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10 December 2021

Dear Members

Meeting of the Sentencing Council – 17 December 2021

The next Council meeting will be held via Microsoft Teams, the link to join the meeting is included below. **The meeting is Friday 17 December 2021 from 9:30 to 14:45**. Members of the office will be logged in shortly before if people wanted to join early to confirm the link is working.

The agenda items for the Council meeting are:

▪ Agenda	SC(21)DEC00
▪ Minutes of meeting held on 19 November	SC(21)NOV01
▪ Burglary	SC(21)DEC02
▪ Miscellaneous guideline amendments	SC(21)DEC03
▪ Motoring	SC(21)DEC04
▪ Animal Cruelty	SC(21)DEC05
▪ Underage sale of knives	SC(21)DEC06

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.

The link to join the meeting is: Click here to join the meeting

Best wishes

Steve Wade

Head of the Office of the Sentencing Council

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Sentencing Council

COUNCIL MEETING AGENDA

17 December 2021
Virtual Meeting by Microsoft Teams

09:30 – 09:45	Minutes of the last meeting and matters arising (paper 1)
09:45 – 10:45	Burglary - presented by Mandy Banks (paper 2)
10:45- 11:15	Miscellaneous guideline amendments - presented by Ruth Pope (paper 3)
11:15 – 11:30	Break
11:30 – 12:30	Motoring - presented by Lisa Frost (paper 4)
12:30 – 13:00	Lunch
13:00 - 13:45	Animal cruelty - presented by Ollie Simpson (paper 5)
13:45 – 14:00	Break
14:00 – 14:45	Underage sale of knives - presented by Ruth Pope (paper 6)

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Sentencing Council

MEETING OF THE SENTENCING COUNCIL

19 NOVEMBER 2021

MINUTES

Members present:	Tim Holroyde (Chairman) Rosina Cottage Rebecca Crane Rosa Dean Nick Ephgrave Michael Fanning Diana Fawcett Adrian Fulford Max Hill Jo King Juliet May Maura McGowan Alpa Parmar Beverley Thompson
Representatives:	Elena Morecroft for the Lord Chief Justice (Legal and Policy Advisor to the Head of Criminal Justice) Claire Fielder for the Lord Chancellor (Director, Youth Justice and Offender Policy)
Members of Office in attendance:	Steve Wade Mandy Banks Lisa Frost Ollie Simpson

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 22 October 2021 were agreed.

2. MATTERS ARISING

2.1 The Chairman welcomed Lauren Maher a new member of the Analysis and Research team who has joined as a senior statistical officer.

3. DISCUSSION ON MOTORING OFFENCES – PRESENTED BY LISA FROST, OFFICE OF THE SENTENCING COUNCIL

3.1 The Council agreed to revise the scope of the motoring project and detach aggravated vehicle taking offences, as fewer resources were available than was originally anticipated and the consultation may otherwise be delayed. This would risk delaying the publication of guidelines for offences in the PCSC Bill, which the Council agreed it should be responsive to as quickly as possible. It is anticipated that work on the detached guidelines could commence during the consultation for the priority offences.

3.2 The Council gave further consideration to culpability factors for careless driving offences and agreed a number of revisions and additional factors. The Council also confirmed the approach to be taken to assessing culpability for causing death by careless driving under the influence, to inform the development of a guideline for consideration at its next meeting.

4. DISCUSSION ON ANIMAL CRUELTY – PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL

4.1 The Council considered a first draft of revised guidelines for animal cruelty for consultation next year. They agreed proposing that cruelty to multiple animals should be considered an aggravating factor and that, subject to some amendment, the guideline could cover the offences of mutilation, tail docking and poisoning (in addition to causing unnecessary suffering and fighting).

5. DISCUSSION ON PERVERTING THE COURSE OF JUSTICE – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL

5.1 The Council discussed draft sentence ranges for the perverting the course of justice and witness intimidation guidelines. Current sentencing data for these offences was considered, and the Council agreed that the guidelines should aim to maintain current sentencing practice. There is one further planned meeting to finalise the guidelines ahead of the consultation planned for spring next year.

6. DISCUSSION ON SEXUAL OFFENCES – PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL

6.1 The Council considered responses to the consultation on sexual offences, including on a new guideline for sexual communication with a child, resulting in amendments to the culpability factors and aggravating and mitigating factors. They also considered consultees' views on new proposals for expanded explanation text and how the Council's guidance should best reflect youth and immaturity in the context of historical sexual offences.

7. DISCUSSION ON BURGLARY – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL

7.1 This was the first meeting to discuss the guidelines after the consultation over the summer. The Council noted that the proposed revised guidelines were generally well received. The Council considered responses relating to culpability factors across the three guidelines, and agreed to make some small changes following suggestions by consultees.

7.2 The Council also considered the responses received relating to equality and diversity issues. Future meetings will look at responses relating to harm, sentence levels and aggravating and mitigating factors.

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Sentencing Council

Sentencing Council meeting: 17 December 2021
Paper number: SC(21)DEC02 – Burglary Revision
Lead Council member: Rebecca Crane
Lead officials: Mandy Banks
0207 071 5785

1 ISSUE

1.1 This is the second meeting to discuss the burglary guideline post consultation. There are two further scheduled meetings to discuss the guideline ahead of sign off of the definitive guideline in March. The guideline will then be published in May and come into force in July. This meeting will focus on looking at responses relating to harm and sentence levels across all three guidelines. Next month we will focus on aggravating and mitigating factors.

2 RECOMMENDATION

2.1 That the Council:

- Considers the responses relating to harm
- Considers the responses relating to sentence levels

3 CONSIDERATION

Harm factors

3.1 There were a number of comments made by respondents about two of the harm factors in non-domestic and domestic burglary, '*much greater emotional impact on the victim than would normally be expected'* in category one*, and 'greater emotional impact on the victim than would normally expected'* in category two (page two of **Annex A).** A number of magistrates, two Crown Court Judges, a barrister, the Criminal Law Solicitors Association (CLSA) the Justice Committee (JC), Prison Reform Trust (PRT) and the Justices' Legal Advisers and Court Officers' Service (JCS) all raised concerns. The concerns were that the factors were too subjective,

and that it would be difficult to assess objectively. The issue was also raised as a concern during road testing, with similar comments made that the terms were highly subjective (page seven of **Annex B**.) Respondents made suggestions for alternative wording.

3.2 Firstly, one magistrates bench suggested that instead of the proposed factors, the harm factors from the aggravated burglary guideline **(Annex C)** should be used instead, so:

- Category one: Substantial physical or psychological injury or other substantial impact on the victim
- Category two: Some physical or psychological injury or some other impact on the victim
- Category three: Limited physical or psychological injury or other limited impact on the victim

  However, they suggested that the category three factor should be reworded to: *'a degree of physical or psychological injury or other impact on the victim'*.

3.3 The JCS suggest instead that the factors should be: '*very significant emotional harm based on any factors placed before the court' and 'significant emotional harm based on any factors placed before the court.'* They do not suggest a category three factor but based on the above text it could be: '*a degree of emotional harm based on any factors placed before the court.'*

3.4 Given that so many respondents raised concerns and the issue was highlighted in road testing it is recommended that the harm factors are reworded. Respondents stressed that all burglaries were distressing for victims, and this was a key factor to get right. As the factors in aggravated burglary are broader than the factors suggested by the JCS which just reference emotional harm, they are perhaps more appropriate.

3.5 Although the harm factors within the aggravating guidelines are broader than the ones in the domestic and non-domestic guideline, the CPS suggest broadening them further, to make it clear that emotional impact may be covered even where it does not amount to psychological injury. This seems a good suggestion, given how important the effect on victims of these offences is. They suggest rewording to:

- Substantial physical or psychological injury or substantial emotional or other impact on the victim

- Some physical or psychological injury or some emotional or other impact on the victim
- Limited physical or psychological injury or limited emotional or other impact on the victim

A version of the non-domestic guideline with all the proposed changes in is attached at **Annex D.**

Question one: Does the Council agree to revise the harm factors in domestic and non-domestic burglary to the revised aggravated burglary harm factors proposed by the CPS?

3.6 A number of concerns were also raised about the '*soiling of property and/or extensive damage or disturbance to property'* category one harm factor and *'ransacking and vandalism'* factor in category two, that there isn't enough distinction between the two. Respondents were clear that soiling must remain in category one.

3.7 The CPS suggest that '*ransacking and vandalism'* be changed to *'some degree of damage or disturbance to the property',* as this would provide a clearer sliding scale between '*limited damage or disturbance'* and '*extensive damage or disturbance'.* They also say that by doing so it would better reflect the level of damage/disturbance intended for category two harm, as the natural meaning of ransacking/vandalism is arguably closer to '*extensive damage or disturbance' i*n category one.

3.8 HM Council of District Judges said that the difference between *'extensive damage/disturbance'* and *'ransacking or vandalism'* will not be clear, so the latter should read '*some ransacking and vandalism'* to draw a distinction between that and '*extensive damage/disturbance'*.

3.9 Rory Kelly, an academic also said the factors needed revising to avoid confusion, and proposed:

- Category one: Soiling of property and/or extensive damage or disturbance to property
- Category two: Moderate damage or disturbance to property
- Category three: Limited/no damage or disturbance to property

3.10 The JC also proposed that the category two factor should be '*moderate damage or disturbance to property*'. Given the amount of comments on these factors

it is recommended that they should be revised. The common theme seems to be to change the wording of the ransacking/vandalism category two factor, to either 'moderate' or 'some' damage or disturbance to property. 'Moderate' has also been suggested in reference to rewording the category two harm factor relating to loss (see para 3.11 below) so for consistency moderate may be the better term. The category one factor of '*soiling of property and/or extensive damage or disturbance to property'* would remain unchanged.

Question two: Does the Council agree to reword the category two ransacking/vandalism factor to 'moderate damage or disturbance to property'?

3.11 The Sentencing Academy, the JCS and a magistrate commented on the category two factor of '*theft of/damage to property causing some degree of loss to the victim (whether economic, commercial or personal value',* stating that 'some' is too loose a description, that there is not much difference between 'some degree of loss' and 'property of low value'. They suggest that 'moderate' instead of 'some' might mark more clearly the difference between 'substantial degree of loss' in category one, and property of low value in category three. To avoid problems with the appropriate categorisation of loss suffered it may be appropriate to reword to 'moderate', especially if 'moderate' is also going to be used in relation to the amount of damage caused. The category one and three factors would be unchanged.

