY IMPRISONABLE	3 mths
Immigration and Asylum Act 1999	105(1) & (2)	Knowingly cause another to fail to notify change of circumstances - immigration	SUMMARY IMPRISONABLE	3 mths
Immigration and Asylum Act 1999	106(1) & (2)	Make false statement / representation re benefit - immigration	EITHER WAY	7 yrs
Immigration and Asylum Act 1999	106(1) & (2)	Produce / give false document re benefit - immigration	EITHER WAY	7 yrs
Immigration and Asylum Act 1999	106(1) & (2)	Immigration - benefit - allow false document to be produced	EITHER WAY	7 yrs
Immigration and Asylum Act 1999	106(1) & (2)	Immigration - benefit - fail to notify of change of circumstances	EITHER WAY	7 yrs
Immigration and Asylum Act 1999	106(1) & (2)	Immigration - benefit - cause another to fail to notify of change of circumstances	EITHER WAY	7 yrs
Immigration and Asylum Act 1999	107(1) & (2)	Asylum seeker delay / obstruct official - immigration	SUMMARY NON-IMPRISONABLE	Fine
Immigration and Asylum Act 1999	107(1) & (2)	Asylum seeker refuse / neglect to answer question - immigration	SUMMARY NON-IMPRISONABLE	Fine
Immigration and Asylum Act 1999	107(1) & (2)	Asylum seeker refuse / neglect to give information - immigration	SUMMARY NON-IMPRISONABLE	Fine
Immigration and Asylum Act 1999	107(1) & (2)	Asylum seeker refuse / neglect to produce document - immigration	SUMMARY NON-IMPRISONABLE	Fine
Immigration and Asylum Act 1999	108(1) & (2)	Sponsor fail to maintain applicant rules - immigration	SUMMARY IMPRISONABLE	3 mths
Immigration and Asylum Act 1999	Sch11 Para 1	Custody officer made / recklessly made a false statement - immigration	SUMMARY NON-IMPRISONABLE	Fine

Immigration and Asylum Act 1999	Sch11 Para 4	Assault on a detainee custody officer - immigration	SUMMARY IMPRISONABLE	6 mths
Immigration and Asylum Act 1999	Sch11 Para 5	Resisting a detainee custody officer - immigration	SUMMARY NON- IMPRISONABLE	Fine
Immigration and Asylum Act 1999	Sch11 Para 5	Wilfully obstruct a detainee custody officer - immigration	SUMMARY NON- IMPRISONABLE	Fine
Immigration and Asylum Act 1999	Sch12 Para 4(1) & (3)	Assisting detained person / persons to escape - immigration	EITHER WAY	2 yrs
Immigration and Asylum Act 1999	Sch12 Para 4(1) & (3)	Assist detained person / persons to attempt to escape - immigration	EITHER WAY	2 yrs
Immigration and Asylum Act 1999	Sch12 Para 4(2) & (3)	Convey item to detention centre to facilitate escape - immigration	EITHER WAY	2 yrs
Immigration and Asylum Act 1999	Sch12 Para 4(2) & (3)	Send item into a detention centre to facilitate escape - immigration	EITHER WAY	2 yrs
Immigration and Asylum Act 1999	Sch12 Para 4(2) & (3)	Place an item at detention centre to facilitate escape - immigration	EITHER WAY	2 yrs
Immigration and Asylum Act 1999	Sch12 Para 5(1) & (4)	Bring alcohol into detention centre / to detained person - immigration	SUMMARY IMPRISONABLE	6 mths
Immigration and Asylum Act 1999	Sch12 Para 5(1) & (4)	Attempt to bring alcohol into detention centre / to detained person - immigration	SUMMARY IMPRISONABLE	6 mths
Immigration and Asylum Act 1999	Sch12 Para 5(2) & (4)	Placed alcohol outside detention centre with intent - immigration	SUMMARY IMPRISONABLE	6 mths
Immigration and Asylum Act 1999	Sch12 Para 5(3) & (4)	Immigration - allow alcohol for sale / use - detention centre	SUMMARY IMPRISONABLE	6 mths
Immigration and Asylum Act 1999	158(1) & (2)	Unauthorised disclosure of information by immigration custody officer	EITHER WAY	2 yrs
Immigration and Asylum Act 1999	Sch 12 Para 6(a)	Convey thing in / out detention centre / to person	SUMMARY NON- IMPRISONABLE	Fine
Immigration and Asylum Act 1999	Sch 12 Para 6(2)(a)	Place thing outside detention centre for detained person	SUMMARY NON- IMPRISONABLE	Fine
Immigration and Asylum Act 1999	Sch 12 Para 3(4) & 3(5)	Asylum applicant failed to submit medical examination - immigration	SUMMARY IMPRISONABLE	6 mths
Immigration and Asylum Act 1999	93(2) & (4)	Immigration - unlawful disclosure of information	EITHER WAY	Fine
Accession (Immigration and Worker Authorisation) Regulations 2006	12(1) & (6)	Unauthorised employment of accession State National - Accession (Immigration & Worker Authorisation) Reg's 2006	SUMMARY NON- IMPRISONABLE	Fine

