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23 July 2021

Dear Members

Meeting of the Sentencing Council – 30 July 2021

The next Council meeting will be held via Microsoft Teams, the link to join the meeting is included below. **The meeting is Friday 30 July 2021 from 9:30 to 14:15**. 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)JUL00
▪ Minutes of meeting held on 25 June	SC(21)JUN01
▪ Terrorism	SC(21)JUL02
▪ Totality	SC(21)JUL03
▪ Perverting the Course of Justice	SC(21)JUL04
▪ Immigration and animal cruelty options	SC(21)JUL05
▪ What next for the Sentencing Council?	No paper
▪ Modern slavery	SC(21)JUL06
▪ Miscellaneous amendments to guidelines	SC(21)JUL07
▪ Archiving guidelines	SC(21)JUL08

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

30 July 2021
Virtual Meeting by Microsoft Teams

09:30 - 09:45	Minutes of the last meeting (paper 1)
09:45 - 10:45	Terrorism - presented by Vicky Hunt (paper 2)
10:45 - 11:15	Totality - presented by Ruth Pope (paper 3)
11:15 - 11:30	Break
11:30 - 12:00	Perverting the Course of Justice and Witness Intimidation presented by Mandy Banks (paper 4)
12:00 - 12:30	Immigration and animal cruelty options paper - presented by Ollie Simpson (paper 5)
12:30 - 12:45	What next for the Sentencing Council? - presented by Emma Marshall
12:45 - 13:00	Break
13:00 - 13:30	Modern Slavery - presented by Ollie Simpson (paper 6)
13:30 – 14:00	Miscellaneous amendments to guidelines - presented by Ruth Pope (paper 7)
14:00 - 14:15	Archiving guidelines - presented by Phil Hodgson (paper 8)

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Sentencing Council

MEETING OF THE SENTENCING COUNCIL

25 JUNE 2021

MINUTES

Members present:	Tim Holroyde (Chairman) Rosina Cottage Rebecca Crane Michael Fanning Diana Fawcett Adrian Fulford Max Hill Jo King Juliet May Maura McGowan Alpa Parmar Beverley Thompson
Apologies:	Rosa Dean Nick Ephgrave
Representatives:	Elena Morecroft for the Lord Chief Justice (Legal and Policy Advisor to the Head of Criminal Justice) Amy Randall for the Lord Chancellor (Deputy Director, Sentencing Team)
Members of Office in attendance:	Steve Wade Phil Hodgson Vicky Hunt Lisa Frost Emma Marshall Ruth Pope Ollie Simpson

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 21 May 2021 were agreed.

2. MATTERS ARISING

2.1 The Chairman welcomed Harriet Miles who had recently joined the Analysis and Research team as the new research officer.

3. DISCUSSION ON MODERN SLAVERY– PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL

3.1 The Council considered further changes to the draft Modern slavery guideline following consultation. Following a detailed discussion, the Council agreed on balance not to include a culpability factor of psychological abuse and to retain an aggravating factor particularising age as a vulnerability in victims.

3.2 The Council also agreed other changes, including further guidance on imposing slavery and trafficking prevention orders (STPO), a reference to restraining orders and removing the reference to breach of disqualification as a company Director as a guideline analogous to Breach of an STPO.

4. DISCUSSION ON SENTENCING COUNCIL ANNUAL REPORT – PRESENTED BY PHIL HODGSON, OFFICE OF THE SENTENCING COUNCIL

4.1 The Council discussed the content of the Sentencing Council Annual Report 2020/21. Subject to amendments agreed at the meeting and any minor corrections, the Council approved the report for submission to the Lord Chancellor.

5. DISCUSSION ON TERRORISM – PRESENTED BY VICKY HUNT, OFFICE OF THE SENTENCING COUNCIL

5.1 The Council discussed the Preparation of terrorist acts guideline and agreed a number of amendments to reflect the changes made to terrorism legislation by the Counter Terrorism and Sentencing Act 2021. These changes include the addition of guidance on serious terrorism sentences, and serious terrorism cases; a change to the sentencing table; and a new step 3 dealing with minimum terms, serious terrorism sentences and exceptional circumstances.

5.2 The Council also discussed whether the Preparation of terrorist acts guideline needs to be amended to help judges deal with cases where, due to the involvement of the security services or undercover police officers, there is no likelihood or minimal likelihood of the terrorist act being committed. The Council agreed that this matter needs further discussion and a working group meeting will now take place.

5.3 Finally the Council agreed some immediate changes that can be made to the Preparation of terrorist acts (section 5 TA 2006), Explosive substances (Terrorism Only) (section 2-3 Explosive Substances Act 1883), Membership of a proscribed organisation (section 11 TA 2000) and Support for a proscribed organisation (section 12 TA 2000) guidelines to make clear that for offences committed on or after 29 June 2021 these guidelines are now out of date as certain provisions of the 2021 Act will have come into force.

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

6.1 This was the first meeting to consider the scope of the motoring offences guidelines. The Council agreed that the scope should include the guidelines covered within the existing SGC guidelines '*Driving Offences causing Death*' as well as other relevant offences where injury is caused, and aggravated vehicle taking offences.

6.2 The Council agreed that the new offence 'causing serious injury by careless or inconsiderate driving' proposed by the Police, Crime, Sentencing and Courts (PCSC) Bill should also be included.

6.3 The Council agreed that summary offences updated as part of the Magistrates courts sentencing guidelines (MCSG) revision in 2017 should remain out of scope. It also agreed a guideline should be developed for the offence of wanton and furious driving, as while this is an antiquated offence it provides a mechanism to charge and sentence cyclists who may injure others.

7. DISCUSSION ON WHAT NEXT FOR THE SENTENCING COUNCIL? – CONSULTATION RESPONSES – PRESENTED BY EMMA MARSHALL, OFFICE OF THE SENTENCING COUNCIL

7.1 The Council considered an approach to presenting the actions from the *What Next for the Sentencing Council?* consultation based on the themes that were set out in the original consultation document and any further issues that emerged from responses. Work will now begin on drafting the consultation response document, a draft of which the Council will consider at the next meeting.

8. DISCUSSION ON WHAT NEXT FOR THE SENTENCING COUNCIL? – CRITERIA FOR DEVELOPMENT OF GUIDELINES – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

8.1 The Council considered proposed revisions to the criteria published on the website for whether and when to develop or revise guidelines. It was agreed that these should make it clear that the Council will consider representations from the public as well as professional groups while recognising the need for evidence to underpin decisions on

whether the production or revision of a guideline is the answer to the issue raised.

8.2 It was agreed that further work would be done with the communications team to ensure that the criteria were presented in an accessible way, potentially with the use of a diagram to aid clarity.

Sentencing Council

Sentencing Council meeting:	**30 July 2021**
Paper number:	**SC(21)JUL02 – Terrorism**
Lead Council member:	**Maura McGowan**
Lead official:	**Vicky Hunt** **0207 0715786**

1 ISSUE

1.1 This month the Council is invited to consider a draft approach to revising the Membership of a Proscribed Organisation (Terrorism Act 2000, section 11), and the Support of a Proscribed Organisation (Terrorism Act 2000, section 12) guidelines to take into account the new statutory maximum sentences brought in by the Counter Terrorism and Sentencing Act 2021 which has increased the maximum from 10 to 14 years for both offences.

1.2 In addition, the Council is asked to look again at the Preparation of Terrorist Acts guideline (Terrorism Act 2006, section 5) following a meeting of the working group who have considered whether extra guidance is needed to ensure that Judges approach cases involving undercover police or security services, in a consistent manner.

2 RECOMMENDATION

2.1 It is recommended that the Council consider this paper and proposed approach.

3 CONSIDERATION

Rationale for the Increased Statutory Maximum Sentences

3.1 The attacks at Fishmongers' Hall on 29 November 2019 and in Streatham on 2 February 2020 were the main impetus for the Government to make changes to terrorism legislation. In the Government's impact assessment for the Bill they indicated their reasons for why intervention was necessary:

The [terrorist attacks] demonstrate the risk to public safety that we are facing from known terrorist offenders who are released having spent insufficient time in custody. The terrorism threat level in the UK remains "substantial" – meaning an attack is likely – and there have been 25 attacks foiled since March 2017. Government intervention to ensure that serious and dangerous terrorism offenders spend longer in custody and are monitored more effectively upon release is necessary to keep the public safe and requires primary legislation.

The policy objectives are to better protect the public from terrorism by strengthening the law which governs the sentencing, release, and monitoring of terrorism offenders. The intended effect of this will be that serious and dangerous terrorism offenders will spend longer in custody, which provides better protection for the public, more time in which to support the offender's disengagement and rehabilitation through the range of tailored interventions available while they are in prison, and ensures the length of sentence reflects the seriousness of the crime. It will also strengthen the ability of the Government and operational partners, including HM Prison & Probation Service (HMPPS) and the police, to monitor and manage the risk posed by terrorist offenders and individuals of terrorism concern outside of custody.

3.2 Specifically, in relation to the increased statutory maximum sentences the Government provided the following reasoning:

This means that where the courts see appropriate, they would be able to impose longer sentences. The preferred option gives the courts scope to impose longer custodial sentences where appropriate and brings the maximum penalties for these ... offences more closely into line with the penalties for other similar serious offences.

3.3 Having read through the debates it is not clear whether the will of parliament was that all sentences should attract a higher sentence, or whether there should be an increase just to the most serious cases. However, there are references in the above quotes to *serious and dangerous terrorism offenders*, which perhaps indicates those who currently receive the higher sentences.

3.4 One comment made by the Government during Commons Committee stage of the Bill also seems to suggest that the aim is to allow sentencers to give a higher sentence for the more serious examples of the offence:

It will, of course, remain a matter for the sentencing judge to decide on the appropriate sentence, but given how serious the offences are we feel it appropriate to give the court the ability to issue a sentence of up to 14 years if, on the basis of the evidence and the pre-sentence report, the judge sees fit.

3.5 In 2019 the Council worked on revising a number of guidelines where the statutory maximum had been increased by the Counter-Terrorism and Border Security Act 2019. The guidelines included:

- Failure to Disclose Information About Acts of Terrorism (Terrorism Act 2000, section 38B) - from five to ten years;

- s58 TACT 2000 Collection of Terrorist Information (Terrorism Act 2000, section 58) - from ten to 15 years; and
- ss1 and 2 TACT 2006 Encouragement of Terrorism (Terrorism Act 2006, sections 1 and 2) - from seven to 15 years.

3.6 Within those revisions the Council focused on the most serious offences and adjusted the sentences up accordingly. In the consultation paper the Council highlighted that the original guidelines had already increased sentences to reflect the seriousness of current terrorism offending:

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

3.7 Within the final resource assessment for the first package of guidelines the Council said:

> The intention is that the new guidelines will encourage consistency of approach to sentencing. For some of the offences, Council intends either to increase sentences from those currently imposed at courts, or for some of the very low volume offences, to set sentencing practice at a sufficiently high level to reflect the seriousness of the offences.

3.8 The Council may, therefore, wish to be cautious about further increasing sentences across all levels of the guidelines, and instead might wish to focus increases on the top levels of seriousness were there was no room to increase prior to the change to the statutory maxima.

3.9 At **Annex A** the Council can see a summary of some membership and support cases taken from transcripts.

3.10 At **Annex B** the Council can see the sentencing tables of a number of other terrorism offences with similar statutory maximum sentences, alongside the proposed sentencing table for the offences of membership and support.

Proscribed Organisations – Membership (Terrorism Act 2000, section 11)

3.11 The current guideline can be seen here.

3.12 From 2010 to 2020 (inclusive) there have been 20 offenders sentenced for this offence. 19 of those offenders received an immediate custodial sentence. The mean average custodial sentence length (ACSL) was 4 years 11 months (median was 5 years 6 months), after any reduction for guilty plea.

3.13 The proposed changes can be seen below:

Harm	A	B	C
	Starting point* 10 years' custody **Category range** 8 - 13 years' custody	**Starting point*** 7 years' custody **Category range** 5-9 years' custody	**Starting point*** 3 years' custody **Category range** High level community order - 4 years' custody

*These sentence levels have been increased from the current levels

Question 1: Does the Council agree with the proposed sentences for the revised Membership guideline?

Proscribed Organisations – Support (Terrorism Act 2000, section 12)

3.14 The current guideline can be seen here. However, this guideline has already been the subject of some amendments (related to factors, rather than sentence levels) that the Council consulted on in 2019. Following that consultation, the Council finalised the guideline but did not publish it due to the introduction of the Counter Terrorism and Sentencing Bill which meant that further changes would be needed. The post consultation version of this guideline, and the one that we are now seeking to further amend is at **Annex C**.

3.15 From 2010 to 2020 (inclusive) there have been 11 offenders sentenced for this offence. All 11 offenders were actually sentenced in 2016 and 2017 which was prior to the publication of the sentencing guideline. All offenders received an immediate custodial sentence. The mean ACSL was 4 years 5 months (median was 5 years), after any reduction for a guilty plea.

3.16 The proposed changes can be seen below:

	A	B	C
1	**Starting point*** 10 years' custody **Category range** 8-13 years custody	**Starting point*** 7 years' custody **Category range** 5-9 years custody	**Starting point** 3 years' custody **Category range** 2-4 years custody
2	**Starting point*** 8 years' custody **Category range** 7-9 years custody	**Starting point** 4 years' custody **Category range** 3-5 years custody	**Starting point** 2 years' custody **Category range** 1-3 years custody
3	**Starting point*** 6 years' custody **Category range** 5-7 years custody	**Starting point** 3 years' custody **Category range** 2-4 years custody	**Starting point** 1 years' custody **Category range** High level community order – 2 years custody

*These sentence levels have been increased from the current levels

Question 2: Does the Council agree with the proposed sentences for the revised Support guideline?

Preparation of Terrorist Acts (Terrorism Act 2006, section 5)

3.17 At the June Council meeting members discussed whether extra guidance is needed in the Preparation guideline (and the Explosive substances guideline) to ensure that Judges approach cases involving undercover police or security services, in a consistent manner. The Council asked for the matter to be adjourned to a working group meeting so that further and fuller discussions could take place. That meeting has now happened, and the members of the working group proposed the inclusion of some narrative – entitled 'notes for culpability and harm', which aims to explain the position and how Judges should approach sentencing.

3.18 This proposed wording can be seen in **Annex D** on page 2 of the guideline.

Question 3: Does the Council agree with the proposed wording within the Preparation of Terrorist Acts guideline?

3.19 At the last meeting members were also invited to look at a new Step 3 (entitled, Minimum terms, Serious Terrorism Sentences and exceptional circumstances), within the Preparation guideline. Since that meeting I have made some minor changes in line with the comments received. I have separated some of the text into sections and addressed the repeated use of the words 'minimum term' which was causing confusion as the term has different meanings in different contexts.

Question 4: Does the Council agree with the wording in Step 3?

4 IMPACT AND RISKS

The Analysis and Research team have gathered up to date statistics on all guideline terrorist offences and will soon start preparing an initial Resource Assessment for the consultation.