Question three: Does the Council agree to revise the category two harm factor to 'theft of/damage to property causing a moderate degree of loss to the victim (whether economic, commercial or personal)'?

3.12 PRT raised a concern that the draft guideline does not distinguish between when violence is used or threatened against the victim-they are both in category one harm. The suggest that '*violence used against the victim'* remains in category one, but '*violence threatened but not used against the victim'* goes to category two. They also suggest that the category one factor of '*context of public disorder'* is amended to *'context of public disorder (when linked to the commission of the offence)'.* They say without this addition it is unclear what 'context' may be relevant- the defendant could be penalised for public disorder which they had no involvement in or may not be aware of, for example, violence after a football match which had taken place nearby.

Question four: Does the Council wish to differentiate between violence used and violence threatened in the way PRT suggest? Does the Council wish to amend the 'context of public disorder' factor also in the way PRT suggest?

3.13 The CPS commented on the *'victim on the premises (or returns) while offender present'* factor in non-domestic burglary. They suggest that it should be reworded to '*victim on the premises (or returns or otherwise attends) while offender present'.* They state that this would better capture situations where a security guard who would not normally be present attends a warehouse after an alarm was triggered, for example.

3.14 The HM Council of District Judges commented on the '*occupier at home (or returns home) while offender present'* factor in domestic burglary, asking if the person returning home has to be the occupier, as opposed to anyone else who had legitimate access to the property, such as a babysitter, cleaner, etc. They ask if the increased harm is only due to the occupier on the basis they would perceive it as a home invasion, or is the intention also to reflect a victim being confronted by the offender? If it is the latter we could simply reword the factor to *'victim in the dwelling (or returns to the dwelling) while offender present'.*

Question five: Does the Council wish to reword the factor in non-domestic burglary in the way the CPS suggest? Does the Council wish to reword the factor in domestic burglary in the way suggested?

3.15 The Howard League raise a different concern about the '*occupier at home (or returns home*)' while offender present factor in domestic burglary **(Annex E).** They point to the evaluation of the original guideline which found that this was the most common step one factor. They argue that whilst it is obviously very frightening to be present during such an incident, the presence of the occupier should not be in the same harm category as actual violence against a victim, so should be a step two factor.

Question six: Does the Council wish to move the occupier at home factor in domestic burglary to be a category two factor instead?

3.16 English Heritage commented that there should be reference to the loss of cultural or heritage assets resulting from these offences within harm. They state that the harm caused can be high because they are finite, irreplaceable often unique resources[1] that belong to the community, forming part of the nation's history. They point to the harm factor within the theft guideline of *'damage to heritage assets'* and the aggravating factor within criminal damage of '*damage caused to heritage and/or cultural assets.'* They request that the guideline specifically includes a harm factor of'

[1] E,g Set of gold rosary beads carried by Queen Mary of Scots at her execution stolen in a burglary.

'*Loss or damage caused to heritage and/or cultural assets.'* However if the Council do not want this factor at step two it could be a step two aggravating factor.

Question seven: Does the Council wish to add a harm factor relating to loss of heritage/cultural assets? Or as an aggravating factor?

3.17 The Chief Magistrate commented that violence or confrontation with the occupier should be the first item within the list of harm factors, since despite the lack of precedence human instinct is to consider the first items in a list as more important. The items could be reordered so that the first and third factor exchange places, so the 'violence used' factor appears first in the list.

Question eight: Does the Council wish to reorder the list of harm factors?

Wording on Drug Rehabilitation Requirements (DRRs) and Alcohol Treatment requirements (ATRs)

3.18 The non- domestic and domestic burglary guidelines contained wording above the sentence table stating that DRR's/ATR's may be a proper alternative to a short or moderate custodial sentence (page 3 of **Annex A**). The original guideline just referenced DRR's, the Council added in ATR's in recognition of the proportion of offences where alcohol is a factor. In road testing the wording was found to be clear and useable. The additional wording on ATR's was not opposed but some judges stated they would need to be persuaded to apply this in domestic burglary cases or would need evidence that addiction was the root cause of the offending.

3.19 Just over half of the respondents that answered the question agreed with this proposed wording, these respondents included the CPS, Council of HM Circuit Judges and HM Council of District Judges. The JC agreed with the wording but suggested that the Council undertakes research to determine the extent that the inclusion of such wording changes the approach of sentencers. The rest offered a mixed response, one magistrate said the wording was patronising and over-prescriptive, another thought the wording was too vague. The Chief Magistrate and Magistrates Association (MA) thought there should be a link to the Imposition guideline instead. Given that there was broad approval for the inclusion of the wording it is recommended that it remains unaltered in the guideline

Question 9: Does the Council agree that the wording should remain unaltered?

Sentence levels- non- domestic burglary

3.20 The proposed sentence levels (page three of **Annex A)** were based on current sentencing practice. The proposals were met generally with broad approval.

Of those that questioned the ranges, two magistrates thought they were too low, and two Crown Court Judges thought sentencing for more serious cases should be closer to the maximum of 10 years, perhaps six years instead of five in A1, and that the starting point doesn't have to be in the middle of the range. The Chief Magistrate queried having discharge at the bottom of the range in C3, stating that it should remain a requirement that reasons are given for passing such a lenient sentence for a serious offence. Also, that when compared to the sentences for going equipped, a preparatory offence, the sentences in this guideline are too low, the lowest starting point in going equipped is a Band C fine, compared to a Band B fine in this guideline.

3.21 The MA by contrast thought the ranges were an increase on the levels in the existing guideline and queried whether this was intentional. Both the JC and JCS commented on the gap between the starting points of C1 and C2, saying there was too big a gap between a medium level community order and 6 months' custody, and suggested that the top of the range in C2 should be a high level community order instead. Changing this would necessitate increasing the top of the range to 6 months' custody and making the same changes to B3.

3.22 In road testing, sentencers were happy with the proposed levels. Sentencing data for 2020 for this offence is shown on tabs 1.1-1.4 of **Annex F.** The ACSL is 10.6 months, 74 per cent of offenders receive sentences of one year or less, and only 1 per cent receive sentences above 5 years, the top of the range. Therefore, it is not recommended that the top of the range is increased from 5 years**.**

Question 10: Does the Council agree the top of the range should remain at 5 years?

3.23 However, the Council may like to close the gap between the starting points of C1 and C2, so that the starting point of C2 and B3 becomes a high level community order, with the top of the range increasing to 6 months. As only 2 per cent of offenders receive discharges and 3 per cent receive fines, the Council may wish to act on the comments by the Chief Magistrate and increase the starting point in C3 to a medium level community order, increase the bottom of the range to a band B fine and the top to a high level community order. Doing so would mean the range is higher than the equivalent in going equipped and is closer to the range in the existing guideline.

Question 11: Does the Council wish to increase the starting points of C2 and B3 to a high level community order and the top of the range to 6 months custody? Does the Council wish to increase the starting point of C3 to a

medium level community order, the bottom of the range to a band B fine and the top of the range to a high level community order?

Domestic burglary- Annex E

3.24 The consultation asked for views on the wording '*for cases of particular gravity, sentences above the top of the range may be appropriate',* which appears directly above the sentence table. Of those that responded, most agreed with the proposed wording. Of those that disagreed, one Judge and a magistrate said it was no substitute for increasing the starting points/ranges. The CPS pointed out that Judges can already depart from guidelines if necessary, and that either the wording should be included in all guidelines, or not at all, to avoid a suggestion that some sentences above the ranges are more appropriate for some offences than others. This view was also echoed by a magistrate. This wording was found to be clear and useable during road testing.

3.25 PRT said that it would be necessary to explicitly outline what 'particular gravity' meant, or, reword to 'cases of exceptional gravity'. A Judge said it should be reworded to say that '*where multiple features of harm/culpability are present, it is likely that a sentence outside of the range will be appropriate'.*

3.26 The Sentencing Academy did not agree with including this wording, says courts could already go above the top of the range if necessary, it risked sentence inflation, and it singled out domestic burglary for special treatment. Also, that there is no reference to the statutory test for departing from the range, as laid down by s.59 of the Sentencing Act 2020, which is much tighter than the proposed wording of 'may be appropriate', so is directing courts to ignore the statute. The JC also made the same point and said that the wording should refer to the statutory test.

3.27 A decision on whether to retain this wording or not, and if it is to be retained, whether to reword it or not, is closely linked to consideration of responses on the sentence levels for this offence, the discussion which is below. Therefore, it may be practical to consider the sentences levels and this wording in the round and make decisions at the end of that discussion.

Proposed sentence levels- domestic burglary

3.28 The proposed levels (page three of **Annex E**) were based on current sentencing practice. Most respondents generally agreed with the proposals, with a small number saying they thought the levels were too low. A Judge commented that all the starting points and ranges were too low, and that he believed most Judges

thought this, and that the reason why only 2 per cent of cases went above the top of the existing range was due to fear of the case being appealed if they sentenced above the range, which they may have wished to. Another judge and a magistrate bench thought the starting point for A1 was far too low, that it should be far closer to the statutory maximum. The JC also queried the large gap between the top of the range and the statutory maximum. The Judge thought the starting point should be nearer six years in a range of three - nine years. A barrister also said that the starting point in A1 was too low at three years, and it would lead to too many suspended sentences being given.

3.29 Another magistrate thought that all the sentences should be increased by one level. The JC thought the gap between the starting points in C2 and C3 was too great, at 1 year's custody and a high level community order, they suggested that the starting point in C3 should be six months' custody to reflect the seriousness of domestic burglary. If this is done the top of the range would need to increase to 1 year's custody. The Council of Circuit Judges thought the ranges were too low, but with the additional wording above the table 'for cases of particular gravity' etc, it works. In contrast, PRT thought there should be more community orders available within the table, and the MA queried the ranges in A3/B2/C1, saying that they were higher than the equivalent in the existing guideline, and asked if this was deliberate.

3.30 In road testing, a number of Judges felt from past experience that the area was under sentenced, and felt the proposed levels were too low, especially in A1. Alternative ranges of three to ten years with a starting point of four years, and four to eight years with a starting point of five years were suggested. The sentencing data for 2020 is on tabs 2.1 to 2.4 of **Annex F.** The ACSL is two years four months, 91 per cent of offenders received sentences of four years or less, and only 2 per cent received sentences above six years.