Accession (Immigration and Worker Authorisation) Regulations 2006	13(1) & (2)	Accession State national take unauthorised work - Accession (Immigration & Worker Authorisation) Reg's 2006	SUMMARY IMPRISONABLE	3 mths
Accession (Immigration and Worker Authorisation) Regulations 2006	14	Obtain / seek to obtain an accession worker card - Accession (Immigration & Worker Authorisation) Reg's 2006	SUMMARY IMPRISONABLE	3 mths
Immigration Act 1971	24(1)(a)	Enter United Kingdom in breach of a deportation order	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	24(1)(a)	Enter United Kingdom without leave - immigration	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	24(1)(b)(i)	Immigration - enter / remain in UK beyond time limit	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	24(1)(b)(ii)	Fail to observe conditions to enter / remain in United Kingdom	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	24(1)(c)	Enter United Kingdom lawfully without leave but remain beyond time limit	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	24(1)(d)	Fail to comply with immigration requirement of medical test	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	24(1)(g)	Breach immigration restriction on embarkation	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(a)	Refuse / fail to submit to examination by immigration officer	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(a)	Refuse / fail to submit to examination by medical inspector	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(d)	Alter immigration certificate / permit / clearance	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(d)	Use / possess false immigration document / passport	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(e)	Fail to complete / produce landing card - immigration	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(e)	Fail to complete / produce embarkation card	SUMMARY IMPRISONABLE	6 mths

Immigration Act 1971	26(1)(f)	Foreign national failing to register with the police	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Foreigner failed produce passport / document when registering	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Foreign national - fail to report change of residence	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Foreign national fail to notify change in particulars	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Foreigner fail to inform his referee of temporary address	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Foreigner fail to provide name / nationality to hotelier	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Hotel keeper fail require information from foreigner	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Hotel keeper fail to keep proper records	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Hotel keeper fail to open records for inspection	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Foreigner fail to provide information to hotel keeper	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Foreigner fail to produce registration certificate	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Foreigner fail to pay for registration certificate	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(g)	Obstruction of immigration officer / other person	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	27(a)(ii)	Captain of ship / aircraft fail to comply with direction to remove person from United Kingdom	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Foreigner fail to notify address other than residence	SUMMARY IMPRISONABLE	6 mths



Immigration Act 1971	26(1)(f)	Foreigner fail to notify change of address within 8 days	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Foreigner fail to notify change of referee's address	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Referee fail to furnish information as to foreigner	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Foreigner fail explain no passport / documents when registering	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Foreigner fail to produce registration certificate at a police station	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(f)	Foreign national fail furnish information to registration officer	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(b)	Fail to furnish information - immigration	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(b)	Fail to produce documents - immigration	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(c)	Make a false return / statement - immigration	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	26(1)(c)	Cause false return / statement to be made to immigration officer	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	24(1)(e)	Fail to observe immigration act restriction	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	24(1)(f)	Disembark ship / aircraft when being removed from United Kingdom	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	27(a)(i)	Captain of ship / aircraft fail to comply re disembarkation of passenger / crew	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	27(a)(i)	Captain of ship / aircraft permit disembarkation in United Kingdom	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	27(b)(i)	Owner / agent of ship / aircraft arrange call at unscheduled entry port	SUMMARY IMPRISONABLE	6 mths