Offender name and year sentenced	Offence	Details	Sentence
Yamin **2019**	S11	Went to Syria in 2013 and joined Al Quaeda. Took part in a video recording which showed that he was part of an armed combat group engaged in fighting against Kurdish forces in northern Syria. He promoted the Al Qaeda cause in the video. The video recording demonstrates that the defendant had entrenched extremist views and fully supported and encouraged the use of violence to achieve the group's aims. Due to his own sight and hearing difficulties, the defendant, although armed with a gun, played a limited combat role. However, he was based near the front line of the fighting and provided active support and encouragement for those group members who were engaged in the actual fighting by driving ambulances, caring for Al Qaeda combatants, as well as what has been described as 'cooking and general maintenance' for the group. On 31 May 2014, shortly before ISIS, or IS, declared a new Caliphate over a large part of the Syrian and neighbouring regions, the defendant returned to this country, having become disillusioned with Al Qaeda and the nature and the course of the armed conflict in Syria. He was arrested on his return and interviewed at Heathrow Airport. Having turned his back on the extremist cause, the defendant returned home and, in due course, resumed his studies and has now completed his degree in civil engineering. **Culpability B- active but not prominent member.**	14 years for preparation of terrorist acts offence and **4 years** concurrent for membership (after trial).
Ward **2019**	S11	Pleaded guilty to being a member of the proscribed organisation, National Action. Joined in October 2016 when it was then not a proscribed organisation. In his application he said, "We are at war and it's time for me to fight". He said he was, "A hundred per cent committed", and, quote, "All I have to offer is my thirst for gratuitous violence". He told the leader, he considered himself fanatical. The organisation was proscribed on 16 December 2016 and shortly thereafter he left because he did not consider that National Action, was likely to meet his needs. He "needed to fight" and would " be better use somewhere else". By April he was back and making suggestions for a means of recruitment for further members of what he knew then was a terrorist organisation, suggestions for improved security and particularly training. He was very keen to encourage the others in the need for paramilitary training. He planned a camp and was keen that the organisation was active in its pursuit of its violent, racist objectives and calling	**4 years** (after trial)

		for the organisation to do something rather than simply talk about it. By May 2017 he was sending messages within the chat group saying, "Our main goal should be to cause conflicts between different groups of people and force society to collapse. We should become agitators". Arrested on 5 September 2018 he was in possession of extreme right-wing material and had two pistols, an air pistol, and a steel ball bearing gun and two air rifles. **Culpability B- active but not prominent member.**	
Jones, Jack, Cutter **2020**	S11	Prior to proscription, all three offenders were members of National Action. Following proscription, all 3 defied the ban and continued active membership. Before proscription JONES was the London regional organiser and heavily involved in the creation of propaganda and artwork for the organisation. After proscription, he was one of only a handful of prominent individuals included in two chat groups known as Inner and Sesh. He met with other prominent members in January 2017 and planned how National Action was going to operate underground. He also co-founded a group called NS131. That organisation was an online artwork platform, but on 28 September 2017 it was proscribed as being an alias of National Action. Furthermore, he designed some artwork for an organisation calling itself Scottish Door which in due course was proscribed as being another alias for National Action. He continued to organise training camps for recruits in which boxing and martial arts were taught and weapons were used, including knives. Over a period of several months he was involved in grooming a 16 year-old girl for membership in the organisation. **He played a significant role in the continuity of the organisation. Within the definitive guideline his role was prominent.– culpability A. Although it was accepted that others were more central, and his role fell short of being a leader- thus moved down the range.** JACK became a member of National Action in July 2016. On 9 July 2016 he was involved in placing inflammatory and racist stickers on the grounds of the Aston University. Subsequently, he was involved in a number of National Action demonstrations and meetings. Following proscription, he remained a committed member of the organisation and attended eight meetings involving its membership. That includes a meeting in Birmingham where senior members of the organisation set out plans for the group's continuance. Immediately after the ban he was	**JONES 5 years 6 months** (after trial) **JACK, 4 years 6 months** (after trial) **CUTTER, 3 years** (after trial)

		involved in seeking to introduce one of his friends to the organisation. Subsequently, he put forward an idea to create propaganda on behalf of the continuing organisation. In April '17 he was arrested for stirring up racial hatred relating to the stickering at Aston University. But not withstanding that he remained as a member of National Action and attended two further meetings of the organisation. **Despite his dedication to the group it is accepted that he was never in organising or leadership roles- culpability B.** Alice Cutter, became a member of National Action in late May or early June of 2016. Following proscription, she continued to express extreme anti-Semitic and racist and revolutionary views and aspirations. She also attended the meeting in Birmingham in which plans were set out by senior members for the group's continuance. She was a trusted confident of Alex Deakin who was the organiser of the Midland chapter of the continuing group, providing him with encouragement and advice upon recruitment, training and security and spoke of her desire to recruit two women into the organisation. **It was accepted that she never held any organising or leadership role - culpability B.**	
Anderson & Khan **2016**	S12	Set up a stall near Oxford Circus to distribute leaflets urging support for ISIS. 'It is clear that you were at that location that day to promote and invite support for ISIS/IS by engaging with and trying to persuade passers by and by handing out leaflets'. It was no coincidence that the pair chose to set the stall up on a day when there was a pro Gaza event in the vicinity that was likely to pass by the stall. 'The danger is that those invited and who succumb are often young people who then, once recruited, will be lured to Syria or Iraq and to a potential death.'	**2 years (after trial)**
Kahar **2016**	S12	Sought to encourage his nephew, brother in law and friend to join IS sending documents and material to them to influence them via social media/ internet chat.	3.5 years (after trial) increased as ULS to **4 years** (consecutive to various other sentences for different terrorism

			offences – total sentence 8 years)
Anjem Choudhary & Mohammed Rahman **2016**	S12	Both joined in and became signatories to an oath of allegiance document affirming the legitimacy of the caliphate. Both then took part in lectures broadcast via the internet in which it was said that ISIS had established a legitimate caliphate and there was an obligation on every Muslim to obey the caliph (leader of the caliphate) and to fight those who differed from him. It was also said that apostates (those who renounce this belief) would face capital punishment. Both were highly regarded, influential men within a particular section of the Muslim community in the UK and abroad, followers looked to them for advice and guidance. The audiences were very large, and it is likely that a significant proportion were impressionable people looking for guidance as to how they should act. It was very likely that some of their followers would be influenced by the words to commit acts of violence. The offences were repeated and determined.	Each sentenced to **5 years 6 months** (after trial)

Proscribed organisations – membership Terrorism Act 2000, s.11

https://www.sentencingcouncil.org.uk/offences/crown-court/item/proscribed-organisations-membership/

Statutory Maximum: 14 years

Harm	A	B	C
	Starting point* 10 years' custody **Category range** 8 - 13 years' custody	**Starting point*** 7 years' custody **Category range** 5-9 years' custody	**Starting point*** 3 years' custody **Category range** High level community order - 4 years' custody

Proscribed organisations – support Terrorism Act 2000, s.12

https://www.sentencingcouncil.org.uk/offences/crown-court/item/proscribed-organisations-support/

Statutory Maximum: 14 years

	A	B	C
1	**Starting point*** 10 years' custody **Category range** 8-13 years custody	**Starting point*** 7 years' custody **Category range** 5-9 years custody	**Starting point** 3 years' custody **Category range** 2-4 years custody
2	**Starting point*** 8 years' custody **Category range** 7-9 years custody	**Starting point** 4 years' custody **Category range** 3-5 years custody	**Starting point** 2 years' custody **Category range** 1-3 years custody
3	**Starting point*** 6 years' custody **Category range** 5-7 years custody	**Starting point** 3 years' custody **Category range** 2-4 years custody	**Starting point** 1 years' custody **Category range** High level community order – 2 years custody

Funding terrorism Terrorism Act 2000, s.15 - s.18
https://www.sentencingcouncil.org.uk/offences/crown-court/item/funding-terrorism/

Statutory Maximum: 14 years

	A	B	C
1	**Starting point** 12 years' custody **Category range** 10-13 years custody	**Starting point** 9 years' custody **Category range** 8-10 years custody	**Starting point** 7 years' custody **Category range** 6-8 years custody
2	**Starting point** 9 years' custody **Category range** 8-10 years custody	**Starting point** 7 years' custody **Category range** 6-8 years custody	**Starting point** 4 years' custody **Category range** 2-5 years custody
3	**Starting point** 7 years' custody **Category range** 6-8 years custody	**Starting point** 4 years' custody **Category range** 2-5 years custody	**Starting point** 2 years' custody **Category range** High level community order – 3 years custody

Collection of terrorist information Terrorism Act 2000, s.58
https://www.sentencingcouncil.org.uk/offences/crown-court/item/collection-of-terrorist-information/

NB. The Council revised this guideline in 2019 to reflect the stat max increasing from 10 to 15 years. However, that guideline has not yet been published, and so is not in force.
Statutory Maximum: 15 years

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

Encouragement of terrorism Terrorism Act 2006, s.1 and s.2
https://www.sentencingcouncil.org.uk/offences/crown-court/item/encouragement-of-terrorism/

NB. The Council revised this guideline in 2019 to reflect the stat max increasing from 7 to 15 years. However, that guideline has not yet been published, and so is not in force.
Statutory Maximum: 15 years

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

Possession for terrorist purposes Terrorism Act 2000, s.57
Possession for terrorist purposes – Sentencing (sentencingcouncil.org.uk)

Statutory Maximum: 15 years

	A	B	C
1	**Starting point** 12 years' custody **Category range** 9 - 14 years custody	**Starting point** 7 years' custody **Category range** 6-9 years custody	**Starting point** 4 years' custody **Category range** 3-6 years custody
2	**Starting point** 8 years' custody **Category range** 7-9 years custody	**Starting point** 6 years' custody **Category range** 4-7 years custody	**Starting point** 3 years' custody **Category range** 2-4 years custody
3	**Starting point** 6 years' custody **Category range** 4-7 years custody	**Starting point** 4 years' custody **Category range** 2-5 years custody	**Starting point** 2 years' custody **Category range** 1-3 years custody

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Proscribed Organisations

Support

Terrorism Act 2000 (section 12)

Triable either way
Maximum: 10 years' custody

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

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

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

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

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

This guideline applies only to offenders aged 18 and older

Step 1 – Determining the offence category

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

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following:

A

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

B

- Reckless offence - Offender in position of trust, authority or influence and abuses their position
- Arranged or played a significant part in the arrangement of a meeting/event aimed at gaining significant support for organisation
- Intended to gain widespread or significant support for organisation
- Encourages activities intended to cause widespread or serious damage to property, or economic interests or substantial impact upon civic infrastructure

C

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

Harm

The court should consider the factors set out below to determine the level of harm.

Category 1

- Evidence that others have acted on or been assisted by the encouragement to carry out activities endangering life
- Significant support for the organisation gained or likely to be gained

Category 2

- Evidence that others have acted on or been assisted by the encouragement to carry out activities not endangering life

Category 3

- All other cases

Step 2 - Starting point and category range

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

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

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

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity (*When considering this factor, sentencers should bear in mind the statutory definition of terrorism in section 1 of the Terrorism Act 2000, and should be careful to avoid double counting)*

Other aggravating factors:

- Used multiple social media platforms to reach a wider audience (where not taken into account at Step One)
- Offender has terrorist connections and/ or motivations
- Vulnerable/impressionable audience
- Failure to respond to warnings
- Failure to comply with current court orders
- Offence committed on licence or Post Sentence Supervision
- Offence committed whilst in prison

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Good character and/or exemplary conduct
- Offender has no terrorist connections and/ or motivations
- Unaware that organisation was proscribed
- Clear evidence of a change of mind set prior to arrest
- Offender involved through coercion, intimidation or exploitation
- Offender's responsibility substantially reduced by mental disorder or learning disability
- Age and/or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives

Step 3 – Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account section 74 of the Sentencing Code (reduction in sentence for assistance to prosecution) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Step 4 – Reduction for guilty plea

The court should take account of any potential reduction for a guilty plea in accordance with section 73 of the Sentencing Code and the Reduction in Sentence for a Guilty Plea guideline.

Step 5 – Dangerousness

The court should consider whether having regard to the criteria contained in Chapter 6 of Part 10 of the Sentencing Code it would be appropriate to impose an extended sentence (sections 266 and 279)

Step 6 – Required special sentence for certain offenders of particular concern

Where the court does not impose an extended sentence, but does impose a period of imprisonment, the term of the sentence must be equal to the aggregate of the appropriate custodial term and a further period of 1 year for which the offender is to be subject to a licence. (sections 265 and 278 of the Sentencing Code).

Step 7 – Totality principle

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

Step 8 – Ancillary orders

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

- Ancillary orders – Crown Court Compendium

Step 9 – Reasons

Section 52 of the Sentencing Code imposes a duty to give reasons for, and explain the effect of, the sentence.

Step 10 – Consideration for time spent on bail (tagged curfew)

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003 and section 325 of the Sentencing Code.

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Preparation of terrorist acts Terrorism Act 2006, s.5

Triable only on indictment
Maximum: Life imprisonment
Offence range: 3 years' custody – Life Imprisonment (minimum term 40 years)

This is a Schedule 19 offence for the purposes of sections 274 and 285 (required life sentence for offence carrying life sentence) of the Sentencing Code.

For offences committed on or after 3 December 2012, this is an offence listed in Part 1 of Schedule 15 for the purposes of sections 273 and 283 (life sentence for second listed offence) of the Sentencing Code.

This is a specified offence for the purposes of sections 266 and 279 (extended sentence for certain violent, sexual or terrorism offences) of the Sentencing Code.

This is an offence listed in Schedule 13 for the purposes of sections 265 and 278 (required special sentence for certain offenders of particular concern) of the Sentencing Code.

For offences committed on or after 29 June 2021, this is a serious terrorism offence listed in Part 1 of Schedule 17A for the purposes of sections 268B and 282B (serious terrorism sentence), section 323 (minimum term order: other life sentences), and section 268(4)(b)(iii) and 281(4)(b)(iii) (increase in extension period for serious terrorism offenders) of the Sentencing Code.

This guideline applies only to offenders aged 18 and older.

Step 1 – Determining the offence category

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

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Notes for culpability and harm

In some cases, Law Enforcement Authorities (LEA) may be involved, either posing as terrorists jointly involved in the preparations for terrorist activity, or in keeping the offender under surveillance. Their involvement is likely to ensure that the terrorist activity could never be successfully completed. Irrespective of this, the court should approach the assessment of the offender's culpability and harm as follows:

Culpability

Where an undercover LEA is involved in the preparations for the terrorist activity, the culpability of the offender is not affected by the LEA's involvement. Culpability is to be assessed as if the LEA was a genuine conspirator.

Where the LEA is surveilling the offender and prevents the offender from proceeding further, this is to be treated the same as apprehending the offender.

Harm

In any case that involves LEA, the court should identify the category of harm on the basis of the harm that the offender intended and the viability of the plan, and then applying a downward adjustment at step two.

The extent of this adjustment will be specific to the facts of the case. In cases where, but for the LEA involvement, the offender would have carried out the intended terrorist act, a small reduction within the category range will usually be appropriate.

Where, for instance, an offender voluntarily desisted at an early stage a larger reduction is likely to be appropriate, potentially going outside the category range.

In either instance, it may be that a more severe sentence is imposed where very serious terrorist activity was intended but did not take place than where relatively less serious terrorist activity did take place.

Culpability demonstrated by one or more of the following:

A

- **Acting alone**, or in a **leading** role, in terrorist activity where preparations were complete or were so close to completion that, but for apprehension, the activity was very likely to have been carried out

B

- **Acting alone**, or in a **leading** role, in terrorist activity where preparations were advanced and, but for apprehension, the activity was likely to have been carried out
- **Significant** role in terrorist activity where preparations were complete or were so close to completion that, but for apprehension, the activity was very likely to have been carried out
- Offender has coordinated others to take part in terrorist activity, whether in the UK or abroad (where not falling within A)

C

- **Leading** role in terrorist activity where preparations were not far advanced
- **Significant** role in terrorist activity where preparations were advanced and, but for apprehension, the activity was likely to have been carried out
- **Lesser** role in terrorist activity where preparations were complete or were so close to completion that, but for apprehension, the activity was very likely to have been carried out
- Offender acquires training or skills for purpose of terrorist activity (where not falling within A or B)
- Acts of significant assistance or encouragement of other(s) (where not falling within A or B)

D

- Offender has engaged in very limited preparation for terrorist activity
- Act(s) of lesser assistance or encouragement of other(s)
- Other cases not falling within A, B or C

Harm

Harm is assessed based on the type of harm risked and the likelihood of that harm being caused. When considering the likelihood of harm, the court should consider the viability of any plan.

See the notes for culpability and harm at the start of this section before proceeding

Category 1

- Multiple deaths risked and very likely to be caused

Category 2

- Multiple deaths risked but not very likely to be caused
- Any death risked and very likely to be caused

Category 3

- Any death risked but not very likely to be caused
- Risk of widespread or serious damage to property or economic interests
- Risk of a substantial impact upon civic infrastructure
- Any other cases

Step 2 - Starting point and category range

Offenders committing the most serious offences are likely to be found dangerous and so the table below includes options for life sentences. However, the court should consider the dangerousness provisions in *all* cases, having regard to the criteria contained in section 308 of the Sentencing Code to make the appropriate determination. (See STEP 6 below). The court must also consider the provisions set out in s323 (3) of the Sentencing Code (minimum term order for serious terrorism offenders).(See STEP 3 below).

Where the dangerousness provisions are met but a life sentence is not justified, the court should consider whether the provisions for the imposition of a serious terrorism sentence have been met, having regard to the criteria contained in s268B (adult offenders aged under 21) or s282B (offenders aged 21 and over) of the Sentencing Code. If the criteria are met, a minimum custodial sentence of 14 years applies. (see STEP 3 below).

Where the dangerousness provisions are not met the court must apply the provisions set out in sections 265 and 278 of the Sentencing Code (required special sentence for certain offenders of particular concern). (See STEP 7 below).

Harm	Culpability			
	A	B	C	D
1	**Starting point** Life imprisonment - minimum term 35 years' custody	**Starting point** Life imprisonment - minimum term 25 years' custody	**Starting point** Life imprisonment - minimum term 15 years' custody	**Starting point** 15 years' custody
	Category range Life imprisonment - minimum term 30 – 40 years' custody	**Category range** Life imprisonment - minimum term 20 - 30 years' custody	**Category range** Life imprisonment - minimum term 10 – 20 years' custody*	**Category range** 10-20 years' custody**
2	**Starting point** Life imprisonment - minimum term 25 years' custody	**Starting point** Life imprisonment - minimum term 15 years' custody	**Starting point** 15 years' custody	**Starting point** 8 years' custody**
	Category range Life imprisonment - minimum term 20 - 30 years' custody	**Category range** Life imprisonment - minimum term 10- 20 years' custody*	**Category range** 10- 20 years' custody**	**Category range** 6-10 years' custody**
3	**Starting point** 16 years' custody	**Starting point** 12 years' custody	**Starting point** 8 years' custody	**Starting point** 4 years' custody
	Category range 12 – 20 years' custody	**Category range** 8- 16 years' custody	**Category range** 6 - 10 years' custody	**Category range** 3– 6 years' custody

* For serious terrorism cases the minimum term must be at least 14 years' unless exceptional circumstances apply. See s323 (3) of the Sentencing Code.

** Where a Serious Terrorism Sentence is imposed, the appropriate custodial term is a minimum of 14 years (s282C Sentencing Code).