Question 12: Does the Council wish to increase the range or starting point in A1?

Question 13: Does the Council wish to increase the starting point in C3 as the JC suggest, and increase the top of the range to a years' custody?

Question 14: Does the Council wish to retain the wording re cases of particular gravity? If so, should it be reworded at all?

Aggravated burglary

3.31 The proposed sentence levels (page three of **Annex C)** were again based on current sentencing practice. Of those that answered the question, the vast majority of respondents agreed with the proposals, with just one Judge saying he thought the levels were too low and the starting point should be closer to the top of the range. In road testing, the majority of the Judges were comfortable with the proposed sentence levels. The sentencing data for 2020 is on tabs 3.1 to 3.4 of **Annex F.** The ACSL is seven years two months, 89 per cent of offenders received sentences of ten years or less, and only 2 per cent received a sentence above 12 years. Therefore, it is proposed that the sentence ranges remain unchanged.

Question 15: Does the Council agree that the sentence levels for this offence should remain unchanged?

4. EQUALITIES

4.1 An update on some further analysis on any possible racial disparities that has been carried out will be discussed in next month's paper, when the available demographic data will also be provided.

Sentencing Council

Sentencing Council meeting:	**17 December 2021**
Paper number:	**SC(21)DEC03 – Miscellaneous guideline amendments**
Lead Council member:	**Jo King**
Lead official:	**Ruth Pope** **ruth.pope@sentencingcouncil.gov.uk**

1 ISSUE

1.1 In order to ensure that guidelines are kept up-to-date and accurate the Council has a policy of holding an annual consultation on overarching issues and miscellaneous minor updates to guidelines. The first consultation ran from 9 September to 2 December this year.

1.2 This is the first meeting to consider responses to the consultation. The plan is to sign off the changes at the January meeting with changes coming into effect from 1 April 2022. The annual process will then begin again.

2 RECOMMENDATION

2.1 That the Council considers the responses to the consultation and agrees on any changes to be made.

3 CONSIDERATION

3.1 There are 19 responses to the consultation. The majority support the proposals but there is some disagreement and suggestions for where the changes could go further.

Breach of a sexual harm prevention order (SHPO)

3.2 The Council consulted on adding a note to this guideline to clarify that a court dealing with a breach of a SHPO does not have a power to make a fresh order or vary an existing order – the wording proposed is highlighted below:

Step 6 – Ancillary orders

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

- Ancillary orders – Magistrates' Court
- Ancillary orders – Crown Court Compendium

Note: when dealing with a breach of a sexual harm prevention order, the court has no standalone power to make a fresh order or to vary the order. The court only has power to do so if an application is made in accordance with sections 103A and 103E of the Sexual Offences Act 2003.

3.3 With the exception of one respondent who answered every question with an assertion that guidelines should be scrapped, all respondents broadly agreed with the proposal. The Legal committee of HM Council of District Judges (Magistrates' Courts) noted:

> The legislation providing the power to vary a SHPO upon application now depends on whether the SHPO was imposed after conviction or upon application on complaint. Section 345 of the Sentencing Code now provides for SHPO upon conviction and section 103A of the SOA 2003 has been amended accordingly.
>
> Hence, the proposed amendment should also make reference to section 350 of the Sentencing Code, which provides for applications to vary a SHPO made on conviction.

3.4 This is a valid point. Section 103A Sexual Offences Act 2003 (SOA 2003) only applies to the making of SHPOs other than on conviction. The power to make a SHPO on conviction is in section 345 of the Sentencing Code (SC). The power to vary orders is in s103E SOA 2003 and s350 SC.

3.5 The wording consulted on uses the phrase 'only has the power to do so' without perhaps making it clear if that refers to varying an existing order, making a new order or both. On reflection it might be clearer to word it as follows:

> **Note:** when dealing with a breach of a sexual harm prevention order, the court has no standalone power to make a fresh order or to vary the order.
>
> The court only has power to vary an order if an application is made in accordance with section 103E of the Sexual Offences Act 2003 or section 350 of the Sentencing Code.
>
> The court only has the power to make an order in the circumstances set out in section 103A of the Sexual Offences Act 2003 or section 345 of the Sentencing Code.

3.6 One magistrate respondent suggested adding a reference to the relevant person for making an application being the Chief Officer of Police. However, this is not necessarily the case so it is preferable just to refer to the relevant legislation.

3.7 The Met Police suggested adding more information about the permitted length and conditions of a SHPO. Since the main message here is that the court should not be making or varying an order it does not seem the appropriate place to give further information of the type suggested.

3.8 The Justices' Legal Advisers and Court Officers' Service (JCS) suggested;

> In order to make the position even clearer, especially to lay Justices, we would suggest that the following wording is considered;
>
> ''When dealing with a breach of a sexual harm prevention order, the court cannot, of its own motion, make a fresh order or vary the existing order……''.

3.9 The Council had considered using this wording initially but thought that it might be **less** clear to lay magistrates than the wording consulted on. There were 10 responses to the

consultation from individual lay magistrates or on behalf of lay benches and all approved of the proposed wording so no further change is recommended.

Question 1: Should the breach of SHPO guideline be amended as proposed at para 3.5?

Compensation

3.10 The Council consulted on adding a reference in all relevant guidelines to the statutory duty to give reasons if not awarding compensation where injury, loss or damage is suffered. The proposed additional wording is highlighted below:

> In all cases, the court should consider whether to make compensation and/or other ancillary orders. Where the offence has resulted in personal injury, loss or damage the court must give reasons if it decides not to order compensation (Sentencing Code, s.55).

3.11 Most respondents were in favour of this proposal. One magistrate disagreed:

> Compensation should not be a default option. There are too many scenarios where it is complex, inappropriate or just impossible to pay compensation.
>
> Giving reasons should not be mandated as they should be part of the entire sentencing announcement rather than specific

3.12 Other magistrates agreed with the proposals but commented on the practical difficulties of awarding compensation in cases where the offender has limited means. One individual magistrate suggested that compensation should be awarded according to the loss suffered and not take account of means, a magistrates' bench noted that awarding a low sum may give the impression that the impact on the victim has not been appreciated.

3.13 A barrister suggested that mention should also be made of offences taken into consideration (TICs). There is guidance in the explanatory materials for magistrates and in the Compendium (at S3.4) for judges in the Crown Court on the making of compensation orders. The magistrates' court guidance does include a reference to TICs, the Compendium does not. TICs are only relevant in a small proportion of cases typically including theft, burglary and criminal damage offences. Where TICs are likely to be relevant, the offence specific guideline will have this as an aggravating factor and the expanded explanation for the factor includes a reference to compensation orders. It therefore is probably not particularly useful to add a reference to TICs to the wording on compensation in every guideline.

Question 2: Should any changes be made to the wording consulted on regarding compensation?

Confiscation

3.14 In addition to the wording on compensation, the Council consulted on using the following wording relating to confiscation in all relevant guidelines:

> **Confiscation orders** under the Proceeds of Crime Act 2002 may only be made by the Crown Court. The Crown Court must proceed with a view to making a **confiscation order** if it is asked to do so by the prosecutor or if the Crown Court believes it is appropriate for it to do so.
>
> Where, following conviction in a magistrates' court, the prosecutor applies for the offender to be committed to the Crown Court with a view to a confiscation order being considered, the magistrates' court must commit the offender to the Crown Court to be sentenced there (section 70 of the Proceeds of Crime Act 2002). Where, but for the prosecutor's application under s.70, the magistrates' court would have committed the offender for sentence to the Crown Court anyway it must say so. Otherwise the powers of sentence of the Crown Court will be limited to those of the magistrates' court.
>
> Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation).
> (See Proceeds of Crime Act 2002 sections 6 and 13)
>
> The court should also consider whether to make ancillary orders.

3.15 Again, most respondents supported the suggestion. One magistrates' bench queried whether the power to make a confiscation order could be extended (or re-introduced) to magistrates' courts. We can explain in the response to consultation document that this would be a matter for government (Section 97 of the Serious Organised Crime and Police Act 2005 confers a power on the Secretary of State to make provision for magistrates' court to impose confiscation orders but, to date, no such order has been made).

3.16 A barrister suggested that 'mention should be made of the power in relation to summary offences'. Under section 70 of the Proceeds of Crime Act 2002 (POCA) magistrates' courts can commit a case to the Crown Court with a view to confiscation, including for a summary only offence. Although the wording consulted on does not contradict this, neither does it make it clear. Some extra wording could be added to the second paragraph as shown highlighted below:

> Where, following conviction in a magistrates' court, the prosecutor applies for the offender to be committed to the Crown Court with a view to a confiscation order being considered, the magistrates' court must commit the offender to the Crown Court to be sentenced there (section 70 of the Proceeds of Crime Act 2002). This applies to summary only and either-way offences. Where, but for the prosecutor's application under s.70, the magistrates' court would have committed the offender for sentence to the Crown Court anyway it must say so. Otherwise the powers of sentence of the Crown Court will be limited to those of the magistrates' court.

3.17 Three respondents mentioned the importance of stressing that magistrates' courts must make it clear if they would have committed an either-way offence anyway. If it was felt to be helpful the text could be split so that the sentence beginning 'Where' starts a new paragraph.

Question 3: Should any changes be made to the wording on confiscation as consulted on?

Uplift for racially or religiously aggravated offences

3.18 The Council consulted on amending existing guidelines to create a separate step for the uplift for racial/ religious aggravation as has been done with the new assault guidelines. The guidelines it would apply to are:

- criminal damage (under £5,000) and criminal damage (over £5,000)
- s4, s4A and s5 Public Order Act offences
- harassment/ stalking and harassment/ stalking (with fear of violence)

3.19 Respondents were overwhelmingly in favour of this proposal and there were no suggestions for changes.

Domestic abuse – overarching principles

The Council consulted on proposals to amend this guideline to align it with the new statutory definition of domestic abuse introduced by the Domestic Abuse Act 2021 (DAA) and to widen the definition of domestic abuse (for the purposes of the guideline) to cover situations such as that in AG Ref R v Tarbox [2021] EWCA Crim 224. This would make clear that the guideline may apply in situations where there is no 'personal connection' as defined in the Act.

The proposed new wording is as follows (paragraphs 2, 3 and 4 are new or revised):

1. This guideline identifies the principles relevant to the sentencing of cases involving domestic abuse. Domestic abuse is a general term describing a range of violent and/or controlling or coercive behaviour.