Immigration Act 1971	27(b)(i)	Owner / agent of ship / aircraft concerned in call at unscheduled entry port	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	27(b)(ii)	Owner / agent of ship / aircraft fail to supply passenger with landing card	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	27(b)(ii)	Owner / agent of ship / aircraft fail to supply passenger with embarkation card	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	27(b)(iii)	Owner / agent of ship / aircraft fail to arrange removal of person from United Kingdom	SUMMARY IMPRISONABLE	6 mths
Immigration Act 1971	24A(1)(a)	Seek / obtain leave to enter / remain in UK by deceptive means - immigration	EITHER WAY	2 yrs
Immigration Act 1971	24A(1)(b) & (3)	Secure avoidance of enforcement action by deceptive means - immigration	EITHER WAY	2 yrs
Immigration Act 1971	25(1) & (6)	Do an act to facilitate the commission of a breach of UK immigration law by a non EU person	EITHER WAY	14 yrs
Immigration Act 1971	0	Conspire to do an act to facilitate the commission of a breach of UK immigration law by a non EU person	INDICTABLE	14 yrs
Immigration Act 1971	25(A) & 25(6)	Help asylum seeker to enter United Kingdom - immigration	EITHER WAY	14 yrs
Immigration Act 1971	25(B)(1) & 25(6)	Assist entry into United Kingdom in breach of a deportation order - immigration	EITHER WAY	14 yrs
Immigration Act 1971	25(B)(3) & 25(6)	Assist arrival / entry / remain in United Kingdom in breach of exclusion order - immigration	EITHER WAY	14 yrs
Immigration Act 1971	26A(3)(a) & (5)	Make a false registration card - immigration	EITHER WAY	10 yrs
Immigration Act 1971	26A(3)(b) & (5)	Alter / enable another to alter a registration card with intent to deceive - immigration	EITHER WAY	10 yrs
Immigration Act 1971	26A(3)(c) & (6)	Possess a false / altered registration card without reasonable cause - immigration	EITHER WAY	2 yrs
Immigration Act 1971	26A(3)(d) & (5)	Use a false registration card for a purpose for which a registration card is issued	EITHER WAY	10 yrs
Immigration Act 1971	26A(3)(d) & (5)	Attempt to use a false registration card for a purpose for which a registration card is issued	EITHER WAY	10 yrs
Immigration Act 1971	26A(3)(e) & (5)	Use an altered registration card with intent to deceive	EITHER WAY	10 yrs
Immigration Act 1971	26A(3)(e) & (5)	Attempt to use an altered registration card with intent to deceive	EITHER WAY	10 yrs
Immigration Act 1971	26A(3)(f) & (5)	Make an article designed for use in making a false registration card	EITHER WAY	10 yrs
Immigration Act 1971	26A(3)(g) & (5)	Make an article designed for use by self / another in altering a registration card with intent to deceive	EITHER WAY	10 yrs
Immigration Act 1971	26A(3)(h) & (6)	Have article designed for use by self / another to alter / make registration card with intent to deceive	EITHER WAY	2 yrs
Immigration Act 1971	26B(1) & (4)	Possess an immigration stamp without reasonable excuse - immigration	EITHER WAY	2 yrs
Immigration Act 1971	26B(2) & (4)	Possess a replica immigration stamp without reasonable excuse - immigration	EITHER WAY	2 yrs
Immigration Act 1971	27c	Port manager fail take steps re embarkation of passengers in designated control area	SUMMARY IMPRISONABLE	6 mths