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

Factors increasing seriousness

Statutory aggravating factors

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity *(When considering this factor, sentencers should bear in mind the statutory definition of terrorism in section 1 of the Terrorism Act 2000, and should be careful to avoid double counting)*

Other aggravating factors

- Recent and/or repeated possession or accessing of extremist material
- Communication with other extremists
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection
- Offender attempted to disguise their identity to prevent detection
- Indoctrinated or encouraged others
- Preparation was with a view to engage in combat with UK armed forces
- Conduct in preparation includes the actual or planned commission of other offences, where not taken into account in step one
- Failure to respond to warnings
- Failure to comply with current court orders
- Offence committed on licence or Post Sentence Supervision
- Offence committed whilst in prison

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Good character and/or exemplary conduct
- Offender involved through coercion, intimidation or exploitation
- Clear evidence of a change of mind set prior to arrest
- Offender's responsibility substantially reduced by mental disorder or learning disability
- Age and/or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives

Step 3 – Minimum terms, Serious Terrorism Sentences and exceptional circumstances

Life Sentence Minimum Terms

For serious terrorism cases the life sentence minimum term must be at least 14 years' **unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify a lesser period.**

A "serious terrorism case" is a case where, but for the fact that the court passes a life sentence, the court would be required by section 268B(2) or 282B(2) to impose a serious terrorism sentence (s323 (3) of the Sentencing Code).

Serious Terrorism Sentence - Minimum Custodial Sentence

Where the criteria for a serious terrorism sentence are met, as set out in s268B (adult offenders aged under 21) or s282B (offenders aged 21 and over) of the Sentencing Code, then the court must impose the sentence **unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify not doing so.**

Where a Serious Terrorism Sentence is imposed, the appropriate custodial term is a minimum of 14 years" (s282C Sentencing Code).

Exceptional circumstances

In considering whether there are exceptional circumstances that would justify not imposing the minimum term (in the case of a life sentence), or not imposing the Serious Terrorism Sentence where the other tests are met, the court must have regard to:

- the particular circumstances of the offence **and**
- the particular circumstances of the offender.

either of which may give rise to exceptional circumstances

Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see Criminal Practice Directions VII: Sentencing B.

Where the issue of exceptional circumstances has been raised the court should give a clear explanation as to why those circumstances have or have not been found.

Principles

Circumstances are exceptional if the imposition of the minimum term (in the case of a life sentence), or not imposing the Serious Terrorism Sentence would result in an arbitrary and disproportionate sentence.

The circumstances must truly be exceptional. It is important that courts do not undermine the intention of Parliament and the deterrent purpose of the provisions by too readily accepting exceptional circumstances.

The court should look at all of the circumstances of the case taken together. A single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances.

The mere presence of one or more of the following should not *in itself* be regarded as exceptional:

- One or more lower culpability factors
- One or more mitigating factors
- A plea of guilty

Where exceptional circumstances are found

If there are exceptional circumstances that justify not imposing the minimum term (in the case of a life sentence) then the court must impose a shorter minimum.

If there are exceptional circumstances that justify not imposing a Serious Terrorism Sentence, then the court must impose an alternative sentence.

Note: a guilty plea reduction applies in the normal way if a Serious Terrorism Sentence is not imposed (see step 5 – Reduction for guilty pleas).

Step 4 – Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account section 74 of the Sentencing Code (reduction in sentence for assistance to prosecution) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Step 5 – Reduction for guilty plea

The court should take account of any potential reduction for a guilty plea in accordance with section 73 of the Sentencing Code and the Reduction in Sentence for a Guilty Plea guideline.

Where a **serious terrorism sentence** has been imposed, the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than 80 per cent of the statutory minimum.

Step 6 – Dangerousness

The court should consider:

1) whether having regard to the criteria contained in Chapter 6 of Part 10 of the Sentencing Code it would be appropriate to impose a life sentence (sections 274 and 285)

2) whether having regard to sections 273 and 283 of the Sentencing Code it would be appropriate to impose a life sentence.

3) whether having regard to the criteria contained in Chapter 6 of Part 10 of the Sentencing Code it would be appropriate to impose an extended sentence (sections 266 and 279)

When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

Step 7 – Required special sentence for certain offenders of particular concern

Where the court does not impose a sentence of imprisonment for life or an extended sentence, or a Serious Terrorism Sentence but does impose a period of imprisonment, the term of the sentence must be equal to the aggregate of the appropriate custodial term and a further period of 1 year for which the offender is to be subject to a licence (sections 265 and 278 of the Sentencing Code).

Step 8 – Totality principle

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

Step 9 – Ancillary orders

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

- Ancillary orders – Crown Court Compendium

Step 10 – Reasons

Section 52 of the Sentencing Code imposes a duty to give reasons for, and explain the effect of, the sentence.

Step 11 – Consideration for time spent on bail (tagged curfew)

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003 and section 325 of the Sentencing Code.

Sentencing Council

Sentencing Council meeting:	**30 July 2021**
Paper number:	**SC(21)JUL03 - Totality**
Lead official:	**Emma Marshall/ Ruth Pope**

1 ISSUE

1.1 The Totality guideline has been in force since 11 June 2012 and in January this year a sub group considering the responses to the What next for the Sentencing Council? ('Vision') consultation agreed that in response to matters raised in the consultation this would be a good opportunity to carry out a light touch assessment of the guideline.

1.2 This has now been completed and the assessment is attached at Annex A.

2 RECOMMENDATION

2.1 That that the Council agrees to:

- Publish the assessment, and
- Consult on minor revisions to the Totality guideline.

3 CONSIDERATION

Background

3.1 The Council has a statutory duty to 'prepare sentencing guidelines about the application of any rule of law as to the totality of sentences.'[1] The Totality guideline is used in all criminal courts. When sentencing an offender for more than one offence, or where the offender is already serving a sentence, courts must consider whether the total sentence is just and proportionate to the overall offending behaviour. The Totality guideline sets out the principles to be followed, the approach for different types of sentence and gives examples of how sentences should be structured in different circumstances.

3.2 In terms of how often the Totality guideline is relevant to sentencing, we can provide an estimate (rounded to the nearest 1,000 offenders) of how often more than one offence is sentenced:

- For adults sentenced at magistrates' courts in 2019, it is estimated that around 84% (912,000 offenders) were sentenced for one offence, while around 16% (179,000 offenders) were sentenced for two or more offences.

[1] Coroners and Justice Act 2009 s120(3)(b)

- For adults sentenced at the Crown Court in 2019, it is estimated that around 40% (28,000 offenders) were sentenced for one offence, while around 60% (41,000 offenders) were sentenced for two or more offences.

3.3 These figures do not account for when an offender is already serving a sentence. There are no published figures on multiple offences and data issues make obtaining reliable figures very difficult. If the Council wished to publish these figures considerable further work would be required to verify them and get them quality assured.[2]

3.4 The Totality guideline has received some criticism from academics, notably from Professor Andrew Ashworth. In 'The evolution of English sentencing guidance 2016'[3] he points out that the guideline is often not referred to by the CACD in appeals where it is relevant and that it appears to be overlooked by sentencers. The Bottoms report[4] on the Sentencing Council notes that Ashworth argues that there is little principled guidance on totality and there is generally too much flexibility in guidelines (see paragraph 51 of the report). In his response to the 'Vision' consultation Professor Ashworth states:

> The Council claims to have fulfilled its duties to produce guidelines on totality, allocation and reductions in sentencing for a guilty plea. However, it is arguable that simply to state that the total sentence should be 'just and proportionate' does not amount to a guideline on totality, since it gives no clue as to the process by which the court should find its way to a total sentence that meets this test.

3.5 Criticism was also contained in the response to the 'Vision' consultation by Mandeep Dhami who argues that more guidance should be given to the weight to be attached to mitigating factors in multiple offence cases and that the Totality guideline 'ought to include clear guidance on how much downwards adjustment should be made for consecutive sentences made up of different combinations of offences, and how much upwards adjustment should be made for concurrent sentences in these cases'. The Sentencing Academy response recommended that the Council revisit the Totality guideline. They note that a number of academics have criticised this guideline for providing insufficient or minimal guidance for courts and suggest that 'the Council could explore sentencers' experiences with, and reactions to, this particular guideline to determine whether it is in fact achieving a more uniform approach to multiple offence sentencing'.

3.6 The Council has identified that the guideline might be out of date in terms of some of its content and style. Some changes were made when the guideline was updated to take

[2] There is an action arising from the 'Vision' consultation to look at data on multiple offences which the Council decided should be lower priority.
[3] [2017] Crim. L.R. Issue 7
[4] https://www.sentencingcouncil.org.uk/wp-content/uploads/SCReport.FINAL-Version-for-Publication-April-2018.pdf

account of the Sentencing Code (such as removing references to IPPs) but no overall review of the content was undertaken.

3.7 Qualitative research was conducted with sentencers to explore their views of the guideline and how it is currently used in practice, with the aim of informing a discussion about whether the guideline needs revising and in what way.

Method

3.8 The first stage of the research was an online survey emailed to members of the Council's research pool (approximately 550 sentencers) to measure respondents' use of the guideline and their attitudes towards it. It used a combination of multiple choice and open-ended questions. The survey was open for three weeks and 130 responses were received, from three Court of Appeal judges, one High Court judge, 42 circuit judges, 10 district judges and 74 magistrates.

3.9 Ten follow-up interviews were conducted (with a Court of Appeal judge, a High Court judge, four circuit judges and four magistrates) where interviewees were asked a series of questions about how they use and view the guideline, as well as about their views on some of the findings which had come out of the survey responses. They were also shown an alternative format for the guideline and asked for their views on this.

Summary of findings

3.10 In general survey respondents agreed with the current content in each section of the guideline and agreed that the guideline provides practical help in sentencing.

3.11 The most common way that survey respondents said they used the guideline is to apply its principles and consult it only for difficult or unusual cases. Accordingly, both survey respondents and interviewees commented on their infrequent use of the guideline.

3.12 Some survey respondents highlighted perceived problems with the guideline, such as difficulties ascertaining appropriate financial penalties for multiple offences. Nearly half of survey respondents reported that there are particular types of offence where they have problems applying the guideline including offences with multiple victims and offences which are dissimilar, as well as particular specific types of offences such as sexual offences, assaults, driving offences, thefts, and drug offences. Interviewees largely agreed with these identified offences, and highlighted sexual offences and driving offences as posing particular difficulties. They also commented that, in cases with multiple victims, they experience problems reflecting the seriousness of the offending against each individual victim in the final sentence.

3.13 While some survey respondents asked for more detail in the guideline, more commonly there were comments that the guideline is overly detailed and lengthy, and there were requests for improvements to be made to its format. Most interviewees thought the current examples contained in the guideline are sufficient.

3.14 Several survey respondents commented that some sections of the guideline have no relevance to magistrates' courts while other sections have little relevance in the Crown Court. However, most interviewees did not find this a problem and preferred to keep the same document across jurisdictions.

3.15 Some survey respondents expressed concerns regarding external perceptions of totality and its perceived leniency, and most interviewees agreed that this is a problem. Half the interviewees thought that including a reminder to explain in court how the sentence has been constructed would be helpful, while others commented that the problem lies in public education and press coverage and that altering the guideline would not solve this issue.

Alternative format

3.16 Respondents to the survey made the following suggestions for improving the guideline's format: the inclusion of flow charts; matrices; more tables; a reference index or table; concise summaries of each section and the use of bullet points rather than prose. A revised version incorporating some of these ideas was demonstrated to interviewees (and will be shown to Council members at the meeting). This retained the same content as the existing guideline but made use of bullet points and drop down boxes. Most interviewees were positive about these proposed changes.

Publication of the report

3.17 The report at Annex A could be prepared for publication prior to the publication of the 'Vision' response document. Publication would show that the Council is taking account of points raised by respondents. Some further work would be required to prepare for publication and the report would be reviewed by the A&R sub group and circulated to members prior to publication.

Question 1: Should the report be published as outlined above?

Proposals for reviewing the guideline

3.18 In the light of the findings, it is proposed that some further work is done on updating the guideline without changing the essentials of the content. The revised version would be subject to consultation which would also serve to bring the guideline to attention of users.

Question 2: Should the Totality guideline be revised to ensure that the content is current and to update the style?

4 EQUALITIES

4.1 The nature of the guideline and the lack of reliable data on multiple offences will make it difficult to draw any conclusions about how the guideline applies to different demographic groups. However, in reviewing the guideline the Council can have regard to how the provisions may apply to different offences or cohorts of offenders and consider whether there are potential inequities that can be addressed. Consideration could be given to cross referencing to material in the Equal Treatment Bench Book or elsewhere in guidelines if appropriate.

5 IMPACT AND RISKS

5.1 As referred to earlier, this guideline has been in force for nine years and it could be argued that it is overdue for review. There would be reputational risks in not publishing the report and reviewing the guideline.

5.2 The guideline is of wide application and therefore any changes could have a significant impact on sentencing practice, although the proposed revision of the guideline is unlikely to make substantive changes.

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Totality guideline: research with sentencers

The Sentencing Council is reviewing the Totality guideline,[1] which has been in force since 2012. The guideline is of wide application in all courts. It has received some criticism from academics, including: that it is rarely referred to (Harris, 2015); that there is little evidence its principles are widely known by sentencers (Ashworth, 2017); and that it does not help determine how to quantify sentence reductions (Harris, 2015). The Council has also identified that the guideline might be out of date in terms of some of its content and style. Therefore, we conducted qualitative research with sentencers to explore their views of the guideline and how it is currently used in practice, with the aim of informing a discussion about whether the guideline needs revising and in what way.

The aims of the research are:

- To understand how sentencers use the guideline;
- To explore sentencers' attitudes towards the guideline; and
- To identify any potential problems or issues with the guideline.

Method

The first stage of the research was carried out by online survey, via SmartSurvey. The survey used Likert scale questions[2] to measure respondents' use of the guideline and their attitudes towards it. It also asked open-ended questions to understand in more detail respondents' views of the guideline.[3] A link to the survey was emailed to members of the Council's research 'pool' (approximately 550 sentencers). The survey was open for three weeks, from 4 March to 21 March 2021. A total of 130 responses were received, from three Court of Appeal judges, one High Court judge, 42 circuit judges, 10 district judges and 74 magistrates.

Eighty survey respondents indicated that they were willing to participate in a follow-up interview. We aimed to select a stratified random sample of 10 participants, covering each type of sentencer who responded to the survey. We were unable to organise an interview with a district judge, and so our final sample was composed of one Court of Appeal judge, one High Court judge, four circuit judges and four magistrates. The interviews, lasting approximately 30 minutes, were designed to follow up on some of the points raised by sentencers in response to the survey and explore these in more detail. We asked interviewees a series of questions about how they use and view the guideline, as well as about their views on some of the findings which had come out of the survey responses. They were also shown an alternative format for the guideline and asked for their views on this.[4]

In both pieces of the research, participants were self-selecting and the sample sizes are small, particularly in relation to specific subsamples. The findings are therefore not necessarily representative of sentencing practice and should be taken as indicative rather than conclusive.

[1] When sentencing an offender for more than one offence, or where the offender is already serving a sentence, courts must consider whether the total sentence is just and proportionate to the overall offending behaviour. The Totality guideline sets out the principles to be followed, the approach for different types of sentence and gives examples of how sentences should be structured in different circumstances.

[2] Likert scale questions use scales to measure respondents' level of agreement with various statements (for example: agree, somewhat agree, neither agree nor disagree, somewhat disagree, disagree).

[3] The survey questionnaire is set out in Annex A.

[4] The interview questions are set out in Annex B.

Key findings

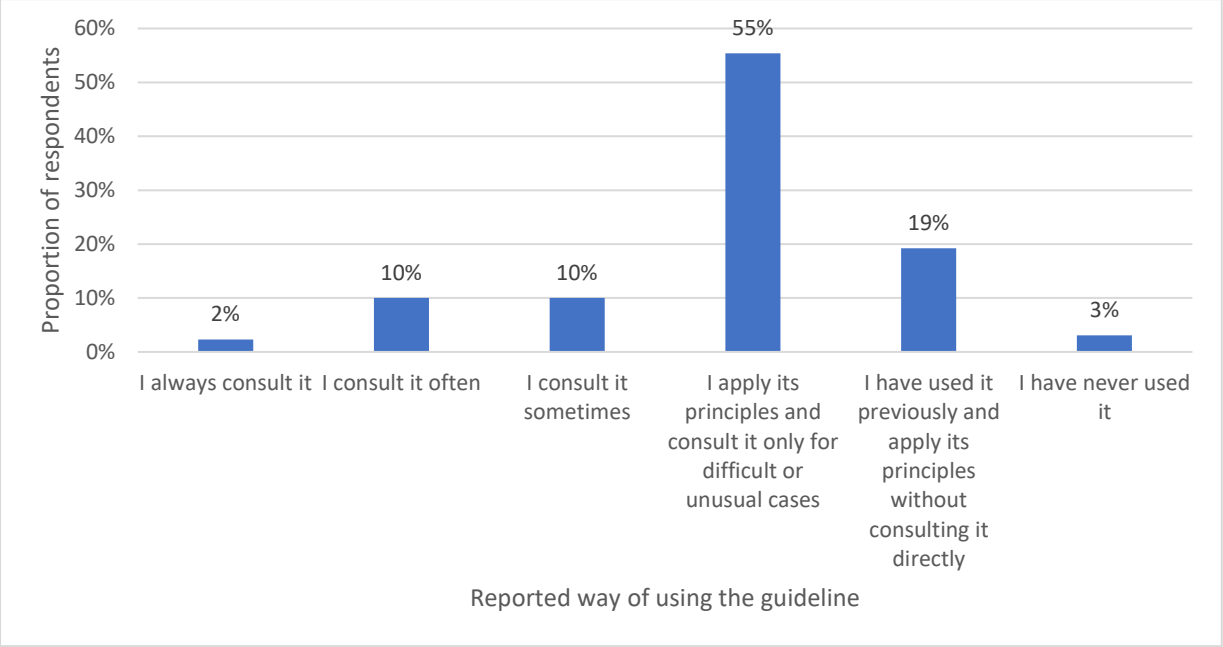
- Most survey respondents agreed with the current content in each section of the guideline and agreed that the guideline provides practical help in sentencing. There were several positive comments regarding the guideline's examples, clarity and usefulness.
- The most common way that survey respondents said they used the guideline is to apply its principles and consult it only for difficult or unusual cases. Accordingly, both survey respondents and interviewees commented on their infrequent use of the guideline.
- Some survey respondents highlighted perceived problems with the guideline, such as difficulties ascertaining appropriate financial penalties for multiple offences. Nearly half of survey respondents reported that there are certain types of offence where they have problems applying the guideline. This included offences with multiple victims and offences which are dissimilar, as well as specific offences such as sexual offences, assaults, driving offences, thefts, and drug offences. Interviewees largely agreed with these identified offences and highlighted sexual offences and driving offences as posing particular difficulties. They also commented that, in cases with multiple victims and a range of offending, they experience problems reflecting the seriousness of the offending against each individual victim in the final sentence.
- While some survey respondents asked for more detail in the guideline, more commonly there were comments that the guideline is overly detailed and lengthy, as well as requests for improvements to be made to its format. Most interviewees thought the current examples contained in the guideline are sufficient. When discussing ideas for improving the format of the guideline, most were positive (particularly with regards to bullet points, drop-down menus and tables).
- Several survey respondents commented that some sections of the guideline have no relevance to magistrates' courts while other sections have little relevance in the Crown Court. However, most interviewees did not find this a problem and preferred to keep the same document across jurisdictions.
- Some survey respondents expressed concerns regarding external perceptions of totality and its perceived leniency, and most interviewees agreed that this is a problem. Half the interviewees thought that including a reminder to explain in court how the sentence has been constructed would be helpful, while others commented that the problem lies in public education and press coverage and that altering the guideline would not solve this issue.