2. A statutory definition of domestic abuse is provided by Part 1 of the Domestic Abuse Act 2021. In summary domestic abuse is defined for the purposes of that Act as:

Behaviour (whether a single act or a course of conduct) consisting of one or more of:

- physical or sexual abuse;
- violent or threatening behaviour;
- controlling or coercive behaviour;
- economic abuse (any behaviour that has a substantial adverse effect on the victim's ability to acquire, use or maintain money or other property, or obtain goods or services);
- psychological, emotional or other abuse

between those aged 16 or over:

- who are, or have been married to or civil partners of each other;
- who have agreed to marry or enter into a civil partnership agreement one another (whether or not the agreement has been terminated);
- who are, or have been, in an intimate personal relationship with each other;
- who each have, or have had, a parental relationship in relation to the same child; **or**
- who are relatives.

This definition applies whether the behaviour is directed to the victim or directed at another person (for example, the victim's child). A victim of domestic abuse can include a child who sees or hears, or experiences the effects of, the abuse, and is related to the primary victim or offender.

3. For the purposes of this guideline domestic abuse includes so-called 'honour' based abuse, female genital mutilation (FGM) and forced marriage.

4. The principles in this guideline will also apply to persons living in the same household whose relationship, though not precisely within the categories described in para 2 above, involves a similar expectation of mutual trust and security.

5. Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capabilities for personal gain, depriving them of the means needed for independence, resistance and escape and/or regulating their everyday behaviour.

6. Coercive behaviour is an act or pattern of acts of assault, threats, humiliation (whether public or private) and intimidation or other abuse that is used to harm, punish, or frighten the victim. Abuse may take place through person to person contact, or through other methods, including but not limited to, telephone calls, text, email, social networking sites or use of GPS tracking devices.

7. Care should be taken to avoid stereotypical assumptions regarding domestic abuse. Irrespective of gender, domestic abuse occurs amongst people of all ethnicities, sexualities, ages, disabilities, religion or beliefs, immigration status or socio–economic backgrounds. Domestic abuse can occur between family members as well as between intimate partners.

8. Many different criminal offences can involve domestic abuse and, where they do, the court should ensure that the sentence reflects that an offence has been committed within this context.

3.20 The majority of respondents were in favour of the proposals and one specifically welcomed para 4. The JCS, however, expressed concern about the inclusion of para 4:

> Whilst appreciating the comments in the Tarbox case (para 21), we do not agree that the guideline should be expressly applicable to the situation described above. We are concerned that to apply the guideline to this type of situation is to significantly extend the concept of 'domestic abuse', a concept which Parliament has already specifically defined in wide terms in Part 1 Domestic Abuse Act 2021.
>
> In Tarbox the Court of Appeal found that the killing of the victim represented a violation of the trust and security which, in the circumstances of the case, the victim could reasonably have expected to exist between her and the defendant. However, and notwithstanding the fact that the defendant and victim and had twice previously had sexual relations, the Court was satisfied that the nature of their relationship did not fall within the ambit of the existing Domestic Abuse guideline. In view of these observations, we would suggest that a violation/breach of trust and/or security should be regarded as an aggravating feature to the specific offence being sentenced, and should not be used to effectively extend the very clearly defined statutory definition of 'domestic abuse'.

3.21 In the light of all other respondents being content with the inclusion of para 4, no change is proposed.

3.22 The Legal Committee of HM Council of District Judges (Magistrates' Courts) suggested that the guideline should make it clear if it is adopting the definition of domestic abuse in the DAA rather than just stating how it is defined for the purposes of that Act. This is a valid point – while it is implicit that the guideline is adopting the definition (without being limited by it) it is not categorically stated. One solution could be to amend para 3 to read:

> 3. This guideline applies to domestic abuse as defined in para 2 above and to so-called 'honour' based abuse, female genital mutilation (FGM) and forced marriage.

3.23 There were other points raised by respondents:

> What about actions taken by a person at the instructions of the DA perpetrator? For example getting someone else to send a text. Is that covered? In respect of parental responsibility are Foster Carers and other carers "appointed" by a local authority included? *Magistrate*

> We agree with the proposed new wording, but not the assumption that such behaviour can only arise "between those aged 16 or over" as members of this committee have, sadly, encountered both domestic and sexual abuse involving under-16s. We strongly recommend that specific reference should be made in the guidelines to the sentencing of youths in such cases. *Magistrates' bench*

3.24 The Council may feel that any attempt in the guideline to further define what circumstances are or are not covered by the guideline would be unhelpful. The guideline is applicable to offenders aged 16 and over – any change to that would require further consideration and consultation.

Question 4: Should the Domestic abuse guideline be amended as suggested at 3.22 above?

Question 5: Should any other changes be made to the Domestic abuse guideline?

4 EQUALITIES

4.1 The consultation did not include any proposals expressly relating to equalities. No issues were identified in response to a question in the consultation paper asking if there were any equality issues relating to the proposals.

5 IMPACT AND RISKS

5.1 In view of the nature of the consultation, no resource assessment was produced but the consultation document briefly addressed the potential impact of each proposal. There were only a few comments relating to the impact of the changes and these generally welcomed the clarity that the changes would bring.

5.2 The Prison Reform Trust expressed concern that there are currently insufficient measures to monitor any effect of the changes in relation to confiscation orders. This can be discussed at the January meeting.

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Sentencing Council

Sentencing Council meeting:	**17 December 2021**
Paper number:	**SC(21)DEC04 – Motoring offences causing death or injury**
Lead Council member:	**Rebecca Crane**
Lead official:	**Lisa Frost** **0207 071 5784**

1 ISSUE

1.1 This meeting will ask the Council to finalise culpability factors for careless driving and to consider the potential to develop enhanced guidance for motoring offences involving drug driving. This paper provides an overview of consideration which has been given to developing a drug driving guideline and specific guidance for drug levels in motoring offences, and the limitations which exist to developing a full guideline as exists for drink driving. Consideration of the approach to assessing culpability for careless driving causing death under the influence is also required.

2 RECOMMENDATION

2.1 The Council is asked to:

- Consider and agree draft culpability factors for careless driving offences;
- Consider issues related to the development of enhanced guidance for drug driving offences and;
- Consider approaches to assessing culpability for careless driving when under the influence of drink or drugs.

3 CONSIDERATION

Careless driving culpability factors

3.1 At the November meeting progress was made on agreeing factors for revised careless driving offences guidelines. The Council agreed the following revisions to factors:

- Culpability factors relating to medical conditions and driver impairment should be separated and clarified.
- A factor relating to unsafe manoeuvre or positioning of a vehicle should be included.
- 'Knowingly' should be removed from factors where it was included.

3.2 Two other points were raised. The first was that explanatory wording should be included to clarify that the circumstances and context of the offence should be considered in assessing the culpability of an offender, as this will be relevant to which category of culpability is most appropriate. The following explanatory wording is proposed:

'The court should determine culpability by reference to the factors below, which comprise the principal factual elements of the offence. The circumstances and context of the offence will also be important to assessing the level of culpability.'

Question 1: Does the Council agree with the proposed explanatory wording?

3.3 Another point raised was in relation to offences involving a vehicle being in driven in an unsafe condition, including where driver visibility is obstructed. Consideration has been given to the wording of a factor as the dangerous driving offence provides for the driving of a vehicle which is in a dangerous condition. For this reason, the term 'dangerous' has been avoided and the following wording is proposed:

'Driving vehicle which is unsafe or where visibility or controls are obstructed'.

This would capture obstructed windscreens as well as any interior obstructions in a vehicle which impede access to vehicle controls, such as a gear stick being obstructed by objects on the passenger seat of a vehicle.

The culpability factors and assessment would be as follows:

The court should determine culpability by reference to the factors below, which comprise the principal factual elements of the offence. The circumstances and context of the offence will also be important to assessing the level of culpability.
High • Standard of driving was just below threshold for dangerous driving and/or includes extreme example of a medium culpability factor
Medium • Unsafe manoeuvre or positioning of vehicle • Engaging in a brief but avoidable distraction • Driving at a speed that is inappropriate for the prevailing road or weather conditions, although not greatly excessive • Driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs

• Driving vehicle which is unsafe or where visibility or controls obstructed • Driving in disregard of advice relating to the effects of medical condition or medication • Driving whilst ability to drive impaired as a result of a known medical condition • Driving when deprived of adequate sleep or rest • The offender's culpability falls between the factors as described in high and lesser culpability
Lesser • Standard of driving was just over threshold for careless driving • Momentary lapse of concentration

Question 2: Does the Council agree with the proposed culpability factors for careless driving offences?

Drug Driving

3.4 In agreeing the scope of this project, the Council agreed to consider enhanced drug driving guidance. The Council has considered expanding the guidance for drug driving in the MCSG previously, with a view to ultimately developing guidance which linked levels of drugs to offence seriousness similar to the approach used for drink driving offences.

3.5 Developing a guideline for drug driving is complex as, unlike alcohol related driving offences, the legislation provides for a zero tolerance approach to drug driving (but ruling out accidental exposure) rather than providing for a legal limit. Measuring levels of drugs consumed is also highly complex given the potential for drug interactions, different impacts on individuals depending on their physical characteristics and drug potency.