Immigration Act 1971	27c	Port manager fail to take steps re disembarkation of passengers in a designated control area	SUMMARY IMPRISONABLE	6 mths
Nationality, Immigration and Asylum Act 2002	106(4)	Fail to comply with a requirement to attend before adjudicator / at tribunal - immigration	SUMMARY NON- IMPRISONABLE	Fine
Nationality, Immigration and Asylum Act 2002	Sch. 3 Para 13(1)	Person returns to UK and requests travel and accommodation arrangements - immigration	SUMMARY IMPRISONABLE	6 mths
Nationality, Immigration and Asylum Act 2002	Sch. 3 Para 13(2)	Person failing to mention previous request - requests travel and accommodation arrangements - immigration	SUMMARY IMPRISONABLE	6 mths

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**Paper number:** 10 May 2019  
**Lead official:** SC(19)MAY08 – Terrorism  
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## 1 ISSUE

1.1 The Counter-Terrorism and Border Security Act 2019 has increased the maximum sentences for some terrorism offences in the Terrorism Act 2000 (TACT 2000) and Terrorism Act 2006 (TACT 2006) which are covered by sentencing guidelines. It has also slightly changed the elements of some of those offences and brought others in scope for 'Extended Determinate Sentences' and 'Sentences for Offenders of Particular Concern'.

1.2 The Council will need to consider the impact of the changes on the guidelines, propose changes, consult on the proposed changes and issue updated guidelines.

1.3 In the interim the Council may wish to consider adding a note to the affected guidelines to alert users to the legislative changes.

## 2 RECOMMENDATION

2.1 That the Council should:

- Agree the scope of the changes to be considered in detail at a later meeting (currently planned for June/July); and
- Agree in the interim to add a note to guidelines that are affected by the legislative changes.

## 3 CONSIDERATION

*The legislation and the guidelines*

3.1 The Counter-Terrorism and Border Security Act 2019 act which came into force on 12 April 2019, can be seen here:

<https://www.legislation.gov.uk/ukpga/2019/3/contents/enacted>

3.2 The guidelines can be seen here:

<https://www.sentencingcouncil.org.uk/crown-court?s&collection=terrorism-offences>

3.3 They cover offences contrary to:

Explosive Substances Act 1883, s.3  
Explosive Substances Act 1883, s.2

Terrorism Act 2000, s.11  
 Terrorism Act 2000, s.12  
 Terrorism Act 2000, s.15, s.16, s.17, s.18  
 Terrorism Act 2000, s.38B  
 Terrorism Act 2000, s.57  
 Terrorism Act 2000, s.58

Terrorism Act 2006, s.1, s.2  
 Terrorism Act 2006, s.5

*Changes to offences covered by guidelines*

3.4 Maximum sentences have increased as follows:

Offence	Previous Maximum	New Maximum
TACT 2000, s.38B (information about acts of terrorism)	5 years	10 years
TACT 2000, s.58 (collection of terrorist information)	10 years	15 years
TACT 2006 s.1 (encouragement of terrorism) s.2 (dissemination of terrorist publications)	7 Years	15 years

3.5 The elements of some the offences have changed in ways that may need to be reflected in the factors in the guidelines.

3.6 There is a new subsection 1A to section 12 TACT 2000 (Proscribed organisations – support).

(1A) A person commits an offence if the person—  
 (a) expresses an opinion or belief that is supportive of a proscribed organisation, and  
 (b) in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.

3.7 The wording of the culpability factors in this guideline reflect the language in the (unamended) statute. It seems likely that using the guideline as currently worded (absent any other factors being present) convictions based on the new subsection would come under culpability C:

**A**

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

**B**

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

**C**

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

3.8 There are new subsections (1)(c) and (1A) to section 58 TACT 2000 (Collection of terrorist information) so that it will read:

(1) A person commits an offence if–

(a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or

(b) he possesses a document or record containing information of that kind or

(c) the person views, or otherwise accesses, by means of the internet a document or record containing information of that kind.

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

3.9 The culpability factors (set out below) closely reflect the original wording of the statute and so the Council may wish to consider adding wording such as 'or accessed by means of the internet':

**A**

- Offender collected, made a record of, or was in possession of information for use in a specific terrorist act

**B**

- Offender collected, made a record of, or was in possession of information likely to be useful to a person committing or preparing an act of terrorism and the offender had terrorist connections or motivations
- Offender repeatedly accessed extremist material (where not falling within A)

**C**

- Offender collected, made a record of, or was in possession of information likely to be useful to a person committing or preparing an act of terrorism but had no terrorist connections or motivations

3.10 There are changes to the wording of sections 1 and 2 of TACT 2006 (encouragement of terrorism) which now refer to a 'reasonable person' rather than 'some or all members of the public'. This change of wording is unlikely to necessitate a revision to the wording in the guideline.