Detailed findings

<u>Use of the guideline</u>

Around half (51 per cent; 66) of survey respondents reported that most cases they sentence involve more than one offence, with 15 per cent (19) reporting that most cases involve just one offence and the remaining 35 per cent (45) saying that the split is about even. When asked whether they usually find it more difficult to sentence cases involving more than offence, 36 per cent (47) of respondents said that they usually find it more difficult, 25 per cent (32) said that they find it 'about the same' and 39 per cent (51) said that the difficulty varies.

Figure 1: Responses to the question 'When sentencing more than one offence on the same occasion, or when sentencing an offender who is already serving a sentence, which of the following statements most closely reflects your use of the Totality guideline?'[5]



Most sentencing guidelines have a totality step which reads something like this:

> If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour. See Totality guideline.

Nearly all (95 per cent; 123) of survey respondents reported being somewhat or very familiar with the totality step in the sentencing guidelines. Additionally, 69 per cent (90) said that the inclusion of this step is useful or very useful. When the totality step applies, 2 per cent (3) of respondents said that they always consult the Totality guideline, and a further 20 per cent (26) reported that they consult it often or sometimes. The most common way of using the guideline, reported by 55 per cent (72) of respondents, is to apply its principles and consult it only for difficult or unusual cases. A further 19 per cent (25) of respondents reported that they had used the guideline previously and apply its principles without consulting it directly. These were the most common ways of using the guideline across all sentencer types who responded to the survey. Only 3 per cent (4) of respondents stated that they had never used the guideline. Overall, survey respondents commented that the guideline is currently underused or used infrequently: one circuit judge stated that "it is one of the least used guidelines". Several magistrates commented that they tend to get advice from the legal adviser rather than the guideline when considering totality.

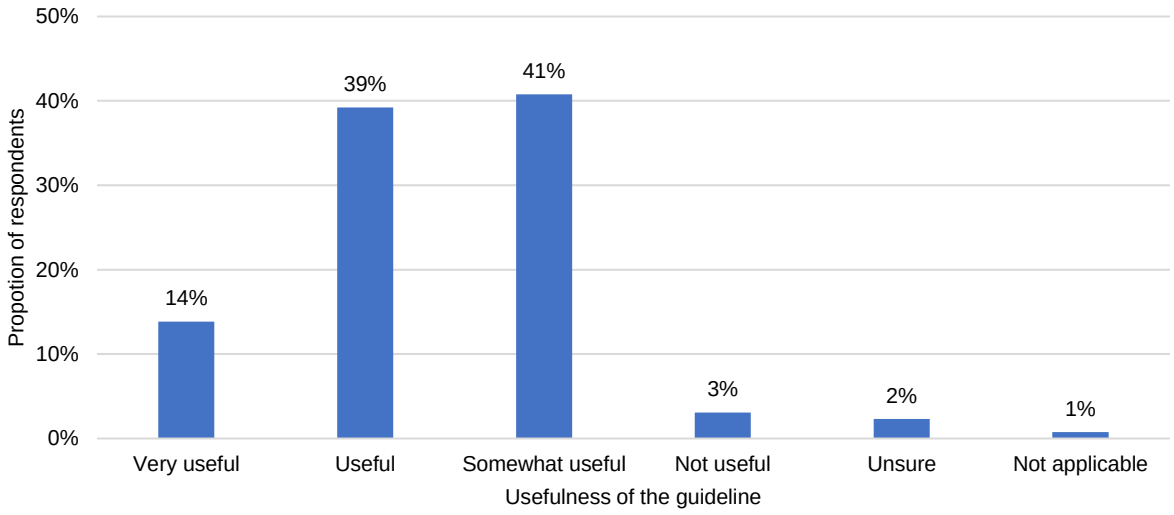
We asked interviewees how often they refer to the Totality guideline. One circuit judge reported that they refer to it two or three times a week, and another circuit judge said that they refer to it "regularly" when sentencing cases with multiple offences. However, the other

[5] Where percentages do not total 100 per cent, this is because individual percentages have been rounded to the nearest whole number.

interviewees commented that they refer to it rarely or not very often. Two magistrates commented that they use the guideline to train other magistrates or in discussions with their colleagues about totality when sentencing, while other sentencers commented that they refer to the guideline in instances such as where they have a particularly complex case or are sentencing a case without a specific guideline. One magistrate commented that "we could all do with a bit of training on it… what its underlying principles and intentions are, then perhaps how to use it". Interviewees had a range of sentencing experience, from three to 27 years', and there was no obvious correlation between years' experience and the frequency with which interviewees use the guideline.

Usefulness of the guideline

Figure 2: Responses to the question 'How useful do you find the Totality guideline?'



Around half (53 per cent; 69) of survey respondents told us that they find the Totality guideline useful or very useful, with a further 41 per cent (53) stating that they find the guideline somewhat useful. Despite this, 47 per cent (61) of respondents reported that there are particular types of offence that pose difficulties when applying the guideline. When asked for more detail on these offences, the most common examples listed were sexual offences (including historical sexual offences), assaults, driving offences, thefts, and drug offences (including where firearms are involved). Several sentencers reported that offences involving multiple victims pose particular difficulties, as well as offences which are dissimilar or unrelated.

Having identified these themes from the survey data, we asked interviewees whether any of these types of offences posed them problems when applying the Totality guideline, and whether they had any suggestions for how the guideline could provide more help in any of these situations. All but one interviewee (the High Court judge) agreed that some or all of these offences pose difficulties. However, four of the ten interviewees said that either the guideline was not the issue, or that they did not have any suggestions as to what the guideline could do to help. Sexual offences and driving offences were the main offences identified by interviewees as causing particular difficulties in this part of the research.

The Court of Appeal judge suggested that further "mathematical" guidance regarding appropriate reductions might be helpful where similar offences have been committed over a

period of time.[6] However, they acknowledged that there would be difficulties with such an approach and that there would be exceptions, including "some situations where you end up with a ridiculous sentence".

One circuit judge reported having difficulties sentencing multiple historical sexual offences where some have different maximum sentences as a result of having been committed prior to the 2003 Act. This judge also commented on the difficulties of composing and explaining a sentence where there are multiple counts on one indictment, which they said is a common situation in sexual offences and cases where offenders are convicted of multiple dissimilar offences. They suggested that, instead of having to look at and remark upon each count individually before coming up with a just and proportionate final sentence, "it might be helpful to have in the guidelines that one of the options is to take a lead offence".

Problems applying the guideline to multiple driving offences were identified by all four magistrates and one of the circuit judges, including in cases where the offender is also being sentenced for unrelated offences. Two of the magistrates explained that it is difficult to balance financial penalties with the seriousness of offending in these types of cases. One said that "even with totality, the guidance can lead you to too high a sentence in terms of fines and their affordability" and suggested that magistrates could receive refresher training on fines. The other commented that a maximum of a band C fine and disqualification is not "appropriate" in instances either where life-changing harm has been caused, or where the person being fined is already in financial distress. This sentencer wanted the guideline to contain the option of taking cases into the area of community penalties in these situations.[7]

In interview, four sentencers highlighted problems with explaining the final sentence when there are multiple victims. Three circuit judges explained that there are particular difficulties reflecting the crimes on victims of the more minor sexual offences in a case involving multiple counts, because they become less visible in the context of the most serious offence. One of these judges said that, instead of imposing one extended sentence which reflects all the criminality:

> *I think there should be a way that the guideline sets out where you can and can't impose for example a lesser sentence, a significantly lesser sentence, but still reflect the criminality on that particular victim.*

<u>The guideline's examples</u>

Survey responses relating to the guideline's clarity and detail were largely positive, and several respondents reported that they like the examples given in each section. Respondents told us that the guideline helps them to work out how sentences can be combined, with one circuit judge stating that the guideline "is specifically and importantly useful in considering the interplay between consecutive and concurrent sentences". However, some respondents asked for more detail and a greater number of specific examples.

[6] The Totality guideline does not provide precise information on how to calculate reductions in individual sentences to take into account the totality of offending, rather it talks in terms of considering whether the total sentence is 'just and proportionate'.

[7] There are legal limitations on when a community penalty can be imposed which would limit the scope of this suggestion.

We asked interviewees what their views were on the guideline's inclusion of examples of particular combinations of offences and the approach that should be taken when sentencing them. One circuit judge said that the guideline is not the place for examples and that the Bench Book would be the better place for them. However, the other interviewees all expressed positive views about their inclusion, calling them "helpful" and "a good starting point".

In contrast, the Court of Appeal judge said that, for more experienced sentencers "who know this bit and are more interested in the acute problems you get with a whole series of similar offences", the examples are less useful and "don't go far enough". One circuit judge wanted the examples to be updated to cover more specific problems, including how to combine sentences where offenders have to serve two-thirds of some sentences and half of other sentences. This sentencer also wanted further "worked examples" detailing how to structure sentences. Another circuit judge similarly commented, "I was going to say that it would be nice to have some actual examples of percentages to reduce by, but it's impossible to do that".

Despite these suggestions, most interviewees thought that the examples are sufficient and that it is not necessary to include more. One circuit judge commented, "I think the examples are about right actually. Because they are specific examples, but they give you a good feel for what you ought to be doing." Two interviewees (from the High Court and magistrates' court) also said that offering more detail could result in the guideline becoming very long.

Layout and usability of the guideline

Among the survey responses, comments that the guideline is overly detailed and lengthy for regular use in a busy court were more common than requests for more examples. One magistrate said that "there is rarely the time to ponder and absorb material of this kind". Respondents made the following suggestions for improving the guideline's format: the inclusion of flow charts; matrices; more tables; a reference index or table; concise summaries of each section and the use of bullet points rather than prose.

We explored with interviewees the issue that had been raised in the survey that some people felt that the guideline was difficult to use in a busy court. We asked them what they thought about the suggestions for tables, bullet points and flowcharts as a way of making the guideline easier to use, or if they had any other ideas that might help with this issue.

Four interviewees (from the Crown Court, High Court and Court of Appeal) commented that they do not find the guideline difficult to use. In comparison, one circuit judge said that the guideline is ""not the easiest to follow, but that's because it's not a tabular type guideline like the offence guidelines". Two magistrates also commented that they are unlikely to use the guideline in a busy court unless it is an exceptional case.

Despite this range of opinions about whether they personally find the guideline difficult to use, interviewees were generally positive about the potential to alter the format to make the guideline easier to use, although views on the specific ideas suggested were mixed. Views on more use of bullet points were generally positive. The Court of Appeal judge and one magistrate expressed positive views about flowcharts, while a different magistrate and the High Court judge said that they did not like this idea. Four interviewees liked the idea of more tables, with one saying that it would allow them to find the part of the guideline they needed more quickly.

Interviewees also suggested that the main principles of totality could be shortened and placed on one page, and that headings and important parts such as the general principles section could be put in bold. One circuit judge suggested that “it might be better just to highlight the different sections more effectively because it all runs into one as it looks at the moment”. Another circuit judge also commented that “if it was set out with steps like in the modern guidelines, that might be helpful”.

Interviewees were also shown a mocked up a version of the guideline with the same content but with the examples placed in drop-down menus. We then asked interviewees their opinions of using such a format to condense the guideline. Three interviewees (from the Crown Court, High Court and Court of Appeal) did not like the idea of drop-down menus, saying that the online guidelines should contain the guidance on the page in full and should match the paper guidelines. One commented that “if you have got to click on things then you might miss them”. The other seven interviewees were in favour of the drop-down menu format, commenting that it would make the guideline appear shorter on the page, would mean less scrolling, and would mean that the main points remain on the page while the examples could be accessed if needed. Three interviewees also mentioned that this format is good as it aligns with how other new guidelines are presented.

Sections of the guideline

For each section of the guideline, we asked survey respondents the extent to which they agree with what the section says, and the extent to which they agree that the section provides practical help in sentencing.

Figure 3: Responses to the question ‘Looking at X section, to what extent do you agree with what is said in this section?’

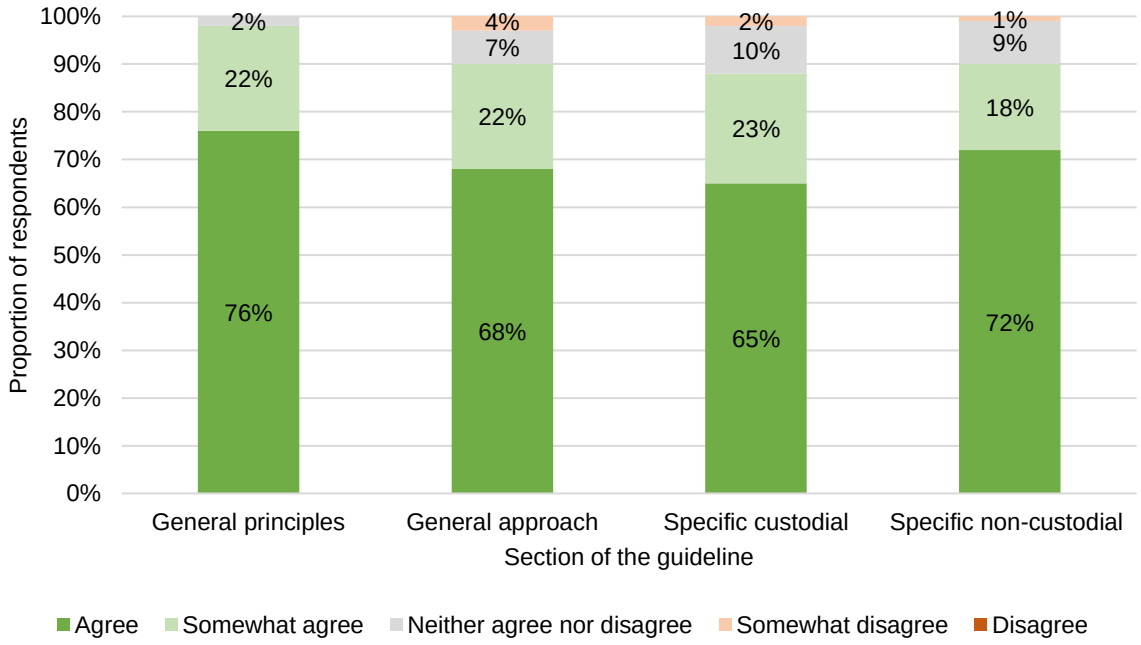
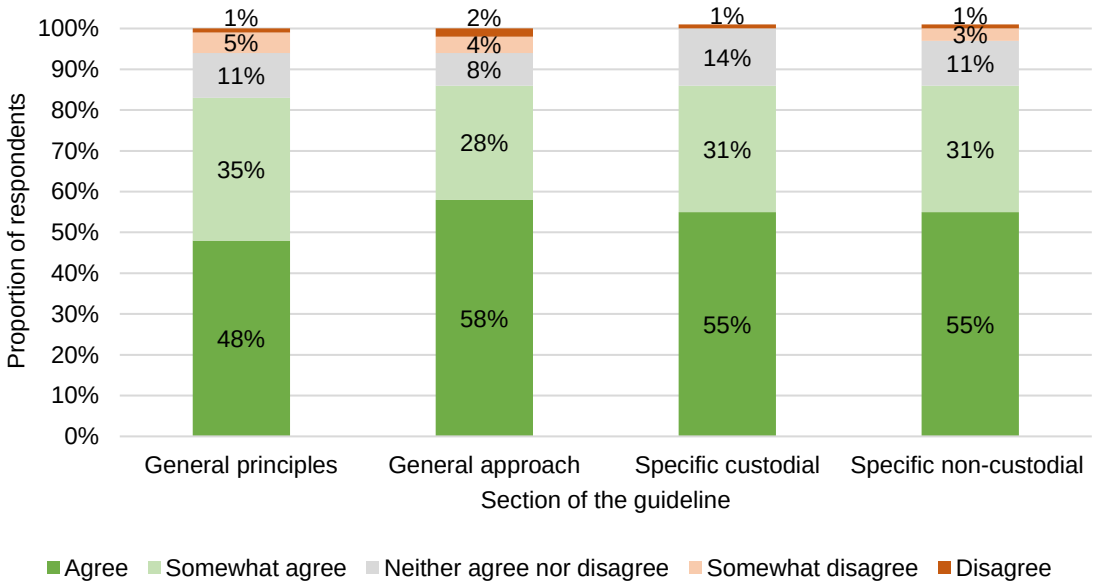


Figure 4: Responses to the question ‘To what extent to do you agree that X section provides practical help in sentencing?’