3.6 Specified limits provide for 17 legal and illegal drugs. A recently published report on drug driving confirms that the government used a 'lower limit of detection' to set the limit for eight illegal drugs, a 'risk-based approach' for eight medicinal drugs, and a separate approach for amphetamine to balance its legitimate medical uses and its abuse. The limits are higher for medicinal drugs than for illegal drugs. The limits for illegal drugs are low but not purely presence based (i.e. showing the presence of any level of drugs). Neither are they based purely on impairment because of the scientific and ethical difficulties of objectively measuring, trialling and defining impairment for psychoactive drugs and driving.[1]

[1] Drug driving: The tip of an iceberg? The Parliamentary Advisory Council for Transport Safety (PACT) report published February 2021

Illegal drugs	**Specified limit in mg per litre of blood**
Benzoylecgonine	**50**
Cocaine	**10**
Delta-9-tetrahydrocannabinol (cannabis)	**2**
Ketamine	**20**
Lysergic acid diethylamide (LSD)	**1**
Methylamphetamine	**10**
Methylenedioxymethamphetamine (MDMA)	**10**
6-monoacetylmorphine (Heroin)	**5**
Medicinal controlled drugs	
Clonazepam	**50**
Diazepam	**550**
Flunitrazepam	**300**
Lorazepam	**100**
Methadone	**500**
Morphine	**80**
Oxazepam	**300**
Temazepam	**1000**
Amphetamine	**250**

3.7 The Council issued drug driving guidance in 2016 which can be found here: Drug driving (guidance only) – Sentencing (sentencingcouncil.org.uk). In November 2019 the Council were due to consider a draft guideline for the s5A Road Traffic Act 1988 offence of driving or attempting to drive with a specified drug above the specified limit. The draft guideline developed at that time is attached at Annex A. The draft guideline took the approach, in line with the point noted that it was not possible to precisely measure the effect of a drug on a drivers impairment, that courts should not draw a direct connection between the level of substance detected and the level of harm. However, in consulting with DfT on

this approach they highlighted work they were undertaking to explore a high risk offenders scheme for those convicted of drug driving, as is already in place for offenders convicted of drink driving. They noted that such a scheme would likely draw a link between the level of substance detected and seriousness, and that classification of high risk offenders would likely be with reference to levels of any substance detected. This presented the possibility that the readings of specified substances could be used to assess seriousness in the guideline, if these were developed by DfT. It was suggested by DfT officials and agreed by the Council that it may be preferable to wait until this work had concluded to decide how to proceed with the drug-drive guidelines.

3.8 The high risk offender classification is currently in place for those convicted of drink driving and relates to offenders who pose a threat of reoffending, or have impairment levels which pose a high risk. For drink driving, the high risk offenders scheme applies to drivers convicted of the following:

- One disqualification for driving or being in charge of a vehicle when the level of alcohol in the body equalled or exceeded either one of these measures:
    - 87.5 mcg per 100 ml of breath
    - 200.0 mg per 100 ml of blood
    - 267.5 mg per 100 ml of urine
- two disqualifications within the space of 10 years for drinking-driving or being in charge of a vehicle while under the influence of alcohol
- one disqualification for refusing or failing to supply a specimen for alcohol analysis
- one disqualification for refusing to give permission for a laboratory test of a specimen of blood for alcohol analysis

Drivers designated as high risk offenders are not automatically re-issued their driving licence once the period of disqualification has ended. Instead, the offender must apply for a new licence and the Driver Vehicle & Licensing Agency (DVLA) will only issue a licence after a satisfactory medical assessment.

Officials have maintained contact with DfT to monitor the progress of their drug driving work. Two reports have been made available to us recently and officials have had a meeting with Professor Kim Wolff, Professor Analytical, Forensic & Addiction Science, Director of King's Forensics and Head of the Drug Control Centre, a leading expert on drug and drink driving and involved in the development of both reports. Identification of potential high risk drug driving offenders has not progressed as quickly as had been hoped, largely due to the

complexity of the subject matter. A summary of the current position and status of the evidence is provided below.

The PACT report

3.9 The independent report published in February 2021 by The Parliamentary Advisory Council for Transport Safety (PACT) titled 'Drug Driving: The tip of an Iceberg' is attached at Annex B. The report highlights issues with the current approach to drug driving across the legal system and steps that should be taken to resolve them. This report is mostly focused on the practical issues and limitations to effective enforcement of drug driving legislation. Among these are variation in enforcement practices across police forces which is attributed to costs; the lack of availability and effectiveness of roadside testing for most drugs; the necessity for blood samples to be collected to evidence offences which presents resource and evidential issues and; issues relating to analysis of blood samples and the potential for laboratory evidence to be challenged. One issue highlighted is the laboratory test turnaround time. The report notes that '*blood test results generally take at least four to five months to come back. Furthermore, backlogs in laboratories are not uncommon and concerns have been raised that backlogs could lead to the statutory time limit (generally six months in Magistrate's Courts) being missed for some samples*.' In short, there is a lack of infrastructure to robustly identify and enforce drug driving legislation, and to obtaining the evidence necessary for effective prosecutions and sentencing. This differs to drink driving, where standardised roadside tests and equipment enable effective identification of offenders and appropriate criminal justice responses.

3.10 These are important issues to consider as they present potential challenges to the operation of a guideline. It is particularly important to consider the impact of levels of drug being referenced in a guideline given the context of current laboratory testing capability and capacity. Among other testing issues the report also notes variation in how levels are reported by commercial laboratories with some results reported as high medium or low levels and others providing specific readings of substance levels. Given the difference it could make to a sentence, it is likely that experts would be commissioned to challenge analysis of results, and a lack of consistency in reporting of test results would cause application of the guideline to be problematic for sentencers.

Expert views on the potential to develop a sentencing guideline

3.11 In discussions with Professor Wolff specific questions were asked as to the possibility of a guideline specifying drug driving levels in the same way as is possible for drink drive offences. Specifically, it was asked if there is evidence of a relationship between drug levels and driver impairment and if evidence is available to support a similar approach to drink driving by multiplying levels of drug to identify seriousness. Professor Wolff confirmed that there is not currently consensus in scientific literature to be confident of levels at which impairment worsens, but that there is a linear relationship between the concentration of drug and impairment in relation to cannabis. She noted that while there is broad acceptance that multiplication of the legal limit is an appropriate measure for alcohol consumption and impairment, science and expert consensus does not provide for same approach for all drugs included in legislation. She stated that scientific consensus exists in respect of cannabis, cocaine and for some other drugs, but not for others such as metabolites. Professor Wolff suggested that the Council could incrementally improve and enhance its guidance as more research and evidence becomes available, and suggested considering the recently commissioned DfT high risk offender report. It was suggested that information within the report may assist the Council in identifying levels of drugs and associated seriousness for a sentencing guideline.

Report on High Risk Offenders

3.12 An embargoed report commissioned by DfT from an expert panel (including Professor Wolff) on the options and considerations necessary to develop a high risk offender scheme for drug driving has been seen by officials. The report is focused specifically on which offenders should be designated as high risk offenders when convicted of drug driving, as is already established for high risk drink drive offenders.

3.13 The report draws on a wide range of published research and evidence, and is complex. It is limited to considering the point at which an offender should be designated as a high risk offender and subject to the same process in reapplying for their driving licence as a drink drive offender would be.

3.14 One of the recommendations is that where there is evidence of a combination of drugs or of drugs and alcohol being present, offenders should be categorised as high risk offenders. This point was already included in the draft guideline developed in 2019 at Annex A as a high culpability factor.

3.15 The report confirms the following considerations were relevant to identifying limits at which an individual should be considered a high risk offender:

Since there is a wide-ranging list of drugs included in the Section 5A legislation, the Panel agreed that in relation to the need to provide an agreed specified drug limit above which an offender would join the HRO scheme, the specified limits for the HRO scheme would be set through consideration of the following:

1) Setting a limit based on the point at which a drug was considered to cause a considerably increased level of risk of a Road Traffic Collision (RTC) as described by an Odds Ratio (OR) or other statistical outcome. This would be based on the scientific evidence in the Driving under the Influence of Drugs: Report from the Expert Panel (2013).This approach was particularly useful when considering the combinatorial effects of more than one drug and drugs and alcohol on driving;

2) Setting a limit based on the point at which a drug was considered to cause a considerably increased level of impairment;

3) Drawing on the historical Section 5A evaluation data, and giving consideration to the proportion of drug drivers with a drug concentration in excess of a particular blood concentration.

3.16 The report notes the limitations of the same approach to assessing high risk drink drive offenders with reference to multiplication of specified levels of drugs:

In the HRO drink-driving scheme there is a criterion that refers to being over two and a half times the legal alcohol driving limit in blood, breath, or urine. The panel propose that this criterion could not be universally applied to individual drugs included in Section 5A (1) and (2) of the Road Traffic Act 1988 because of the different properties, potency and effects of each drug on ability to drive. However, single offences with high concentrations of specific compounds could be determined. The Panel agreed that for single offences with high concentrations of a single illicit or prescribed drug HRO limits should be based on the evidence at which there is an increased risk of a road traffic collision, as set out in the DfT Expert Panel report [2013]. For comparative purposes, and where sufficient data were available, data obtained as part of the evaluation of the Section 5A offence was examined to give an indication of the proportion of drug-positive Section 5A drivers that would be above the proposed HRO level.

3.17 The report then goes on to provide a comprehensive summary of which drugs and quantities could be specified as the threshold for a high risk offender. These are based on evidence from a report published in 2013[2]:

[2] Wolff K Agombar R, C.A., Cowan D, Forrest AR, Osselton MD, Scott-Ham M, Johnston A., *Driving under the Influence of Drugs: Report from the Expert Panel on Drug Driving*, W. k., Editor. 2013, Department for Transport: London.

Illegal drugs	Specified limit in mg per litre of blood	Recommended level for High Risk Offender designation
Benzoylecgonine	**50**	Recommended HRO limit would be 500 µg/L. From examination of the Section 5A data [8] approximately 20% of drug-positive Section 5A samples containing BZE were above this concentration.
Cocaine	**10**	Suggested HRO limit would be 80 µg/L. From examination of the Section 5A data [8], approximately 8% of drug-positive Section 5A samples containing cocaine were above this concentration.
Delta-9-tetrahydrocannabinol (cannabis)	**2**	Recommended HRO limit would be 5 µg/L. From examination of the Section 5A data [8] approximately 36% of drug-positive Section 5A samples containing THC were above this concentration.
Ketamine	**20**	Suggested HRO limit would be 200 µg/L. The Norwegian Academic Advisory Group (2010), in preparing for drug driving legislation, reported that a ketamine blood concentration causing impairment was 238 µg/L [76]. Drug-driving concentration data provided to the DfT Expert Panel showed mean blood drug concentration of ketamine was 345 µg/L (range 20 µg/L – 1,300 µg/L, median, 300 µg/L) from 207 cases. A concentration of 200 µg/L ketamine would capture 70% of those drivers tested positive for ketamine in