3.11 The new legislation also brings further offences in scope for extended determinate sentences and sentences for offenders of particular concern:

**Section 11 TACT 2000** (proscribed organisations – membership)

Now an offence for which 'a special custodial sentence for **offenders of particular concern**' may be imposed under section 236A CJA 2003

**Section 12 TACT 2000** (Proscribed organisations - support) new subsection 1A  
Now a '**specified terrorism offence**' Sch 15 CJA 2003 and subject to extended sentence s226A CJA 2003.

Now an offence for which 'a special custodial sentence for **offenders of particular concern**' may be imposed under section 236A CJA 2003

**Section 58 TACT 2000** (Collection of terrorist information)

Now a '**specified terrorism offence**' Sch 15 CJA 2003 and subject to extended sentence s226A CJA 2003.

Now an offence for which 'a special custodial sentence for **offenders of particular concern**' may be imposed under section 236A CJA 2003

**Section 1 TACT 2006** (encouragement of terrorism)

**Section 2 TACT 2006** (dissemination of terrorist publications)

Both now a '**specified terrorism offence**' Sch 15 CJA 2003 and subject to extended sentence s226A CJA 2003.

Both now an offence for which 'a special custodial sentence for **offenders of particular concern**' may be imposed under section 236A CJA 2003

**Section 5 TACT 2006** (Preparation of terrorist acts)

Now a '**specified terrorism offence**' Sch 15 CJA 2003 (was already listed in Sch 15)

3.12 A 'specified terrorism offence' is subject to a maximum extension period of eight years (as opposed five years for a specified violent offence).

3.13 There are also changes to the details of the automatic notification requirements (Sections 41 – 53 of the Counter-Terrorism Act 2008) and to the list of offences in Schedule 2 of the Counter-Terrorism Act 2008 (offences with a terrorist connection) but these changes are at a level of detail that do not impact on the guidelines.

3.14 The legislative changes outlined at paras 3.4 to 3.11 above will require a review of the affected terrorism guidelines and in due course consultation on the revised draft guidelines. The Council may feel that it would be appropriate to expedite this work and that a short, targeted consultation period would be suitable.

**Question 1: Does the Council agree that the terrorism guidelines should be reviewed to take account of the legislative changes noted at paragraphs 3.4 to 3.11 above?**

**Question 2: Does the Council wish to expedite this review?**

3.15 Even if work is expedited, any amendments to the terrorism guidelines will not be in force for several months and so in the interim it would be helpful to provide a note on the affected guidelines to alert users to the legislative changes. Proposed wording is provided below.



3.16

### **Proscribed organisations - membership**

Terrorism Act 2000, s.11

**Effective from:** 27 April 2018

Triable either way

Maximum: 10 years' custody

Offence range: High level community order – 9 years' custody

Note for offences **committed** on or after **12 April 2019:**

This is a specified terrorism offence for the purposes of section 226A (extended sentence for certain violent, sexual or terrorism offences) of the Criminal Justice Act 2003.

Note for offences **sentenced** on or after **12 April 2019:**

This is an offence listed in Schedule 18A for the purposes of section 236A (special custodial sentence for certain offenders of particular concern) of the Criminal Justice Act 2003.

This guideline applies only to offenders aged 18 and older

3.17

### **Proscribed organisations - support**

Terrorism Act 2000, s.12

**Effective from:** 27 April 2018

Triable either way

Maximum: 10 years' custody

Offence range: High level community order – 9 years' custody

Note for offences **committed** on or after **12 April 2019:**

This is a specified terrorism offence for the purposes of section 226A (extended sentence for certain violent, sexual or terrorism offences) of the Criminal Justice Act 2003.