For each section, at least 65 per cent of respondents reported agreeing with what is said. Furthermore, at least 88 per cent of respondents agree or somewhat agree with what is said. Lower proportions of respondents reported that they agree that each section provides practical help in sentencing: responses of agreement ranged from 48 per cent (General principles) to 58 per cent (General approach as applied to Determinate Custodial sentences). However, for each section, at least 84 per cent of respondents reported that they agree or somewhat agree that it provides practical help.

Survey respondents were asked to provide more detail of their views on each section of the guideline:

General principles

Respondents commented that the 'General principles' section is a "useful", "clear" and "straightforward" guide and a reminder of the overall principles of totality. However, some respondents noted that this section does not give practical help. One magistrate said that this section contains "general statements, rather than specific advice". Two respondents (a Court of Appeal judge and a circuit judge) commented that the section is of little practical use as the principles are already familiar to sentencers, especially those who are experienced.

General approach (as applied to Determinate Custodial sentences)

Several respondents gave positive comments about the advice regarding concurrent and consecutive sentences in the 'General approach (as applied to Determinate Custodial sentences)' section, describing it as "clear" and "useful used in conjunction with specific sentencing guidelines". However, some sentencers highlighted perceived problems with this advice. Two circuit judges queried the robbery with a firearm example. One believed it to be unclear in what it says about the weapon being ancillary to and not distinct and independent of the robbery. The other stated that there is Court of Appeal authority that there should be a consecutive sentence for the firearm. Additionally, in relation to the guidance about domestic violence, a magistrate commented:

> *[The guideline] specifies that consecutive sentences should be considered if the offences are domestic violence, but this is specifically not included as an aggravating factor in common assault cases, as has been pointed out by defence lawyers.*

One respondent wrote that there are issues in magistrates' courts when sentencing spree offenders who move in and out of remand custody before facing sentence for multiple minor offences. This magistrate said that the situation becomes complex for the sentencer if new offences are subsequently committed during a suspended sentence order and the sentencer has to work out which sentence to reactivate. The respondent asked:

> *Given the difficulties in part-activating a suspended sentence constructed from multiple short sentences could the guidance address whether a global sentence would be a preferable approach to multiple short sentences, particularly when such sentences are to be suspended?*

One magistrate commented that this section would be improved by dividing it into Crown Court considerations and magistrates' court considerations.

Specific applications – custodial sentences

Survey responses were largely positive regarding the 'Specific applications – custodial sentences' section. Respondents commented that the section is "clear" and provides "a useful framework and guidance". However, some points of disagreement with the guidance were highlighted. Three sentencers (a circuit judge, district judge and magistrate) disagreed with the guidance concerning recalled prisoners.[8] Two wrote that it is "unjust" and "defies common sense" not to impose a consecutive sentence, while the circuit judge wrote:

> *I am not convinced that the guidance is correct as regards recalled prisoners. As I understand it any new sentence must be concurrent. SC s.225, R.v. McStravick 2018 EWCA Crim 1207.*

Another circuit judge stated that the advice on imposing a determinate sentence on someone already serving a custodial sentence is "too simplistic" as it does not take into account cases such as historical sexual offences or multiple burglaries where the offender chose to hide their other offences when originally sentenced. The same respondent also disagreed that sentences should generally be consecutive if the offence post-dates the offence for which the offender is in custody.

Some respondents commented that elements of this section (including determinate sentences, indeterminate sentences, and extended sentences for public protection) have little relevance to the magistrates' courts. However, one magistrate wrote that although the section was aimed at Crown Court users, "it does have some implications when sentencing historical offences". One district judge commented that it would be helpful to have guidance on applying consecutive sentences when required to take into consideration the maximum sentencing powers of the magistrates' court.

Specific applications – non-custodial sentences

Survey responses were largely positive with regards to the 'Specific applications – non-custodial sentences' section. Comments included that the section is helpful in determining which sentences can and cannot be combined, and that the guidance is "clear" and "comprehensive".

[8] The position relating to recalled prisoners is covered by legislation (section 225 of the Sentencing Code).

Several respondents, mostly magistrates, made comments in relation to ascertaining fines and compensation. Two magistrates and a circuit judge wrote that the section is particularly useful in this respect. Three magistrates commented on the importance of ascertaining whether an offender has the ability to pay any financial penalties. A further magistrate commented that it would be beneficial if the guideline provided advice on "occasions where the totality element takes the calculated fine above the maximum fine for the most serious offence and holding the fine at the maximum does not feel just and proportionate".

Several survey respondents commented that the cases in 'Specific applications – non-custodial sentences' occur often in the magistrates' court. Three circuit judges commented that this section is rarely relevant in the Crown Court.

The relevance of different sections for different jurisdictions

Following on from points raised in the survey that some parts of the guideline are not relevant to magistrates' courts and others are rarely relevant to the Crown Court, we asked interviewees whether they had any views on this and whether they thought it could be helpful to have sections specifically for each jurisdiction.

The High Court judge and one magistrate were in favour of having sections specifically for each jurisdiction. The magistrate said that the sections on indeterminate and extended sentences were not relevant in magistrates' courts, while the sections on fines and community orders were particularly relevant. Additionally, a further magistrate commented that it would be nice to have a guideline tailored to the magistrates' courts but said they were unsure whether this would be practical, and a circuit judge suggested that magistrates might need a more comprehensive guideline "because they are probably less used to the principles than most judges".

In comparison, two interviewees (from the Court of Appeal and magistrates' courts) highlighted potential problems with having different versions of the guideline across jurisdictions. The Court of Appeal judge gave the example of a serial offender being committed to the Crown Court but then being acquitted of the most serious offences and as a result "the Crown Court judge is then sentencing almost as if they are in a magistrates' court". The magistrate commented that they sit in the youth courts where, especially due to the backlog caused by the COVID situation, they sentence serious crimes for which it is useful to have Crown Court guidance. Additionally, five other interviewees said that they either do not experience problems with all the information being contained in one guideline because they "just go to what [they] need", or that they would simply prefer one document covering all jurisdictions. Two interviewees also commented that the other suggestions for making the guideline easier to use, particularly the drop-down menus, could address this issue.

<u>External perception of totality</u>

Several survey respondents raised concerns about the general lack of public understanding of totality, including among defendants, and the perception by victims and the public that totality results in leniency. Some, therefore, suggested that the guideline could include a reminder to explain in court how the sentence has been constructed.

We asked interviewees whether they thought this external perception of totality was a problem. We also asked whether they thought the inclusion of a reminder to explain in court

how the sentence has been constructed would help, or if they had any other suggestions for addressing this perception.

Two interviewees (a High Court judge and a circuit judge) commented that they disagreed about there being a lack of understanding of totality among defendants. However, nine interviewees agreed that there is a general problem regarding the perception that totality results in leniency, particularly from among the public and victims. Three of these sentencers (two circuit judges and a magistrate) commented that the problem lies mainly in a combination of press reporting and a lack of education among the public, and that the guideline is unlikely to be able to help with this. One circuit judge and two magistrates made similar comments regarding the importance of how the sentence is reported back to victims by police officers, the prosecution and witness services, with the circuit judge suggesting that police officers could receive more training on how multiple offences are sentenced so that they are better able to explain sentences to victims.

While it was commented by several interviewees that sentencers explain the effects of totality anyway, five interviewees agreed that a reminder to explain in court how the sentence has been constructed would be helpful. The Court of Appeal judge said that the guideline "could give three short sentences which would then be capable of being used by any judge who wanted to use them in an appropriate case" and one circuit judge thought it would be helpful "if there was a phrase which could be used, or suggested to be used, in a way which would resonate with the victims and the police and the other people who hear this". One of the magistrates suggested that a totality pronouncement card, similar to the youth pronouncement cards, would be useful.

Three interviewees said that this perception of leniency was linked to sentences being passed which do not reflect the harm caused to particular victims. One magistrate commented that not being able to go outside the sentencing limits for offences means that some of the guidance for multiple offences is "jarring". One circuit judge said:

> *The key thing is to ensure that where there are two victims and one offence is much more severe than the other, it's better to pass a concurrent sentence where you still are heard to say that it was a longish sentence for the lesser offence, than to diminish the sentence for the lesser offence because of totality.*

Identifying this same problem, but suggesting a different solution, another circuit judge commented:

> *I think it's important to sometimes reflect [multiple offences] by way of consecutive sentences or sentences that mean something to each victim. Because I think it is an issue with the principle, not that you can change that.*

Annex A: survey questionnaire

The Sentencing Council would be very grateful for your participation in this short survey. The Totality guideline has been in force since 2012 and the Council is carrying out some exploratory work to see what sentencers think of the guideline. Please feel free to express your views - there are no right or wrong answers.

The responses will be collated and reported to the Council, but will not be attributable to any individual.

It will be helpful if you have a copy of the Totality guideline open to refer to during the survey. You can find it here (right click to open the link in a new tab on a computer; click and hold to open in a new tab on a phone or tablet).

It should take approximately 15 minutes to complete the survey. Questions marked with an * must be answered.

The Council's privacy notice can be found here.

Thank you again for your help with our work in this area.

1. What type of sentencer are you? *
    - Court of Appeal Judge
    - High Court Judge
    - Circuit Judge
    - Recorder
    - District Judge
    - Deputy District Judge
    - Magistrate

2. How often do the cases you sentence involve more than one offence? *
    - Most cases involve more than one offence
    - Most cases involve just one offence
    - The split is about even

3. What has been your experience of sentencing cases involving more than one offence? *
    - I usually find it more difficult to sentence cases involving more than one offence
    - I usually find it easier to sentence cases involving more than one offence
    - I usually find it about the same as sentencing cases involving just one offence
    - It varies

4. Most sentencing guidelines have a 'Totality' step which reads something like this: 'If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour. See Totality guideline.' Are you familiar with seeing this step in the guidelines? *
    - Yes, very familiar
    - Somewhat familiar
    - No, not familiar

5. How useful do you find the inclusion of this step in the sentencing guidelines? *
- Very useful
- Useful
- Somewhat useful
- Not useful

6. When sentencing more than one offence on the same occasion, or when sentencing an offender who is already serving a sentence, which of the following statements most closely reflects your use of the Totality guideline? *
- I always consult it
- I consult it often
- I consult it sometimes
- I apply its principles and consult it only for difficult or unusual cases
- I have used it previously and apply its principles without consulting it directly
- I have never used it

7. How useful do you find the Totality guideline? *
- Very useful
- Useful
- Somewhat useful
- Not useful
- Unsure
- Not applicable

8. Are there any particular types of offence that pose difficulties when applying the totality guideline? *
- Yes
- No
- Don't know

9. Please provide more detail about the types of offence for which you have problems applying the totality guideline: *

We will now be asking a series of questions about each part of the Totality guideline. Please have a copy of the guideline open to refer to while you answer these questions. We are interested in any views you may have on each section.

10. Looking at the 'General principles' section, to what extent do you agree with what is said in this section? *
- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Disagree

11. To what extent do you agree that the 'General principles' section provides practical help in sentencing? *
- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree

- Disagree

12. Please can you provide more detail of your views on the 'General principles' section:

13. Looking at the 'General approach (as applied to Determinate Custodial Sentences)' section, to what extent do you agree with what is said in this section? *

- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Disagree

14. To what extent do you agree that the 'General approach (as applied to Determinate Custodial Sentences)' section provides practical help in sentencing? *

- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Disagree

15. Please can you provide more detail of your views on the 'General approach (as applied to Determinate Custodial Sentences)' section:

16. Looking at the 'Specific applications - custodial sentences' section, to what extent do you agree with what is said in this section? *

- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Disagree

17. To what extent do you agree that the 'Specific applications - custodial sentences' section provides practical help in sentencing? *

- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Disagree

18. Please can you provide more detail of your views on the 'Specific applications - custodial sentences' section:

19. Looking at the 'Specific applications - non-custodial sentences' section, to what extent do you agree with what is said in this section? *

- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Disagree

20. To what extent do you agree that the 'Specific applications - non-custodial sentences' section provides practical help in sentencing? *

- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Disagree

21. Please can you provide more detail of your views on the 'Specific applications - non-custodial sentences' section:

22. Finally, considering the totality guideline as a whole, are there any other views that you would like to add?

23. The Sentencing Council may conduct further research to explore sentencers' views and experiences of the Totality guideline. This is likely to involve a 30-minute interview. Would you be willing to participate in this research? *

- Yes
- No

Annex B: Interview discussion guide

1. How many years' experience do you have as a sentencer?

2. How often do you refer to the Totality guideline?

In our survey, we asked for types of offences that posed problems when applying the totality guideline in court. Responses included:

- offences with multiple victims and offences which are dissimilar or unrelated; and
- particular specific types of offences – e.g. sexual offences; assaults; driving offences; thefts; and drug offences.

3. Do you find that any of these offences pose problems when applying the totality guideline?
4. Do you have any suggestions for how the guideline could provide more help in any of these situations?

The guideline currently contains examples of particular combinations of offences and the approach that should be taken when sentencing them. Views on the provisions of these examples were mixed – some respondents found them helpful and wanted more, while others thought there were too many.

5. Do you have any views on this?

Several sentencers said that the guideline was difficult to use in a busy court. Suggestions for making it easier to use included more use of tables, bullet points, or flowcharts.

6. Do you have any views on these suggestions? Or do you have any other ideas that might help with this issue?

We have mocked up a version of the guideline with a slightly different format, but with the same content. Can I share my screen to show it to you?

7. What are your views on using a similar format to this mocked-up version to condense the guideline?

It was pointed out that some parts of the guideline are not relevant to magistrates' courts and others are rarely relevant to the Crown Court.

8. Do you have any views on this, and do you think it could be helpful to have sections specifically for each jurisdiction?

Concerns were raised about the general lack of public understanding of totality (including among defendants) and the perception by victims, law enforcement and the public that totality results in leniency. There were some suggestions that the guideline should include a reminder to explain in court how the sentence has been constructed.

9. Do you think this external perception is a problem, and if so, do you have any other suggestions for addressing it?

10. Is there anything else that you would like to mention in relation to the Totality guideline which the Council should consider?

Sentencing Council

Sentencing Council meeting:	**30 July 2021**
Paper number:	**SC(21)JUL04 - Perverting the Course of Justice and Witness intimidation**
Lead Council member:	**Juliet May**
Lead official:	**Mandy Banks** **0207 071 5785**

1 ISSUE

1.1 This is the first meeting to discuss and agree the scope of the project. There are three further meetings scheduled, with a consultation to start in January next year, although timings are only indicative at this stage. In order to progress the work it would be helpful if the offences to be included in the project are agreed today, in order for guideline development to take place over the summer.

2 RECOMMENDATION

2.1 At today's meeting the Council are asked:

- To agree the offences to be included within the project

3 CONSIDERATION

Perverting the Course of Justice and Witness Intimidation

3.1 Previously in a discussion of future guidelines and priorities the Council agreed that perverting the course of justice (PTCJ) and witness intimidation should be added to the work plan. Due to pressure of other work there has not been time to start this project until now. There are also a number of other related offences that could potentially be included within the project, which are discussed further on in the paper.

3.2 Volumes for all the offences discussed in the paper are shown at **Annex A.** Volumes for 2020 offences are included however, these should be treated with caution as this is the first year of Covid-19 affected data and its possible that volumes of offenders may be lower than they would otherwise have been. Therefore, 2019 figures have been used in the discussion, however, it is worth noting that the distribution of sentencing outcomes seen in 2020 are broadly in line with those seen in 2019. Generally, as can be seen in **Annex A** and in line with the overall trends seen in sentencing, volumes for these offences have been decreasing over time.

3.3 Starting with PTCJ, there is no current guideline for this offence. It is a common law offence, triable only on indictment, with a maximum penalty of life imprisonment. In 2019, around 580 offenders were sentenced for this offence, with the majority receiving a custodial sentence (51 per cent received immediate custody and 43 per cent suspended). The ACSL was around 14 months.

3.4 For witness intimidation, Section 51 of the Criminal Justice and Public Order Act 1994 creates two offences:

- S.51(1) creates an offence directed at acts against a person assisting in the investigation of an offence or a witness or potential witness or juror or potential juror whilst an **investigation or trial is in progress;** and
- 51(2) creates an offence directed at acts against a person who assisted in an investigation of an offence or who was a witness or juror **after an investigation or trial has been concluded.**

3.5 There was a guideline for the s.51(1) offence only in the old Magistrates Court Sentencing Guideline (MCSG). This was not included in the recent work to revise the MCSG, so it is in need of revising as it currently offers little in the way of guidance. Both offences are triable either way, with a maximum penalty of five years imprisonment.