		England and Wales as documented in the DfT Expert Panel report [2013].
Lysergic acid diethylamide (LSD)	**1**	Suggested HRO limit would be 1 µg/L since any concentration of LSD in the body was deemed significantly impairing.
Methylamphetamine	**10**	Suggested HRO limit would be 200 µg/L using DfT Expert Panel report [2013].
Methylenedioxymethamphetamine (MDMA)	**10**	Suggested HRO limit would be 300 µg/L using DfT Expert Panel report [2013] data, which indicates a median blood drug concentration found in drivers for MDMA 305 µg/L (mean 452 µg/L, range 20 µg/L–2,540 µg/L) from 76 of 2995 cases
6-monoacetylmorphine (Heroin)	**5**	Suggested HRO limit would be 5 µg/L on the basis that the presence of 6-MAM in blood would indicate very recent use of heroin.
Medicinal controlled drugs		
Clonazepam	**50**	Suggested HRO limit would be 50 µg/L, which is at the top end of the therapeutic range and associated with problematic use and impaired driving.
Diazepam	**550**	Suggested HRO limit would be 550 µg/L using DfT Expert Panel report [2013] [18]. From examination of the Section 5A data [8] approximately 9% of drug-positive Section 5A samples containing diazepam were above this concentration. In a retrospective study of blood samples for drivers in England and Wales providing evidential

		samples between 2010 and 2012 12.5% had concentrations of diazepam-over this limit.
Flunitrazepam	**300**	Suggested HRO limit would be 300 µg/L using DfT Expert Panel report [2013]
Lorazepam	**100**	Suggested HRO limit would be 100 µg/L using DfT Expert Panel report [2013]
Methadone	**500**	Suggested HRO limit would be 500 µg/L using DfT Expert Panel report [2013]
Morphine	**80**	Suggested HRO limit would be 80 µg/L; From examination of the Section 5A data approximately 6% of drug-positive Section 5A samples containing morphine were above this concentration. In a retrospective study of blood samples for drivers in England and Wales, providing evidential samples between 2010 and 2012 4.8% samples containing morphine were above this concentration.
Oxazepam	**300**	Suggested HRO limit would be 300 µg/L. In a retrospective study of blood samples for drivers in England and Wales providing evidential samples between 2010 and 2012 14.7% samples containing Oxazepam were above this concentration.
Temazepam	**1000**	Suggested HRO limit would be 1000 µg/L using the DfT Expert Panel

		report [2013]. In a retrospective study of blood samples for drivers in England and Wales, providing evidential samples between 2010 and 2012 5.8% samples containing temazepam were above this concentration.
Amphetamine	**250**	Suggested HRO limit would be 600 µg/L based on DfT Expert Panel report [2013] [18] . From examination of the Section 5A data approximately 11% of drug-positive S5A samples containing amphetamine were above this concentration.

3.18 As these are levels which are proposed to designate a high risk offender, one option would be to use these levels in a guideline to assess high culpability offenders. However, it would not be possible to quantify an amount for a medium or low culpability offender given the issues which have been noted with mathematical calculations being more complex for drugs than for alcohol. The limits also apply to the presence of one drug rather than multiple drugs, and multiple drugs may interact differently.

3.19 A further issue is that these limits have been developed for a different purpose than for sentencing, and for some drugs the level is the base limit provided for by legislation. While the evidence the levels are based on is comprehensive, it was published in 2013 and may be considered by other experts to be out of date and could be open to challenge. Issues around drug potency and impact upon offenders depending on metabolic effects and physical characteristics are likely to be raised, and this is a complex and evolving landscape.

3.20 The report is not currently widely available, and if a guideline were to be based on its proposals these would need to be justified with reference to it. DfT officials have confirmed that they intend to arrange for a call for evidence on the report and proposals subject to appropriate approval being obtained from Ministers. For the purposes of a guideline which specifies drug levels it is proposed that the Council should await the outcome of work by DfT and monitor the development of their high risk offender policy for drug drivers. It will be important for the basis of a guideline specifying limits to have a scientific and robust evidence base, and to align with other criminal justice responses and policies.

3.21 One option could be to include detail of specified limits for drugs in the guideline to provide context to readings. However, this could be problematic as sentencers will not know how much of a drug is likely to represent a very high reading and significantly impair a driver. An example is THC (cannabis). Professor Wolff confirmed it is widely recognised by experts that a level of 5 is dangerous and likely to impair, but 5 may not seem significantly higher than the legal limit of 2 to a non-expert.

3.22 The draft guideline already developed does reflect broad scientific and expert consensus that multiple drugs, and combinations of drugs and alcohol, do increase the risk posed by a drug driving offender, as noted in the published PACT report:

'Driving having consumed both alcohol and other drugs is significantly more dangerous than driving with an equivalent amount of alcohol or drugs. This is because the interaction of alcohol and other drugs can be significantly more impairing than in isolation. This can be true for both illicit and medicinal drugs. Drivers could also have low levels of drugs and alcohol in their system and therefore be below the drink and drug driving limit, but still be significantly impaired.'[3]

3.23 However, it is thought that consideration should be given to whether one element of the previously developed guideline should be removed; specifically, the wording in relation to factors indicating greater harm and signs of obvious impairment which states:

'The court should not assume that a particular level of impairment necessarily follows from a particular level of a specified substance without evidence to support this.'

It is thought that this without published guidance on levels and impairment this may result in inconsistent assessments and require commissioning of expert evidence, and as this relates to harm in the S5A offence only and obvious signs of impairment it is thought to be unnecessary.

3.24 It is proposed that subject to the points above the Council could proceed with consulting on the guideline previously developed, and reflect the expert views in other draft guidelines being developed for offences which include drug driving. This would be a step towards the incremental development of enhanced guidance as suggested by Professor Wolff and have the benefit of eliciting other evidence which may be available in this field by consulting widely. This would also enable the Council to be transparent regarding consideration that is being given to this issue and the difficulties posed with specifying limits linked to potential driver impairment while the issue is still under consideration by DfT.

[3] P.53: Drug driving: The tip of an iceberg? (2021) The Parliamentary Advisory Council for Transport Safety (PACT) report

Question 3: Does the Council wish to consult on the drug driving guideline developed previously at Annex B?

Careless driving causing death while under influence – assessing seriousness

3.25 Decisions made in respect of drug driving will be relevant to the development of a guideline for this offence. At the last meeting the Council briefly considered and discussed the current approach to assessing seriousness of this offence. The existing approach is as follows:

The legal limit of alcohol is 35µg breath (80mg in blood and 107mg in urine)	**Careless / inconsiderate driving arising from momentary inattention with no aggravating factors**	**Other cases of careless / inconsiderate driving**	**Careless / inconsiderate driving falling not far short of dangerousness**
71µ or above of alcohol / high quantity of drugs OR deliberate non-provision of specimen where evidence of serious impairment	**Starting point:** 6 years custody **Sentencing range:** 5-10 years custody	**Starting point:** 7 years custody **Sentencing range:** 6-12 years custody	**Starting point:** 8 years custody **Sentencing range:** 7-14 years custody
51- 70 µg of alcohol / moderate quantity of drugs OR deliberate non-provision of specimen	**Starting point:** 4 years custody **Sentencing range:** 3-7 years custody	**Starting point:** 5 years custody **Sentencing range:** 4-8 years custody	**Starting point:** 6 years custody **Sentencing range:** 5-9 years custody
35-50 µg of alcohol / minimum quantity of drugs OR test refused because of honestly held but unreasonable belief	**Starting point:** 18 months custody **Sentencing range:** 26 weeks-4 years custody	**Starting point:** 3 years custody **Sentencing range:** 2-5 years custody	**Starting point:** 4 years custody **Sentencing range:** 3-6 years custody

Failure to provide specimen for analysis

3.26 The Council agreed that any deliberate refusal to provide a specimen would be the most serious type of refusal, and it was agreed that this should inform options regarding a revised draft guideline for this offence. At the last meeting it was noted that factors agreed for this offence should align with failing to provide a specimen for analysis, given that refusal reasons should be the same. The existing MCSG guideline for failing to provide a specimen for analysis assesses the following culpability factors:

CULPABILITY demonstrated by one or more of the following

Factors indicating higher culpability

- Deliberate refusal/ failure

Factors indicating lower culpability

- Honestly held belief but unreasonable excuse
- Genuine attempt to comply
- All other cases

3.27 The MCSG guideline provides for 'honestly held belief but unreasonable excuse' at lower culpability. The Council discussed at the last meeting whether refusal relating to needle phobia or beliefs should be included, but as a distinction is provided for in the MCSG for honestly held beliefs it is thought the same factors should apply. Alternatively the factors could be phrased as 'deliberate refusal' and 'all other refusals to provide a specimen' which would capture rare instances where an offender may have a valid, although not legally defensible, reason for not providing a sample.

Driving under the influence of drugs

3.28 Decisions in respect of a drug driving guideline will also be relevant to careless driving causing death when under the influence of drugs. The existing SGC guideline includes three levels of drug quantities; high, moderate and low. As the issues with determining levels discussed earlier in this paper highlight, this relies on sentencers being able to determine the level based on the evidence. As noted earlier, the draft drug driving guideline at Annex A captures cases where there is evidence of another drug or alcohol at high culpability. For this offence it is proposed that high culpability captures the presence of multiple drugs or combinations of drugs and alcohol. Medium culpability could then provide for other cases of driving under the influence of drugs. This would align with expert views and reflect the zero tolerance approach of legislation to drug driving, and would also reflect the S5A draft guideline approach if we proceed to consult as discussed earlier.

Driving under the influence of alcohol

3.29 If this approach is adopted driving under the influence of drugs and alcohol and the highest alcohol limit expressed in the MCSG excess alcohol guideline and the current SGC causing death by careless driving under the influence guideline would be captured in the

highest culpability category. Medium and lesser culpability would also reflect the established excess alcohol limits in other guidelines. Lesser culpability would therefore only be relevant to the lowest alcohol level offences of careless driving causing death under the influence of alcohol, with specimen refusals and drug offences captured at high and medium culpability. The Council could include only two categories for this offence and provide for high and medium alcohol readings at the highest level of culpability, and but this may inflate sentences for offences involving lower alcohol readings. This may also be difficult to justify as it is considered that the assessment can be more nuanced as alcohol levels are specified. in other guidelines.

3.30 A proposed draft culpability model is attached at Annex C. An alternative approach would be to retain references to moderate and low levels of drugs in medium and lesser culpability, but provide for multiple drugs and high readings in high culpability. However, the proposed approach would reflect the two categories proposed by the s5A guideline and would reflect the seriousness of drug driving.

3.31 It is however important to note that any drug driving offence involving traces of drugs above the specified limit would likely be categorised higher than currently. This could relate to cases where offenders are regular drug users and traces remain in their system although consumption was not directly before driving took place. It is thought that a mitigating factor of 'trace of drug present through prior use and not consumed shortly before driving' could be included to moderate the impact upon sentences.