Note for offences **sentenced** on or after **12 April 2019:**

This is an offence listed in Schedule 18A for the purposes of section 236A (special custodial sentence for certain offenders of particular concern) of the Criminal Justice Act 2003.

This guideline applies only to offenders aged 18 and older

3.18

### **Collection of terrorist information**

Terrorism Act 2000, s.58

**Effective from:** 27 April 2018

Triable either way  
Maximum: 10 years' custody  
Offence range: High level community order – 9 years' custody

Note for offences **committed** on or after **12 April 2019**:

The maximum sentence is increased to **15 years** (section 7(3) Counter-Terrorism and Border Security Act 2019). The increase has not yet been reflected in the sentence levels in this guideline.

This is a specified terrorism offence for the purposes of section 226A (extended sentence for certain violent, sexual or terrorism offences) of the Criminal Justice Act 2003.

Note for offences **sentenced** on or after **12 April 2019**:

This is an offence listed in Schedule 18A for the purposes of section 236A (special custodial sentence for certain offenders of particular concern) of the Criminal Justice Act 2003.

This guideline applies only to offenders aged 18 and older

3.19

### **Failure to disclose information about acts of terrorism**

Terrorism Act 2000, s.38B

**Effective from:** 27 April 2018

Triable either way  
Maximum: 5 years' custody  
Offence range: High level community order – 4 years 6 months' custody

Note for offences **committed** on or after **12 April 2019**:

The maximum sentence is increased to **10 years** (section 7(2) Counter-Terrorism and Border Security Act 2019). The increase has not yet been reflected in the sentence levels in this guideline.

This guideline applies only to offenders aged 18 and older

3.20

### **Encouragement of terrorism**

Terrorism Act 2006, s.1, Terrorism Act 2006, s.2

**Effective from:** 27 April 2018

**Encouragement of terrorism**, Terrorism Act 2006, s.1  
**Dissemination of terrorist publications**, Terrorism Act 2006, s.2

Triable either way  
Maximum: 7 years' custody  
Offence range: High level community order – 6 years' custody

Note for offences **committed** on or after **12 April 2019**:

The maximum sentence is increased to **15 years** (section 7(6) and (7) Counter-Terrorism and Border Security Act 2019). The increase has not yet been reflected in the sentence levels in this guideline.

These are specified terrorism offences for the purposes of section 226A (extended sentence for certain violent, sexual or terrorism offences) of the Criminal Justice Act 2003.

Note for offences **sentenced** on or after **12 April 2019**:

These are offences listed in Schedule 18A for the purposes of section 236A (special custodial sentence for certain offenders of particular concern) of the Criminal Justice Act 2003.

This guideline applies only to offenders aged 18 and older

3.21

## **Preparation of terrorist acts**

Terrorism Act 2006, s.5

**Effective from:** 27 April 2018

Triable only on indictment

Maximum: Life imprisonment

Offence range: 3 years' custody – Life Imprisonment (minimum term 40 years)

This is a serious specified offence for the purposes of sections 224 and 225(2) (life sentence for serious offences) of the Criminal Justice Act 2003.

This is an offence listed in Part 1 of Schedule 15B for the purposes of sections 224A (life sentence for second listed offence) of the Criminal Justice Act 2003.

Note for offences **committed on or after 12 April 2019**:

This is a specified terrorism offence for the purposes of section 226A (extended sentence for certain violent, sexual or terrorism offences) of the Criminal Justice Act 2003.

For offences **committed before 12 April 2019**:

This is a specified offence for the purposes of section 226A (extended sentence for certain violent, sexual offences) of the Criminal Justice Act 2003.

This is an offence listed in Schedule 18A for the purposes of section 236A (special custodial sentence for certain offenders of particular concern) of the Criminal Justice Act 2003.

This guideline applies only to offenders aged 18 and older.

**Question 3: Does the Council agree to add the notes as set out at 3.16 to 3.21 above to the guidelines?**

#### **4 RISKS**

4.1 The Council has already indicated that it will update the Terrorism guidelines to reflect the legislative changes, and so there may be an expectation that this work will be undertaken immediately.