3.6 In 2019, around 210 offenders were sentenced for the s.51(1) offence, with the majority receiving a custodial sentence (60 per cent received immediate custody and 31 per cent suspended). The ACSL was around 10 months. In 2019 for the s.51(2) offence only around 20 offenders were sentenced. A decision needs to be made as to whether to include a guideline for the s.51(2) offence or not given the low volumes, and if it is to be included, whether it would be feasible to develop one guideline for both the s.51(1) *and* the (2) offence.

Question 1: Does the Council wish to include guidance for the s.51(2) offence? If so, is the Council content that further work is carried out over the summer to see whether or not it would be practical to develop one guideline for both s.51(1) and s.51(2)?

Other related offences not currently within the scope of the project

Perjury

3.7 There currently is no guideline for perjury offences. By section 1(1) of the Perjury Act 1911, perjury is committed when:

- a lawfully sworn witness or interpreter in judicial proceedings
- wilfully makes a false statement

- which he knows to be false or does not believe to be true, and
- which is material in the proceedings.

The offence is triable only on indictment and carries a maximum penalty of seven years' imprisonment and/or a fine.

3.8 Volumes for these offences are very low. For the s.1 offence, there have been very few offenders sentenced over the last 11 years and no offenders sentenced since 2015. For a s.1A offence, (false unsworn statement under evidence) there were 4 offenders sentenced in 2019**.** All offenders sentenced in 2019 received a custodial sentence of some kind. As noted above, volumes of offenders sentenced are virtually nil. Although the Council has on occasion produced guidelines for offences with very low volumes, it is suggested that there are no compelling reasons to justify developing a guideline for this offence, so it is recommended that this offence is not included in the project.

Question 2: Does the Council agree not to include perjury offences within the scope of the project?

Contempt

3.9 There is also no current guideline for contempt cases. These cases are a mixture of common law and statute and are dealt with differently depending on the type of contempt and the type of court. Magistrates' courts can only deal with a contempt that takes the form of disruptive behaviour in the court or a refusal to give evidence and, in those situations the court can deal with the offender summarily (ie on the day). The Crown Court can deal with a larger range of contempt summarily or for other types of contempt an application must be made to the High Court.

3.10 There can be civil contempt cases, such as breach of an order made, and criminal contempt, conduct which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice. Criminal contempt of court may arise in many ways and in a variety of forms, such as newspapers publishing information in breach of reporting restrictions; disorderly behaviour in court; taking photographs or recording in court; disobeying a witness summons.

3.11 There is considerable overlap between contempt and other offences against public justice and between the various types of contempt. In 2019 there were around 50 offenders (summary only) sentenced for this offence. There has been only one indictable only case sentenced since 2010.

3.12 It may also be helpful to note that the Law Commission may undertake some work in this area as part of its 14th Programme, a review of the law of contempt of court as it

interacts with the criminal law. In earlier work on contempt the Commission identified a lack of clarity surrounding what behaviour counts as a contempt in the face of the court and the fact that it is dealt with differently by different courts. They have also stated that there may be merit in considering a more general review and codification of the law. If this work goes ahead any proposals for amending offences or changes to legislation would be some way off.

3.13 It is recommended that contempt cases are not included within the scope of this project for a number of reasons. Volumes of cases sentenced are low and given the complexity of procedure for these cases it would be very difficult to develop a guideline, it would probably need to be 3 or 4 guidelines, depending on venue, type of contempt, and so on. The fact that it would be difficult is not a reason by itself not to try to develop the guidelines, but it would be time consuming and for such volumes it may not be the best use of Council's limited time with a full work plan. In addition, there is also the potential work in this area by the Law Commission. If the Council wished to develop guidelines for contempt more work would need to be done to scope out exactly what this would involve and would slow down the project from the timescales outlined at the start of the project. It may be helpful to note that Juliet, the guideline lead, supports both recommendations not to include perjury or contempt offences within the scope of the project.

Question 3: Does the Council agree not to include contempt offences within the scope of the project? Or are there any compelling reasons why the Council think it should be included?

Assisting an offender

3.14 There is also no current guideline for assisting an offender offences. This offence (section 4 of the Criminal Law Act 1967) occurs when someone who knows or believes another person has committed an offence (and that person **has** committed that or another offence) does something to impede the arrest or prosecution of the other person. The offence of assisting an offender can be an alternative to the principal offence – so, for example, if two defendants are charged with murder it is possible that one might be convicted of the murder and the other of assisting an offender.

3.15 The offence can only be committed where a relevant offence has previously been committed by the person assisted, and proof of that person's guilt is an essential element in proof of this offence – although this does not necessarily mean that the other person has to have been convicted of the principal offence. Where there are issues around proving that the principal offence was committed an alternative would be to charge perverting the course of

justice. The maximum sentence depends upon the offence committed by the other person:

- Where the principal offence is murder: maximum is 10 years
- Where the principal offence is subject to a sentence of 14 years, the maximum is 7 years
- Where the principal offence is subject to a sentence of 10 years, the maximum is 5 years
- In other cases: the maximum is 3 years

3.16 In 2019, around 80 offenders were sentenced for this offence. The different statutory maximum depending on the principal offence would make this a complicated guideline to develop. It is recommended that this offence is not included within the project for a number of reasons. There are very low volumes of cases each year, and although there are guidelines for other offences with low volumes and there are guidelines which have more than one stat max, the project would be time consuming and for low volumes it may not be the best use of Council resources to include this offence with a full work plan. In addition, courts could use the new PTCJ guideline as an analogous offence to this one to assist when sentencing in the absence of an offence specific guideline.

Question 4: Does the Council agree not to include assisting an offender offences within the scope of the project? Or are there any compelling reasons why this offence should be included?

Question 5: Are there any other related offences the Council thinks should be considered to be included within the project?

4 EQUALITIES

4.1 The available demographic data, (sex, age group and ethnicity of offenders) will be provided and examined to see if there are any concerns around potential disparities within sentencing. However, due to the low volumes of many of these offences it may not be possible to draw any conclusions on whether there are any issues of disparity of sentence outcomes between different groups. However, care can be taken to ensure that the guideline operates fairly.

Question 6: Does the Council have any particular concerns around equalities for these offences at this early stage of the project?

5 IMPACT AND RISKS

5.1 There have been no risks identified at this early stage of the project.

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Annex A: Number of adult offenders sentenced for perverting the courts of justice offences, 2010-2020.

	Number of adult offenders sentenced										
	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020[1]**
Perverting the course of justice	1,114	984	870	932	929	898	781	788	629	576	404
Intimidating a witness	430	438	322	327	364	405	413	324	275	213	154
Threatening a witness	105	80	67	48	50	52	48	48	30	24	21
Perjury (section 1)	0	1	1	3	5	4	0	0	0	0	0
Perjury (section 1A)	0	2	3	1	6	11	12	11	3	4	3
Contempt of court (summary)	0	66	55	60	67	73	70	86	76	52	20
Contempt of court (indictable)	0	0	0	0	0	1	0	0	0	0	0
Assisting an offender - murder	11	16	10	17	12	23	28	16	18	26	16
Assisting an offender - indictable offence (except murder)	51	38	34	57	40	38	47	33	31	41	18
Assisting an offender - triable either way offences only	5	15	14	14	15	16	7	17	10	12	8
Total	**1,716**	**1,640**	**1,376**	**1,459**	**1,488**	**1,521**	**1,406**	**1,323**	**1,072**	**948**	**644**

Source: Court Proceedings Database, Ministry of Justice

Note:

1) Figures presented for 2020 include the time period since March 2020 in which restrictions were placed on the criminal justice system due to the COVID-19 pandemic. It is therefore possible that these figures may reflect the impact of the pandemic on court processes and prioritisation and the subsequent recovery, rather than a continuation of the longer-term series, so care should be taken when interpreting these figures.

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Sentencing Council

Sentencing Council meeting:	**30 July 2021**
Paper number:	**SC(21)JUL05 – Immigration and animal cruelty options paper**
Lead Council member:	**n/a**
Lead official:	**Ollie Simpson 07900 395719**

1 ISSUE

1.1 Whether to prioritise immigration or animal cruelty guidelines in the remainder of 2021.

2 RECOMMENDATION

2.1 That the Council prioritises work on revising animal cruelty guidelines for the next half of the year, and then turns to immigration offences, for consultation to come shortly after with Royal Assent of the Nationality and Borders Bill.

3 CONSIDERATION

Immigration

3.1 The Council decided in 2020 to decouple the strands of modern slavery and immigration, to prioritise the work done on the modern slavery guideline, and to wait until the end of the Brexit implementation period to see what changes might result for immigration offences.

3.2 With the forthcoming publication of the modern slavery guidelines, it is open to us to pick up work on the immigration guidelines with the aim of developing drafts for consultation at the end of the year/start of 2022. As a reminder the current agreed scope of the guidelines is as follows (with volumes for recent years):

Legislation	Offence	Stat Max	2018	2019	2020
Immigration					
Immigration Act 1971 s25(1) and (6)	Do an act to facilitate the commission of a breach of UK immigration law by a non-UK national.	14 yrs	226	184	107
Immigration Act 1971 s24A(1)(a), s24A(1)(b) and (3)	Seek / obtain leave to enter / remain in UK by deceptive means - immigration. Secure avoidance of enforcement action by deceptive means	2 yrs	12	6	6

Immigration and Asylum Act 1999 s91(1)	Provide an immigration service in contravention of a prohibition. Provide an immigration service in contravention of a restraining order.	2 yrs	7	4	3
Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s2(1)	Entering the UK without a passport	2 yrs	1	0	0
ID cards *(NB – not all of these volumes will relate to immigration)*					
Identity Documents Act 2010 s4	Possessing or controlling identity documents with intent	10 yrs	409	361	235
Identity Documents Act 2010 s6	Possessing or controlling a false or improperly obtained or another person's identity document	2 yrs	110	87	68

3.3 Note that volumes are low for several of these offences although the figures for 2020 will be affected by the circumstances of the pandemic[1], and the figures may in future be influenced by different enforcement strategies.

3.4 The legislation is in the process of being updated, via the Nationality and Borders Bill, introduced to Parliament on 6 July. This will see the maximum penalty for section 25 offences (i.e. those targeted at the people traffickers) raised from 14 years to life imprisonment.

3.5 In doing so, the Bill will also raise the maximum penalty for section 25A offences (helping an asylum seeker to enter the UK) from 14 years to life; that offence is also being amended to remove the requirement that assistance be for gain. The Bill also amends the existing offence of knowingly entering the UK in breach of a deportation order or without leave (section 24(1)(a) of the Immigration Act 1971), which currently is summary only with a maximum of six months' imprisonment. If passed, this would be split into the following updated offences:

- knowingly entering the UK in breach of a deportation order (maximum: 5 years' imprisonment);

[1] Figures presented for 2020 include the time period since March 2020 in which restrictions were placed on the criminal justice system due to the COVID-19 pandemic. It is therefore possible that these figures may reflect the impact of the pandemic on court processes and prioritisation and the subsequent recovery, rather than a continuation of the longer-term series, so care should be taken when interpreting these figures.

- knowingly entering the UK without permission to do so (maximum 4 years' imprisonment);
- knowingly arriving in the UK without valid entry clearance (maximum 4 years' imprisonment).

3.6 We have not so far proposed to produce guidelines for these offences' predecessor offence. They may prove controversial, with higher maximum penalties intended to target individuals seeking to enter the country rather than traffickers. At the same time, the CPS has recently issued guidance on prosecuting those crossing by boats and their traffickers:

> *"Depending on whether there may be aggravating factors, such as repeat offending, or those seeking to enter the UK in breach of a deportation order, prosecutors should consider approaching the occupants of vehicles and vessels (the "passengers") in accordance with the factors set out in the CPS Immigration Legal Guidance, which provides the guiding principles to be applied.*
>
> *Approaching cases in this way, it is unlikely that passengers of vehicles or boats would be prosecuted. In these cases, passengers may have committed a summary only offence and IE should give consideration to administrative removal rather than prosecution. The focus for prosecutions should be on those with more significant roles, i.e. those that facilitate the entry.*
>
> *The same approach should be taken to those who are simply passengers in boats as to those found in vehicles. Further, if the boat has been intercepted, then it is unlikely that an offence of illegal entry under s.24(1)(a) Immigration Act 1971 is made out."*

3.7 There is therefore a question (at some point) for the Council about whether to bring these offences within scope.

3.8 The remaining offences within scope are, to the best of my knowledge, intended to stay the same. An imperative for acting on these sentencing guidelines is that the existing identity documents guideline is well out of date, based as they are on predecessor legislation to the Identity Documents Act 2010. As mentioned in Ruth's paper on miscellaneous amendments, we can mitigate this problem in the short term by simply removing the old guideline from the website.

Animal Cruelty

3.9 The Animal Welfare (Sentencing) Act 2021 received Royal Assent on 29 April and came into force on 29 June. Fuller background to the Act is included in and annexed to Ruth's miscellaneous amendments paper. In short, it has increased the maximum penalty for

the following Animal Welfare Act 2006 offences from six months (summary only) to five years' imprisonment:

- section 4 (causing unnecessary suffering);
- section 5 (mutilation);
- section 6 (tail docking);
- section 7 (poisoning); and
- section 8 (fighting).

3.10 Of these, a magistrates' sentencing guideline exists for unnecessary suffering and fighting. This guideline also covers the offence of breach of duty of person responsible for animal to ensure welfare (section 9), but the maximum penalty for this offence is unchanged at six months, summary only. This guideline was revised in 2017 after consultation on the magistrates' sentencing guidelines, but will now need to be updated following the significant increase in maximum penalties for sections 4 and 8.

3.11 The volumes for these offences (including those without guidelines) are as follows:

Legislation	**Offence**	**2018**	**2019**	**2020**
Animal Welfare Act 2006, s4	Causing, permitting or failing to prevent unnecessary suffering	608	551	298
Animal Welfare Act 2006, s5	Carrying out, permitting or causing to be carried out or failing to prevent prohibited procedure on a protected animal	1	3	2
Animal Welfare Act 2006, s6	Removing or causing or permitting or failing to prevent removal of dog's tail other than for medical treatment	1	0	1
Animal Welfare Act 2006, s7	Administration of poisons etc to a protected animal	0	0	0
Animal Welfare Act 2006, s8	Offences relating to animal fights	9	0	0
Animal Welfare Act 2006, s9	Failing to ensure needs of animal are met as required by good practice	156	136	48

3.12 The custody rate for section 4 offences in 2020 was 12 per cent, while the rate for section 9 was 4 per cent (representing two individuals). Where custody was imposed, the average custodial sentence length for section 4 was 4 months (we have not calculated the ACSL for section 9 as the volume of offenders sentenced to immediate custody is so low). It

should be noted that while volume of offenders sentenced for these offences in 2020 were considerably lower than those seen in 2019 (due to the circumstances of the pandemic), trends in sentencing outcomes and ACSL have remained broadly stable.

Prioritising

3.13 Following publication of the definitive modern slavery guideline and consideration of the revised sex offences guideline, I will be able to continue work on one additional project. One option could be to start immediately on immigration offences, although there would seem to be little benefit in consulting on draft guidelines ahead of the Nationality and Borders Bill completing its passage (expected in Spring 2022). One can imagine some changes to the Bill's content, particularly in the House of Lords.

3.14 The animal cruelty guidelines may not necessarily be straightforward – in particular raising the maximum penalty so significantly from six months to five years – but it would be a fairly limited, self-contained project, which should largely be a matter of identifying particularly heinous forms of the offending and separating these out to higher levels of harm and culpability. In principle it should be possible to consider a draft in two or three meetings and aim to launch a consultation at the end of the year. I can then go on to consider immigration offences, which are likely to represent a bigger project for a Summer 2022 consultation.

3.15 An alternative option would be to commit the rest of this year and the first part of next to immigration, acknowledging it is a larger and more controversial topic. We could then be sure of being ready with draft guidelines for consultation to coincide with Royal Assent of the Bill. In the meantime, we could consult on interim guidance on animal cruelty, as suggested by Ruth in her paper. However, whilst immigration is a big topic, I cannot see it occupying so much of mine or Council's time as to justify that latter approach.

3.16 A further possibility would be to extract identity document offences from the scope of the immigration guidelines and consult on those in the autumn, given how out of date the existing guideline is (albeit we propose removing those from the website). The volumes, particularly of section 4 possessing or controlling ID documents with intent cases, could justify this. Nonetheless, I would still recommend prioritising animal cruelty given how recently the maximum penalty was raised, and the thematic similarities between ID cards and immigration.

3.17 In any event, whether animal cruelty or immigration is prioritised now, we would then be able to develop the other one in due course in the first part of 2022.

Question: do you agree to prioritise the revised animal cruelty guidelines now, and return to immigration early in 2022?

4 EQUALITIES

4.1 We will consider equalities issues in the usual way as part of guideline development and publish breakdowns of the demographics of offenders. Clearly it is likely that a high proportion of immigration offenders will be non-British. We will consider the demographic data as part of the project, although given the high proportion of summary offences involved, we may not have the full picture of offenders' characteristics.

4.2 The majority of animal cruelty offences are dealt with at magistrates' courts and, as such, there are limited data regarding the ethnicity of these offenders (in 2020, the ethnicity was unknown for around 83 per cent of offenders sentenced). This means that we are unable to examine accurately the presence of any sentencing disparities.

5 IMPACT AND RISKS

5.1 We will consider the impact of the guidelines in the usual way although existing trends in sentencing volumes may not be indicative of the future both because of the pandemic and, in the case of immigration, a change in enforcement strategy alongside and because of the new legislation.