Question 4: Does the Council agree with the proposed culpability factors and their placement?

4 IMPACT AND RISKS

4.1 The resource assessment will identify any potential inflationary impacts of proposals in this paper in relation to the categorisation of drug drive offences. These offences are low volume but any changes to offence categorisation would likely inflate sentences. However, proposals are based on expert views and reflect that legislation does not provide for drug consumption and driving in the same way as for alcohol.

Sentencing Council

Sentencing Council meeting:	**17 December 2021**
Paper number:	**SC(21)DEC05 – Animal Cruelty**
Lead Council member:	**Rosa Dean**
Lead official:	**Ollie Simpson** **ollie.simpson@sentencingcouncil.gov.uk**

1 ISSUE

1.1 Agreeing updates to the guideline for offences committed under section 9 of the Animal Welfare Act 2006 (breach of duty of person responsible for animal to ensure welfare). These arise as a consequence of the revision to the animal cruelty guidelines, following the increase in maximum penalty for other offences under that Act from six months' to five years' imprisonment.

2 RECOMMENDATIONS

2.1 That Council:

- agree the revisions to the section 9 guideline;
- confirm the revisions agreed at November's meeting to the animal cruelty guidelines.

3 CONSIDERATION

3.1 The offence of breach of a duty to ensure animal welfare (set out in full at **Annex A**) has remained a summary only offence with a maximum of six months' imprisonment. Its guideline is currently part of the overall animal cruelty guideline which we are revising to reflect the new maximum penalty for other animal cruelty offences (causing unnecessary suffering, mutilation, tail docking, poisoning and fighting).

3.2 Like all animal welfare offences, section 9 is relatively low volume. There were around 50 offenders sentenced for this offence as the principal offence in 2020. These figures are affected no doubt by the pandemic, but even in 2018 and 2019 there were only around 160 and 140 offenders sentenced, respectively.

3.3 Given this offence alone is remaining summary only, I believe it makes most sense to retain a separate magistrates' guideline for section 9, without the need for substantial changes (it was most recently revised in 2017), but with a few necessary updates to reflect the splitting-off of the guidelines and to ensure the two resulting guidelines are consistent.

Question 1: do you agree to maintain a separate magistrates' guideline for section 9 offences?

3.4 If you agree, the first question to consider is the title of the guideline (a draft of which is at **Annex B**). Currently it is "Animal Cruelty", but this seems misleading if the section 9 offence is the only one being covered, it being more about neglect than deliberate intent to cause suffering. We could simply replicate the title of the section in full: "breach of duty of person responsible for animal to ensure welfare". That would mean anyone searching for the offence could find it easily with a search although it could risk confusion with a breach guideline in the alphabetical online list. A snappier title could be "Failure to ensure animal welfare" or simply "Animal welfare" or "Animal neglect", although it may not be clear to the magistrate in a hurry which offence these last titles refer to, and we want to avoid confusion with the other animal cruelty guideline.

3.5 On balance I recommend "Failure to ensure animal welfare" as a title which is short, readily searchable but which describes the offence adequately and accurately.

Question 2: do you agree to change the title of the guideline to "Failure to ensure animal welfare"?

3.6 Given that Parliament has left this offence as it is, there is no evidence that the guideline is proving difficult to use in practice, and it was last revised in 2017, I do not propose a thoroughgoing revision. However, various of the elements in the existing guideline are unnecessary or inappropriate for the offence of failing to ensure an animal's welfare.

3.7 It seems evident that "Deliberate or gratuitous attempt to cause suffering" from high culpability can be removed as that would be a section 4 offence. The higher culpability factors "Prolonged or deliberate ill treatment or neglect" and "Ill treatment in a commercial context" could stand, although I question whether "ill treatment" should remain. I do not believe it is wrong to describe this offending as "ill treatment", but it seems odd to split out the concepts of ill treatment and neglect for an offence which either of those descriptors alone could cover sufficiently.

3.8 Although marginal, I believe "ill treatment" in the current guideline is meant to cover behaviour seen under section 4 and 8 offences (causing unnecessary suffering and fighting), and that "neglect" is a more apt description for section 9 offending. I therefore propose amending those culpability factors to "Prolonged or deliberate neglect" and "Neglect in a commercial context"

3.9 I see no reason to move away from the current middle category capturing anything between high and low. In the context of neglect, it is possible to envisage grey areas for

offenders who ought to know better, but are still somewhat misguided rather than wilfully neglectful.

3.10 For low culpability, as well as the existing factors I propose adding “Momentary or brief lapse in judgement” and “Involved through coercion, intimidation or exploitation” for consistency with the guideline we are drafting for sections 4 to 8.

Question 3: do you agree to amend the relevant high culpability factors to become “Prolonged or deliberate neglect” and “Neglect in a commercial context”?

Question 4: do you agree that the middle level of culpability should remain anything falling between high and low?

Question 5: do you agree adding “Momentary or brief lapse in judgement” and “Involved through coercion, intimidation or exploitation” to low culpability?

3.11 As I have said in previous papers, the current harm table has the benefit of simplicity (raised harm being indicated by death or serious injury/harm to animal, or a high level of suffering caused) and lower harm being any other case.

3.12 I still think that this basic two-tier system works, bearing in mind this is a summary only offence and extensive inquiries into the nature of any injuries or conditions suffered by the animals and their impact may be disproportionate or impossible. I would therefore recommend keeping this model, but modifying the wording slightly to be “death (including condition necessitating euthanasia) or serious harm to animal” as i) including euthanasia brings this into line with the cruelty guideline we are drafting and ii) injuries are probably less relevant to this offending

3.13 However, if Council members wished to provide more detail, one option could be for us to try and replicate some of the elements we are consulting on for the other animal cruelty guidelines. In/if doing so, we should bear in mind that we are calibrating those in a particular way which could see some quite serious harm be categorised as being medium-level where at present the guideline simply seeks to distinguish the worst sorts of harm.

3.14 To make sure that we did not unintentionally downgrade certain harms, I would therefore propose borrowing heavily from our draft category 2 harm elements:

- Death (including condition necessitating euthanasia) or serious harm to animal;
- Offence results in a condition which has a substantial and/or lasting effect
- High level of pain and/or suffering caused

3.15 However, my recommendation remains to continue with the two harm model, with the above amendments.

Question 6: do you agree to continue with higher harm being marked out with "Death (including condition necessitating euthanasia) or serious harm to animal" and high level of suffering caused", and lower harm being all other cases?

3.16 The current sentencing table has a range all the way from a Band A fine to 26 weeks' custody (the statutory maximum). Given Parliament has not changed this offence, I see no reason to change the sentencing levels.

3.17 One might argue that, with the most culpable, sadistic, deliberate acts of cruelty removed from this guideline, there was a case for moving sentencing levels down or decreasing the top of the range. However, the possibility exists for the worst cases of neglect to be captured by the highest culpability now, and very severe cases - where an offender wilfully ignores their responsibilities, and where the results of that neglect are obvious - can certainly be said to justify six months' custody.

Question 7: do you agree to leave the sentencing table as it stands?

3.18 The step two factors do not need significant adjustment, although several aggravating factors are inappropriate or unnecessary for this offence. I propose retaining the existing factors, but deleting the following:

- Use of weapon;
- Use of technology to publicise or promote cruelty;
- Use of another animal to inflict death or injury;
- Animal being used in public service or as an assistance dog

3.19 There are some further amendments which should be made for consistency's sake. We are changing "Offender in a position of responsibility" to "Offender in position of professional responsibility for animal" as part of the revision of the guideline for the other animal cruelty offences. The current mitigating factor "Age and/or lack of maturity where it affects the responsibility of the offender" should be amended to simply "Age and/or lack of maturity" in line with the current standard wording.

Question 8: do you agree to amend the step two factors as above?

Question 9: are there any other points you wish to raise in relation to the revised section 9 guideline?

3.20 The draft guideline for consultation for animal cruelty offences (sections 4 to 8 of the 2006 Act) is at **Annex C**. This incorporates the changes discussed at November's meeting, including (among other things):

- the possibility of category B culpability cases being raised to category A by the extreme nature of one or more category B factors or the extreme impact caused by a combination of those factors;
- an explicit reference to tail docking, ear clipping and similar forms of mutilation at Category B harm;
- guidance before the sentencing table which suggests that a particularly culpable case or one involving a significant numbers of animals could see a starting point elevated within a range and aggravated outside of it.

3.21 With apologies, one aspect of culpability was unclear from last month's discussion: should "serious neglect" be counted in the highest category of culpability? On the one hand where there is wilful and wanton neglect from offenders who do know better, and it is perfectly possible for serious and widespread harm to occur as a result, this should be reflected in setting a category. For example, a farmer who leaves tens of horses in a crumbling stable malnourished and dying in their own waste.

3.22 However, we do want to reserve this top category for very serious offenders who reasonably can face in excess of a year in prison because they have deliberately and sadistically caused animals unnecessary suffering. These offenders, as we discussed last month, may face penalties similar to those who inflict life-changing violence on other humans, including children. These sorts of cases were the ones most prominent in parliamentary and public discussion around the increase in maximum penalties. I am minded to remove the reference to neglect from high culpability, but would welcome discussion.

Question 9: do you agree to remove "serious neglect" from the highest category of culpability?

Question 10: otherwise, are you content with the draft guideline for consultation at Annex C?

4 EQUALITIES

4.1 There is very limited data on the demographics of animal cruelty offenders because until earlier this year (2021) the offence was summary only. In the vast majority of cases (85 per cent of offenders sentenced in 2020) the ethnicity of the offender was either not recorded or not known. Most offenders sentenced for section 4 offences are under 40 and in a typical

year, over a third of offenders are female, which corresponds with the average proportion across all summary non-motoring offences.

4.2 Given the lack of data, we have no evidence or suggestion that there are disproportionate outcomes in terms of age, race or sex. However, we will seek views on this point during consultation, and ask if there are ways the proposed guideline could create or contribute to disparities.

5 IMPACT AND RISKS

5.1 We will present a resource assessment to Council in March at the point of sign-off for the consultation stage draft revisions, setting out the expected impacts. As well as potential impacts on prison places, this will consider the impact on Crown Court case load.