5.2 For animal cruelty, DEFRA estimates that 25 cases per year will now be heard in the Crown Court rather than the magistrates' courts, that there will be no change in the custody rate for section 4 offences, and an increase in ACSL for offences under sections 4 to 7 from 3.6 months to 5.6 months, which will have a small impact on prisons.

5.3 The explanatory notes to the Nationality and Borders Bill state that "*The main public sector financial implications of the Bill fall to the Home Office, Ministry of Justice and associated criminal and civil justice agencies. The estimated annual cost of the measures in the Bill are not yet finalised. These are being worked through as part of the business case*." An impact assessment is expected to be published very shortly.

5.4 A longer delay to immigration guidelines is defensible given the changes in penalties. As mentioned above, the existing identity guidelines can be removed from the website as being out of date. The Office of Immigration Services Commissioner were pressing for a section 91 guideline several years ago, given they are currently relying on fraud offences due in part, they say, to the lack of a guideline, but they have not lobbied strongly on this recently.

5.5 Extending the maximum penalties for animal welfare offences from six months to five years represents a challenge in meeting Parliament's intention, and the same is true of the

revised immigration offences mentioned above should the Council wish to include them within scope.

5.6 Some or all of the immigration offences and associated penalty increases are likely to be controversial during the Bill's passage. Depending on the extent to which we widen the project's existing scope we may see the Council drawn into the wider debate around tackling illegal immigration and the status of asylum seekers. Equally, questions around animal sentience and even pet theft could be (re)ignited by consulting on animal cruelty guidelines.

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Sentencing Council

Sentencing Council meeting:	**30 July 2021**
Paper number:	**SC(21)JUL06 – Modern Slavery**
Lead Council member:	**Rosina Cottage**
Lead official:	**Ollie Simpson** **07900 395719**

1 ISSUE

1.1 Consideration of a consultation response from the Independent Anti-Slavery Commissioner (IASC), Dame Sara Thornton, which was not received in the consultation inbox. The response is also attached in full at **Annex A**.

1.2 The response and a commentary have been circulated and this paper summarises the main points and recommendations arising, which Council members will already have seen. A revised version of the guidelines for sections 1 and 2, section 4 and section 30 is at **Annex B** with further amendments highlighted. If we are able to agree on this and the draft consultation response document which has been sent round separately, our aim is to publish the definitive guidelines on 12 August, to come into force on 1 October.

2 RECOMMENDATION

2.1 That Council:

- adds a new aggravating factor relating to the victim being forced to commit criminal offences;
- inserts a reference to the use of pre-sentence reports in the drop down information on imposing Slavery and Trafficking Prevention Orders;
- adds wording into the section 4 guidance about an offender being a victim of modern slavery or coercion;
- considers whether any further points from the IASC's response should be incorporated in the definitive guideline.

3 CONSIDERATION

Culpability

3.1 The IASC suggests that we should avoid a focus in the culpability table on threats of violence and sexual violence, either by including a more comprehensive list of possible means of control, or avoid any reference to the means of control but describe instead the extent of control achieved.

3.2 We have discussed in some detail how to capture non-violent psychological abuse and control under culpability and this is a variant on that debate. It would not be feasible to list all the different methods of control set out on pages 1 to 2 of the response, so the remaining question is whether to include the various different threats under culpability at all. Control may well be manifested in other ways, but all of this offending involves coercion or control at some level. The added factor of the threat of violence is specifically listed as the Council felt that this behaviour was over and above what would be expected as part of the offending and sufficiently aggravating to be a culpability factor. In any case, threats are simply one factor at each of the levels: other elements such as role in the offending, the scale of the operation and the sorts of advantage envisaged are also present.

3.3 The IASC is also against a focus on financial advantage in the culpability table, arguing that "the depth of the deprivation, control and suffering exacted upon the victim(s) is much more relevant to culpability in slavery offences than the offender's intended gain." Again, financial or material advantage does not necessarily have to be present for an offender to be placed in a higher culpability category. It is only one of a number of factors and the financial gain/advantage sought ought to be relevant to this offending, even if not the single conclusive factor. Furthermore, the court will go on to consider the harm done to an individual.

Question 1: Do you agree not to make any further amendments to the culpability table?

Harm

3.4 The IASC suggests that we should remove the words "after the offending has ceased" from the harm factor "Substantial and long-term adverse impact on the victim's daily life after the offending has ceased", on the basis that the harm being caused *during* the offending are as important to recognise. Arguably the wording does represent a tautology, but the harm table overall does allow both present and long-term harm to be captured.

3.5 It is also suggested that substantial financial loss be reflected in Category 2 harm. However, there is always a degree of financial disadvantage to victims of modern slavery. We have deliberately chosen to reflect the financial harms in the two lower categories in order to separate out the most serious harms done to a victim on a scale for the sentencing court.

3.6 The IASC also suggests that we reflect under harm: i) sexual harm; ii) the harm caused by wider offending which results; and iii) the wider harms to society of modern slavery. We have already sought to address (i) by adding a reference to being coerced or deceived into sexual activity. We have discussed a similar point to (iii) which was made by

MoJ and the Home Office and have agreed that this is already reflected in high sentencing levels. I propose below addressing (ii) by way of an aggravating factor.

3.7 The preamble before the harm table in the current draft contains a caution about inferring anything about absence of evidence from victims. Almost all respondents were content with this text, and we have so far resisted adding further detail about how the court should go about assessing evidence. The IASC thought we should ask sentencers to treat any evidence about the apparent consent of the victim with caution:

> "I would suggest the inclusion of additional wording regarding apparent victim 'consent' to the nature of the work or the movement, which has been a factor previously identified as mitigation of harm. Where modern slavery offences have been proven in respect of a victim, the sentencing judge should take a deeply critical view of whether the victim was able to give consent to anything which took place at the direction of the offender, be it physical labour, sexual activity, or criminal activity. If we consider the definition of consent used for sexual offences, the victim must "agree by choice, and have] the freedom and capacity to make that choice". Consent is positive and active and differs from submission. A victim subjected to slavery, servitude or exploitation is very unlikely to be able to have the freedom and capacity to make a free choice without adverse consequence."

3.8 One way of incorporating this into the draft would be as follows (adding the wording in bold:

"The assessment of harm may be assisted by available expert evidence, but may be made on the basis of factual evidence from the victim, including evidence contained in a Victim Personal Statement (VPS). Whether a VPS provides evidence which is sufficient for a finding of serious harm depends on the circumstances of the particular case and the contents of the VPS. However, the absence of a VPS (or other impact statement) should not be taken to indicate the absence of harm.

Loss of personal autonomy is an inherent feature of this offending and is reflected in sentencing levels. The nature of the relationship between offender and victim in modern slavery cases may mean that the victim does not recognise themselves as such, may minimise the seriousness of their treatment, may see the perpetrator as a friend or supporter, or may choose not to give evidence through shame, regret or fear. ***Equally, assertions of a victim's apparent consent to their treatment should be treated with caution.***

Sentencers should therefore be careful not to assume that absence of evidence of harm from those trafficked or kept in slavery, servitude or in forced or compulsory labour indicates

a lack of harm or seriousness. A close examination of all the particular circumstances will be necessary."

3.9 On balance, I believe even this adds too much to an already long preamble and it is likely in any case judges will be unimpressed by any such argument in mitigation. The question of the victim's apparent consent should ideally not be a live one by the time of sentencing: in modern slavery cases it is not conclusive of anything in relation to guilt, and we do not reference it elsewhere in the guideline.

Question 2: do you agree not to make further amendments to either the Harm table or its preamble?

Sentencing levels

3.10 It is important to reflect on the Commissioner's view that the proposed sentencing levels are not high enough:

> "It is the Commissioner's view that these sentences are inadequate to achieve the goal of deterring modern slavery offences, and ending the impression that it is a 'low risk high reward' crime type which can be practiced with some impunity in the UK. Offenders who violate the liberty and dignity of victims by treating them as property, working them for their own financial benefit on a large scale and moving them around the country by force, threat and deception should receive sentences which are commensurate with this egregious criminality. It cannot be appropriate, or the expectation of the public, that being concerned in the trafficking of drugs poses a greater risk of a significant custodial sentence than being concerned in the trafficking and exploitation of people. It is strongly hoped that the result of the publication of this guidance will result in longer sentences being applied to modern slavery offenders.
>
> In considering the matrix of sentences in the draft guidelines, I remain concerned that, with the culpability and harm factors as they currently are, sentences are unlikely to increase significantly following their implementation, especially in the area of labour abuse.
>
> Where the IASC office is aware of long sentences being given (10+ years), almost invariably this is linked to sexual exploitation – forcing women into prostitution. This is consistent with the draft guidelines as it is likely to attract the highest culpability category but illustrates the point that I raised when discussing culpability about underestimating the severity of other forms of the offence."

3.11 We have considered previously a few responses which have proposed higher sentencing levels, particularly at the higher end of seriousness. We have chosen not to

increase these levels and Council members will recall that we are now lowering sentencing for most low culpability offenders.

3.12 I do not believe we should amend the sentencing levels in light of this response: the sentencing levels we are proposing are very substantial and comparable with some of the worst categories of offending. However, we can and should refer in the consultation response document to the fact we expect sentences to rise following introduction of the guideline. The point the Commissioner makes about sexual offences is precisely why we have been cautious about adding anything specific on sexual exploitation under harm (and again we will refer to that in the response document).

Question 3: do you agree not to amend the sentencing levels?

Aggravating and mitigating factors

3.13 The IASC suggests a number of additional aggravating factors, two of which particularly I think are worthy of consideration. The impact on victims of being forced to commit crimes was raised by a number of respondents to the consultation, and is an example of the knock-on harms caused by modern slavery. As much as anything else, being forced into criminality exerts even greater pressure upon victims, in placing them in conflict with the police and authorities and making them less likely to report being a victim. The IASC suggests it either as a harm factor or as an aggravating factor, and I believe it sits better as the latter. Given the possibility of a section 45 defence for much offending, we would need to be clear that this aggravation could apply whether or not that defence had been deployed successfully.

3.14 A further suggestion is to cover living conditions as an aggravating factor. This is an important and striking part of the background of many modern slavery cases so there is a case for including it somewhere in the guideline. The most likely place would be as an aggravating factor. However, on balance I believe this would be considered in some form as part of harm (or risk of harm) and it is such a commonplace problem in modern slavery offending there is a risk of it being used in too many cases.

Question 4: do you agree to add a new aggravating factor *"victim forced to commit criminal offences (whether or not he/she would be able to raise a defence if charged with those offences)"*?

Question 5: do you agree not to include an aggravating factor relating to living conditions?

Further steps

3.15 The IASC response highlights Home Office guidance which points to the use of pre-sentence reports in determining whether to impose a Slavery and Trafficking Prevention Order (STPO):

"The evidence presented at the trial is likely to be a key factor in the Court's decision [whether to impose an STPO], together with the offender's previous convictions and the assessment of risk contained within the pre-sentence report."

We have already agreed to put further information in a drop down here relating to the considerations a court must make when imposing an STPO and I can see no objection to inserting a reference to getting information from PSRs. I propose the following addition (in bold):

"The risk that the offender may commit a slavery or human trafficking offence must be real, not remote, and must be sufficient to justify the making of such an order. In considering whether such a risk is present in a particular case, the court is entitled to have regard to all the information before it, ***including the contents of a pre-sentence report,*** *or information in relation to any previous convictions, or in relation to any previous failure to comply with court orders."*

Question 6: do you agree to add a reference to the use of information in pre-sentence reports in the drop-down guidance on imposing STPOs?

Section 4 guidance

3.16 The draft guidance we consulted on for section 4 offences (committing an offence with the intention of committing a trafficking offence) suggests starting points commensurate with the underlying offence, but with an uplift of up to two years. The IASC suggests that we should reference specifically the mitigation available to those who may have been victims of modern slavery or other forms of coercion.

3.17 We are clear that the extent of any uplift will depend on the facts of the case and the seriousness of the offending done and intended, so it may be useful to mention this potentially important mitigation here, bearing in mind it is just one of many factors judges will consider in these cases. The revised wording would be:

"The starting point and range should be commensurate with that for the preliminary offence actually committed but with an enhancement to reflect the intention to commit a human trafficking offence. The enhancement will vary depending on the nature and seriousness of the intended trafficking offence, and the seriousness of the preliminary offence, ***and the extent to which the offender was themselves the victim of modern slavery, pressure,***

***coercion or intimidation**, but up to 2 years' custody is suggested as a suitable enhancement. Sentencers should also take into account the totality of offending (see the Totality guideline in particular where the preliminary offence or other modern slavery offences are to be sentenced alongside the section 4 offence."*

Question 7: do you agree to add some specific wording about taking into account the extent to which someone is coerced or a victim of modern slavery in deciding on an appropriate uplift in a section 4 case?

Question 8: are there any other points raised by the IASC that you would like to reflect in the definitive guideline?

4 EQUALITIES

4.1 Nothing further as a result of the response or the changes proposed above.

5 IMPACT AND RISKS

5.1 The revised resource assessment has been circulated for comments. It is estimated that the guideline may result in a requirement for up to around 40 additional prison places per year, driven by longer custodial sentence lengths under the guideline and, to a lesser extent, by a decreased use of suspended sentences and an associated increased use of immediate custody. This overall position has not changed since the consultation draft stage resource assessment and is unchanged as a result of the amendments proposed in this paper.

5.2 Some people, including the Commissioner herself, may be concerned about the decrease in sentencing levels for low culpability offenders. We can explain the reasoning behind this in the consultation response document, making the point that sentencing levels for this category are still higher than under the existing section 59A guideline.

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Independent Anti-Slavery Commissioner's (IASC) Response to Sentencing Council Consultation on Modern Slavery Offences

Written by Detective Inspector Richard Marsh, Law Enforcement Policy Lead, and reviewed and endorsed by Dame Sara Thornton, the Independent Anti-Slavery Commissioner.

Question 1: Do you have any comments on the proposed culpability factors?

1.1 – Culpability factors need more flexibility to address the range of methods to control a victim.

The draft guidelines succeed in avoiding unhelpful stereotypes of locks and chains by the removal of 'physical restraint' from the culpability factors. However, the current draft describes culpability category A as involving "Use or threat of a substantial degree of physical/sexual violence or abuse". As a consequence, other equally damaging methods of control are unlikely to be sentenced in this highest culpability category regardless of the degree of control over victims, which can be considerable.

One benefit of publishing new sentencing guidelines is to increase awareness of the broad range of methods of control available and acknowledge that an apparent absence of physical restraint or violence does not indicate a lack of control (as is also the case in domestic abuse). Research completed in European criminal businesses has found evidence of exploiters deliberately avoiding violence and threats because they attract the attention of authorities and lead to increased sentences[1]. It is important that the culpability scoring is flexible enough to reflect the variety of methods available to offenders.

I see two possible solutions to resolve this issue. One is to include other methods of control in the culpability factors, at the levels the Council feels appropriate. A second might be to exclude specific methods entirely and instead address the degree or extent of control of the victim(s) achieved. The use of physical and sexual assault/threat could then be addressed specifically in the harm section or the aggravating factors.

Examples of other methods which could be included are:

- Deception, fraud and misinformation
- Coercion
- Isolation physical, digital, cultural and linguistic
- Degradation, indignity and antilocution
- Fatigue
- Debt bondage
- Financial ruination such as taking out loans in their name
- Spiritual/religious manipulation

[1] Simone Eelmaa, in "Shady Business: Uncovering the Business Model of Labour Exploitation", The European Institute for Crime Prevention and Control, affiliated with the United Nations, 2020, Pg 14, and in correspondence with IASC office, unpublished.

- Deprivation of food and poor nutrition
- Addiction to drugs and alcohol
- Removal of documents
- False interpreters
- Identity theft
- Close supervision and incentivising informing on other victims
- Instilling fear of state authority
- Intimidation by the reputation of the OCG even where direct threat is absent
- Engaging victims in criminality

These involve the calculated control of the victim by the offender, the subjugation of their dignity and will, and the suppression of their ability to leave servitude or ask for help. Where deployed in combination they should attract a high degree of culpability as they represent the mischief which the Modern Slavery Act was intended to address – the control and exploitation of human beings.

I have considered the sentencing guidelines for related and precursor offences to determine how the Council addressed the offender's method of control. The sentencing guidelines for the offence under s.59A Sexual Offences Act, trafficking for sexual exploitation, included references to psychological abuse, coercion, deception and trick in the category 1 harm factors, and no reference to specific method in culpability factors. If the specific offence for trafficking for sexual exploitation does not require a substantial degree of sexual abuse to reach the highest culpability category, it does not seem consistent to require this for the generic trafficking offence.

1.2 Reference to 'substantial financial advantage' should be removed from culpability factors

Modern slavery and human trafficking are normally motivated by financial advantage, but proving this is not a requirement of the offences as it is in, for example, s.1-4 Fraud Act 2006. Modern slavery and trafficking may be intended to bring a gain to the offender, but they are primarily offences committed against the person rather than against property. It may be the case that other offences against the person are also committed for gain, but this does not feature in the sentencing guidelines. Even robbery does not require a view to substantial financial advantage for the highest culpability category. I am, therefore, concerned that the scale of the (intended) financial advantage should be such a prevalent part of these draft sentencing guidelines; the personal impact of modern slavery offending could be very substantial without the offender standing to gain much more than a modest gain. In contrast, relatively low-level exploitation could be more profitable. It would be my view that the depth of the deprivation, control and suffering exacted upon the victim(s) is much more relevant to culpability in slavery offences than the offender's intended gain.