5.2 We are likely to face criticism that we have not set sentencing levels for the revised animal welfare guideline high enough within the new maximum set by Parliament. The consultation document can explain in greater or lesser detail why we have set sentencing levels as we have, whilst making clear that it is common to leave “headroom” for the worst types of offending, including offending with significant numbers of victims.

Sentencing Council

Sentencing Council meeting:	**17 December 2021**
Paper number:	**SC(21)DEC06 – Underage sale of knives**
Lead Council member:	**Jo King**
Lead official:	**Ruth Pope** **ruth.pope@sentencing.council.gov.uk**

1 ISSUE

1.1 At the October meeting the Council agreed to develop two guidelines for underage sale of knives, one for individuals and one for organisations. It was also agreed that we should work with Trading Standards in developing the guidelines.

1.2 In November we held a very helpful meeting with Trading Standards officers and their input has been fed into the proposals in this paper.

1.3 This meeting will cover the guideline for organisations – the guideline for individuals will be considered at the March meeting, where it is hoped both guidelines can be signed off for consultation. A draft guideline for organisations is provided at **Annex A**.

2 RECOMMENDATION

2.1 The Council is asked to consider the guideline for organisations and:

- Agree culpability factors
- Agree to having just one level of harm
- Agree sentence levels
- Agree the approach to confiscation and compensation
- Agree aggravating and mitigating factors

3 CONSIDERATION

Information from Trading Standards

3.1 The trading standards officers who joined the working group explained how prosecutions generally arise. One issue they face is that (in England and Wales) there is no system of licensing or registering retailers who sell knives so they do not always know who is selling them. This is particularly an issue for online sales. Trading standards have little or no direct information about underage sales and so rely on test purchases. Practice varies between different local authority areas but some will warn retailers 90 days in advance that they will be subject to test purchases. Prior to these taking place retailers may be visited and given advice as to the adequacy of the measures they have in place and may be offered

training. If retailers do not take up the offer of training that may lead to them being the focus of further scrutiny and test purchases. Online retailers may also be warned before test purchasing takes place. For online sales the picture is complicated by the fact that individual trading standards departments only have responsibility for businesses based within their own local authority area. Therefore, if a test purchase is carried out by one local authority, they may then have to pass the information to another to consider what action to take as a result. If a test purchase results in an underage sale a prosecution will not always follow – consideration will be given to factors such as past history and willingness to rectify procedures, training etc. In London retailers may be invited to sign up to a responsible retailer agreement and if a business does not engage with this process a prosecution is more likely to result.

Culpability

CULPABILITY

High
• Offender failed to put in place standard measures to prevent underage sales -
  ○ For in store sales standard measures would normally include: identifying restricted products, clear signage, age verification checks/ Challenge 21 or Challenge 25 policy, staff training, maintaining refusals log, till prompts
  ○ For online sales standard measures would normally include: identifying restricted products, use of a reliable online age verification tool and/or collect in-store policy with checks on collection.
• Offender failed to act on concerns raised by employees or others
• Falsification of documents
• Offender failed to make appropriate changes following advice and/or prior incident(s)

Medium
• Systems were in place but these were not sufficiently adhered to or implemented
• Other cases that fall between categories A or C because:
  ○ Factors are present in A and C which balance each other out and/or
  ○ The offender's culpability falls between the factors as described in A and C

Low • Offender made significant efforts to prevent underage sales falling short of a defence

3.2 The proposed culpability factors are largely the same as those considered at the October meeting with the addition of 'Falsification of documents' as a high culpability factor. The examples that are given to assist the sentencer to identify the relevant standards cover the points made by trading standards at the working group meeting. One potential issue is that there are more factors in high culpability than medium or low. In practice a prosecution

is highly unlikely to be brought in a case that would fall into low culpability which is set as cases falling just short of the statutory defence.[1] Nevertheless there is still value in having three levels of culpability to provide context and balance to the factors in high and medium.

Question 1: Does the Council agree to consult on the culpability factors at Annex A?

Harm

3.3 As discussed at the October meeting, harm for this offence is almost always the risk of harm (as the overwhelming majority of prosecutions relate to test purchases). The Council thought that the age of the purchaser was not a relevant factor and was unsure as to what factors might be appropriate. Consideration was given by the working group to the type or size of knife or blade but, while a larger knife might be seen as capable of causing greater harm, a smaller one could be more easily concealed and may pose a greater risk for that reason. The working group came to the conclusion that there was no meaningful way of distinguishing levels of harm for this offence and therefore only one level is proposed.

3.4 Some wording will be required to explain to guideline users why there is only one level of harm. The suggestion is:

HARM The harm caused by this offence relates to the risks associated with children and young people being in possession of knives. There is just one level of harm, as same level of harm is risked by any such sale to a person aged under 18.

3.5 Any factor that could in rare cases indicate raised harm (such as subsequent use of the weapon) could be considered at step 2.

Question 2: Does the Council agree to consult on having only one level of harm? If so, is the proposed wording right?

Sentence levels

3.6 The majority of these offences are punished by way of a fine. Of 46 organisations sentenced in 2019, one was sentenced to a discharge and 45 were fined.

3.7 For organisations in 2019, the range of fine amounts was £276 to £50,000 (the mean was £5,585 and the median £2,000). All of these fine amounts are after any reduction for a guilty plea.

[1] (4) It shall be a defence for a person charged with an offence under subsection (1) above to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

3.8 There are three existing guidelines for organisations which may provide useful comparators (health & safety, food safety, environmental). As with these guidelines which apply to organisations of widely varying sizes, the suggested approach to sentence levels is to have four sentence tables: for micro, small, medium and large organisations.

3.9 **Annex C** contains a comparison of sentence levels across the three existing guidelines for what might be considered to be an equivalent level of offending. It is relevant to note that while the maximum fine is unlimited for all of the offences, the underage sale offence has a maximum of six months' imprisonment whereas the other three carry a maximum of two years. Based on the deemed equivalent level of offending, none of the comparator sentences would exceed the maximum of six months for individuals. The Council may feel, therefore, that sentence levels for organisations could justifiably be set at levels comparable to the other guidelines.

3.10 The lack of information about cases sentenced in magistrates' courts makes it difficult to draw conclusions from current sentencing practice. The evidence that we do have from trading standards suggests that without a guideline sentencing practice is inconsistent. One of the motivations for developing guidelines for this offence is to ensure that fines are proportionate particularly in the case of larger companies which would lead to increased fines in some cases.

3.11 The largest fine we are aware of is B&M Retail Limited which has a turnover in excess of £2 billion and was fined £480,000 following guilty pleas to three offences. Before guilty pleas the fines were: £200,000, £220,000 and £300,000, all consecutive. The sentencing remarks of District Judge (MC) Lucie are provided at **Annex B** and show that the judge assessed the offences as being at the high end of medium culpability and obtained some assistance from the Organisations: Breach of food safety and food hygiene regulations guideline in arriving at the fine levels. The overall fine after plea was subsequently reduced on appeal to £330,000 on the basis that the offending company had subsequently brought in additional measures to prevent a recurrence.

3.12 The proposed sentence levels at **Annex A** (and below) broadly reflect the sentence levels in the food safety guideline for large and medium organisations using harm level 2 from that guideline. This takes a lower level of harm than that considered by DJ(MC) Lucie but is still likely to result in higher fines overall than are currently imposed. The proposed fine levels for small and micro organisations are lower than those in the food safety guideline to reflect a penalty that is a similar proportion of turnover. The starting points for medium culpability are half that for high and the starting points for low culpability are around a quarter of that for medium. The ranges allow for some overlap between high and medium culpability.

Large organisation - Turnover or equivalent: £50 million and over

	Culpability	
A	**B**	**C**
Starting point £250,000	**Starting point** £100,000	**Starting point** £25,000
Category range £100,000 – £500,000	**Category range** £50,000 – £250,000	**Category range** £10,000 – £50,000

Medium organisation - Turnover or equivalent: between £10 million and £50 million

	Culpability	
A	**B**	**C**
Starting point £100,000	**Starting point** £50,000	**Starting point** £12,000
Category range £50,000 – £250,000	**Category range** £25,000 – £100,000	**Category range** £5,000 – £25,000

Small organisation - Turnover or equivalent: between £2 million and £10 million

	Culpability	
A	**B**	**C**
Starting point £20,000	**Starting point** £10,000	**Starting point** £2,000
Category range £10,000 – £50,000	**Category range** £5,000 – £20,000	**Category range** £1,000 – £5,000

Micro organisation - Turnover or equivalent: not more than £2 million

	Culpability	
A	**B**	**C**
Starting point £5,000	**Starting point** £2,000	**Starting point** £500
Category range £2,000 – £20,000	**Category range** £1,000 – £5,000	**Category range** £200 – £1,000

3.13 The sentence levels should be considered in the context of step 3 – Adjustment of fine, that requires the court to check that the fine meets the objectives of the removal of all gain, appropriate additional punishment, and deterrence in a fair way taking into account the size and financial position of the offending organisation and the seriousness of the offence. This allows for considerable flexibility in the setting of the fine.

Question 3: Are the proposed sentence levels appropriate?

3.14 Another issue for consideration is whether (in common with other guidelines for offences committed by organisations) this guideline should have confiscation and compensation as steps 1 and 2 or whether any mention should be made of these orders in the guideline. Technically both are available, but in practice they are not used. It is difficult to envisage a situation where compensation would be relevant. The prosecution could apply for confiscation (and the case could then be committed to the Crown Court under section 70 of the Proceeds of Crime Act 2002) but having checked with trading standards it is not something that they consider for this offence.

3.15 As it stands, the guideline does not include any reference to compensation or confiscation (including at step 3, where in other guidelines the court is asked to consider the fine in the context of other financial orders).

Question 4: Should the guideline refer to compensation and confiscation? If so, should this be in separate steps 1 and 2 as with other guidelines for organisations?

Aggravating and mitigating factors

3.16 The aggravating and mitigating factors are those considered at the October meeting with the removal of 'falsification of documents' which is now a culpability factor and the inclusion of 'Supply causes or contributes to antisocial behaviour' which had previously been a harm factor.

Question 5: Are the aggravating and mitigating factors the right ones?

4 IMPACT AND RISKS

4.1 Offences committed by organisations are sentenced by way of a fine and so there will not be any impact on prison and probation resources from this guideline. Once the Council has agreed the sentence levels, some work can be done to estimate the likely increase in fine amounts from the guideline and this can be considered by the Council before sign off for consultation.