1.3 Targeting of particularly vulnerable individuals is correctly placed in the aggravating factors

It is noted that "Deliberate targeting of particularly vulnerable victims" is included in the guidelines as an aggravating factor. I have considered whether this should be included in the culpability factors and therefore more directly influence the starting point for sentencing. This is a factor that is included in culpability factors for some offences which can take advantage of vulnerability (such as theft and fraud), but in the aggravating factors for others (such as rape and robbery). Modern slavery offending targets vulnerability almost by definition. It is important to acknowledge where particularly susceptible people have been targeted (e.g. children or substance dependant adults), but on balance I believe the guidance has correctly done so at the aggravating factors phase. Including it as a culpability factor might imply that the abuses exacted on less traditionally 'vulnerable' individuals indicate a lesser degree of criminal responsibility when in fact the methods used to control them may be more intense or harmful.

1.4 Multiple victim/large scale offending is correctly placed in the aggravating factors

I have followed with interest the discussion throughout the drafting process of the fact that the culpability stage does not distinguish between single and multiple victim cases, or the scale and scope of the criminal business model employed. In most organised crime, such as drug supply, you would expect to consider culpability at least partly by this method. There is understandable concern that including language to this effect in the higher culpability category would mean that the most inhumane of abuses of individuals in unsophisticated setups would not reach the higher sentencing categories by virtue only of their lack of scale. While many offenders target multiple victims, some typologies such as domestic servitude may not. I am reminded of the case in South Wales[2] where a family held a single individual on a scrapyard and caused him a great deal of physical and psychological harm, while forcing him to work 16 hour days with minimal food and only a squalid caravan for shelter. An unsophisticated MO, a single victim held in a single place and working directly for the offender, but the culpability of the offenders was not diminished by this. In light of this, I agree with the Sentencing Council's decision to exclude this factor from determining culpability and note that it is included in aggravating factors to prompt sentencing judges to consider this element at that stage.

1.5 It is appropriate that "pressure, coercion or intimidation" is included in the lowest culpability category

International efforts to combat trafficking have established the 'non punishment principle' for persons who have been victims of slavery and trafficking and have been compelled to commit crime as a result.[3] The Modern Slavery Act creates a statutory defence under s.45 which is intended to enshrine this protection in domestic law. Combined with the general defence of duress and the consideration of the Public Interest test in the Code for Crown Prosecutors, the courts have held recently (R v A 2020) that the UK has met its international obligations in this area. Offences under the Modern Slavery Act itself are excluded from the statutory defence as per Schedule 4 of the Act. The result of this position is that circumstances may arise where the court must sentence someone for a s.1 or s.2 offence who has themselves been a victim of exploitation. Inclusion in the draft culpability factors of "pressure, coercion or intimidation" is a good reminder that these offenders should be assigned the lowest category of culpability.

Question 2: Do you have any comments on the proposed harm factors?

2.1 Impact of the offending while it is continuing should be included in the harm factors

Modern slavery offences can result in significant and long-term impacts on victims and, while the offending continues, lost freedom and the deprivation of basic necessities. It is laudable therefore that the harm factors in this draft guideline take account of the wide range of impact of offending - physical, psychological, and social. I do not think, however, that the harm factor "Substantial and long-term adverse impact on the victim's daily life" should include the caveat "after the offending has ceased". Modern slavery offences continue over a long period of time and deprive the victim of their liberty, free expression, and private and family life, while they are ongoing. In this they resemble the 'coercive and controlling behaviour' offence in domestic abuse cases. As the preamble to the harm factors states, "loss of personal autonomy is an inherent feature of this offending". It is my belief that the harms present *during* the offending are as important to recognise as those that remain after it is over, and this would also be consistent with the sentencing guideline for Coercive and Controlling Behaviour. In the same manner that someone who is wrongly imprisoned by the state can claim compensation for that loss of liberty regardless of any long term or lasting effects, a

[2] "Pair jailed for holding man as slave at scrapyard in south Wales", *The Guardian*, 14 June 2019.

[3] Issue Brief: Non Punishment of Victims of Trafficking, ICAT (Inter-Agency Coordination Group against Trafficking in Persons) Bulletin 08/2020 page 1.

person who is held in servitude is harmed solely by virtue of being so held, and having their life and autonomy interrupted by the offender.

2.2 Substantial financial loss to victims should be included in the higher harm factors

Having discussed in my answer to question 1 why I believe offender financial advantage should not dictate culpability, I believe that the opportunity to address financial *harm* exists in this section. Categories 3 and 4 reference financial loss but categories 1 and 2 do not. I would like to see reference to substantial financial loss to the victim included in these higher categories, as cases may involve many years of withheld wages and widespread financial damage by means of defaulted credit and loans, benefit fraud, etc. There are also additional categories of harm which the Council may consider mentioning specifically, including sexual, where victims may have been subjected to rapes by multiple persons, and the detrimental consequences which result from being drawn into criminality. For example, the potential criminal justice consequences a victim may face from being forced to beg are significantly less than those of stabbing another person over a drug debt. This disparity in criminal exploitation could be reflected in the harm factors.

2.3 The guidelines should take account of the wider harm and costs of modern slavery

Currently, the harm factors in the draft guidelines focus only on harm to the individual victim. Modern slavery is a criminal business model and wider harm to society results from the operation of businesses using slave labour and poor working conditions.[4] They undercut legitimate businesses which are complying with the law, and encourage other societal harms such as immigration offending, health and safety breaches, and public health risks (such as those highlighted in the Labour Behind the Label report of June 2020 regarding the Covid-19 pandemic[5]). They engage in economic harms such as tax evasion, benefit fraud, corruption and fraudulent bookkeeping. Where the labour they are controlling is, in itself, criminal, these offences undermine public safety and encourage the proliferation of theft, drug offending, weapons and violence. The rise of the 'County Lines' business model for drug dealers in recent years has brought addiction, anti-social behaviour and violence to rural communities and is fuelled by the trafficking of large numbers of (primarily) children. I believe that the sentencing judge should consider this wider societal harm at this stage in the decision making.

Question 3: Do you have any comments on the additional wording at the head of the table?

3.1 The additional wording is appropriate and necessary

I strongly support the inclusion of this paragraph to direct sentencing judges to wider evidence of harm, in addition to that included in the victim's personal statement, highlighting that the nature of slavery and trafficking is that the victim may not identify as such. It should not be taken as lessening the impact of the offence that the victim has not engaged with the court process, and indeed may indicate a particularly closely controlled victim.

3.2 Additional wording is suggested regarding apparent 'consent' to exploitation

I would suggest the inclusion of additional wording regarding apparent victim 'consent' to the nature of the work or the movement, which has been a factor previously identified as mitigation of harm. Where modern slavery offences have been proven in respect of a victim, the sentencing judge should take a deeply critical view of whether the victim was able to give consent to anything which took place at the direction of the offender, be it physical labour, sexual activity, or criminal activity. If we consider the definition of consent used for sexual offences, the victim must "agree by choice, and

[4] Home Office, The Economic and Social Costs of Modern Slavery, 2018 https://www.gov.uk/government/publications/the-economic-and-social-costs-of-modern-slavery

[5] Boohoo & COVID-19: The people behind the profit, https://labourbehindthelabel.org/report-boohoo-covid-19-the-people-behind-the-profit/

[have] the freedom and capacity to make that choice"[6]. Consent is positive and active and differs from submission[7]. A victim subjected to slavery, servitude or exploitation is very unlikely to be able to have the freedom and capacity to make a free choice without adverse consequence. The rebuttable presumption in sexual offending that consent is not present where the victim is, at the time of the act, unlawfully detained or was caused to fear violence would be used against them appears very relevant to modern slavery cases.[8] It is also notable that a specific caution against assuming consent negated criminal harm was inserted into the Modern Slavery Bill by the House of Lords.[9] The methods of control that were relevant to the offender's culpability should be considered carefully when deciding what activity the victim of a modern slavery offence chose to undertake and what can be attributed to the offender's actions.

Question 4: Do you have any comments on the proposed sentence levels?

4.1 It is submitted that the Act *was* intended to raise sentences for slavery offences but has not done so

A year after the Modern Slavery Act was enacted, the then Prime Minister Theresa May wrote in the Sunday Telegraph that modern slavery was a "barbaric evil" that was "the human rights issue of our time". She wrote that the Act "delivered tough new penalties to put slave masters behind bars where they belong, with life sentences for the worst offenders."[10] It is apparent that her intent in presenting this bill before Parliament was to strengthen the United Kingdoms' response to modern slavery by deterring offenders and making this country a hostile place for their exploitative business models. The severity with which she viewed the offences is apparent from the decision to pass a maximum penalty of life imprisonment. I therefore disagree with the Council's interpretation of Mrs. May's comment about the "worst offenders" as indicating a lack of appetite for an overall uplift in sentencing.

The Independent Anti-Slavery Commissioner's office has examined a range of sentences passed both under the 2015 Act, and under the legislation in force prior to it. Comparing sentence lengths between cases is clearly difficult as the nuance of circumstance is lost, but it is consistently observed that the sentences are very low for such serious offences, and that the passing of the Act has not resulted in a noticeable increase in sentences despite the increase of the maximum penalty to life. In a sample of 45 cases we have ready access to, the median sentence passed was 5 years 6 months (in line with the Council's own observations) and the lowest was 13 months. Although the sample does contain recent sentences that are longer, these are exceptional. Many sentencing remarks from after the passing of the Act reference authorities based directly or indirectly on the previous legislation, which is likely why little increase is seen after 2015. The decision of Parliament to significantly increase the penalty does not appear to have been widely translated into practice.

4.2 Sentences currently passed often fail to reflect the severity of the offence and the draft guidelines insufficiently address this

It has been noted by correspondents with the Commissioner that sentences being passed for modern slavery offending are often of the scale that would be expected for burglars or drug

[6] S.74 Sexual Offences Act 2003
[7] R v Olugboja [1982] QB 320, Court of Appeal
[8] S.75 Sexual Offences Act 2003
[9] Lords Amendments to The Modern Slavery Bill, 5 March 2015, https://publications.parliament.uk/pa/bills/cbill/2014-2015/0184/150184.pdf enacted as Modern Slavery Act 2015, S.1(5),
[10] Defeating modern slavery: article by Theresa May, 30 July 2016, quoted on gov.uk, https://www.gov.uk/government/speeches/defeating-modern-slavery-theresa-may-article

offenders, rather than organised traffickers in human beings. Thames Valley Police, for example, identified a case where a man was sentenced to 5 years for two counts of s.1 and two of s.2 offences under the 2015 Act. His offending involved the exploitation of two mentally vulnerable victims using drug addiction and debt bondage for over a year. Yet his son, who was caught serendipitously during the investigation with an amount of class A and B drugs sufficient to convince a jury of intent to supply, received a very similar sentence. The officer in the case found this difficult to reconcile with the demonstrable human impact of the slavery offending.[11]

It is the Commissioner's view that these sentences are inadequate to achieve the goal of deterring modern slavery offences, and ending the impression that it is a 'low risk high reward' crime type which can be practiced with some impunity in the UK. Offenders who violate the liberty and dignity of victims by treating them as property, working them for their own financial benefit on a large scale and moving them around the country by force, threat and deception should receive sentences which are commensurate with this egregious criminality. It cannot be appropriate, or the expectation of the public, that being concerned in the trafficking of drugs poses a greater risk of a significant custodial sentence than being concerned in the trafficking and exploitation of people. It is strongly hoped that the result of the publication of this guidance will result in longer sentences being applied to modern slavery offenders.

In considering the matrix of sentences in the draft guidelines, I remain concerned that, with the culpability and harm factors as they currently are, sentences are unlikely to increase significantly following their implementation, especially in the area of labour abuse.

Where the IASC office is aware of long sentences being given (10+ years), almost invariably this is linked to sexual exploitation – forcing women into prostitution. This is consistent with the draft guidelines as it is likely to attract the highest culpability category but illustrates the point that I raised when discussing culpability about underestimating the severity of other forms of the offence. When labour exploitation cases are separated out from our examples, the average sentence passed drops to 4 years, compared to 8 years 7 months for sexual exploitation. Under the draft guidelines as they stand, such cases are very unlikely to ever achieve culpability category A or harm category 1 unless there is serious violence involved, limiting the starting point to 8 years at most. It is accepted that the purpose of sentencing guidelines is to set out a spectrum of severity for an offence type, and that in making one aspect more serious it cannot be avoided that other aspects are consequently less serious. But by focusing on sexual abuse and serious violence (already criminalised by other legislation), the effect is that the specific mischief addressed by the Modern Slavery Act is minimised.

Question 5: Do you have any comments on the proposed aggravating and mitigating factors?

Some of my commentary on the aggravating factors is reflected in my answers to questions 1 and 2 which I will not repeat except to reiterate the point that the methods of control (for example, the factors 'deliberate isolation' and 'passport or identity documents removed') reflect in my view the offender's culpability and should feature at step 1.

5.1 The word 'restrain' should be replaced with 'control'

The final aggravating factor, "substantial measures taken to restrain the victim" appears to reawaken the unhelpful stereotype of physical restraint which the Council has carefully exorcised from the culpability section. I would suggest the wording "substantial measures taken to *control* the victim" would direct the sentencing judge to the same point without implying a physical barrier (while allowing one to be considered if present). The aggravating factors should rightly reflect those

[11] Thames Valley Police, Op Marathon

circumstances where the offender has taken multiple or drastic steps to achieve the victim's submission and where the cruelty exacted has gone beyond that which is necessary to commit the offence. I therefore agree with the inclusion of the factor "gratuitous degradation of victim" to capture the more extreme actions of perpetrators.

5.2 Additional elements of offending may be considered aggravating

It is positive that some specific behaviours of traffickers are included in the aggravating factors, such as removing passports and other documents. Consideration should be given to including other aspects of offending as 'aggravating' such as:

- Other crimes committed as a result of the modern slavery offending (e.g. theft, drug supply)
- Significant financial advantage (if moved from 'culpability' as suggested)
- Aspects of identity theft – such as obtaining benefits or loans in the name of victims
- Risks to public health or safety as a result of offending (e.g. County Lines drug dealing, or work conditions which spread disease)
- Conditions (accommodation, food) of victim particularly squalid or of inadequate quality
- Removing or keeping a child from their legal guardian
- Legitimate companies undercut/out-competed by use of slave labour

5.3 Mitigating factors appear appropriate for the new guidelines

The mitigating factors appear appropriate and, again, fittingly include the situation of an offender who themselves has been trafficked in the past, as this is relevant to the 'alpha victim' scenario where prior victims of slavery progress into being recruiters and enforcers themselves. I have no further comments on the mitigating factors.

Question 6: Do you have any comments on the reference to the ancillary orders at step 7?

As well as achieving deterrent sentences for offenders, it is important that victims get the best chance of receiving reparations for the injustices they have suffered. I am pleased to see that guidelines include an explanation of Reparation Orders under the Modern Slavery Act and hope that this will increase their use.

Drawing attention to Slavery and Trafficking Prevention Orders is also appropriate as these provide long term control measures to prevent reoffending both while serving a sentence and after release. It may be appropriate to remind the sentencing judge of the Home Office Guidance on these orders which suggests a pre-sentencing report could be of great value for determining proportionate and effective conditions.[12]

Question 7: Do you have any other comments on the guideline for section 1 and section 2 offences?

No further comment.

Question 8: Do you have any comments on the approach to section 4 guidance?

The approach to sentencing section 4 offences, taken from the guidance for the analogous sexual offence, appears appropriate and the severity of the principle offence committed should naturally determine the starting point and range for this offence. Although no specific aggravating or mitigating factors are mentioned in this section as it is presumed those for the principle offence would apply, it may be of value to draw specific attention to the mitigation already discussed. This should be afforded to those who are themselves victims of slavery and trafficking offences, as the non-punishment principle and the analogous domestic law, unique to this offence type, may not be familiar to sentencing judges.

[12] "Guidance on Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders under Part 2 of the Modern Slavery Act 2015", Home Office Statutory Guidance, April 2017.

Question 9: Do you have any comments on the approach to section 30 guidance?

The guidance appears to be appropriately and succinctly worded and the analogy drawn with other breach offences appears sound. I have no further comment on this section.

Question 10: Is there anything else you wish to say about the proposed sentencing guidelines, which has not been covered elsewhere in this document?

The Commissioner believes that there is significant value in including the voices of survivors in the drafting of policy and guidelines in the field of modern slavery and human trafficking. Their perspective may identify factors which professionals who have never been subjected to these offences would not. If it has not done so already, I would encourage the Council through this consultation or other means, to actively seek the views of MSHT survivors.

Question 11: Do you consider that any of the factors in the draft guidelines, or the ways in which they are expressed could risk being interpreted in ways which could lead to discrimination against particular groups?

I have not identified any such issues in the draft guidance.

Question 12: Are there any other equality and diversity issues the guidelines should consider?

No further comments.

Slavery, servitude and forced or compulsory labour

Modern Slavery Act 2015 section 1

Human trafficking

Modern Slavery Act 2015 section 2

Triable either way

Maximum: life imprisonment

Offence range: high-level community order – 18 years' custody

These are Schedule 19 offences for the purposes of sections 274 and 285 (required life sentence for offence carrying life sentence) of the Sentencing Code.

For offences committed on or after 3 December 2012, these are offences listed in Part 1 of Schedule 15 for the purposes of sections 273 and 283 (life sentence for second listed offence) of the Sentencing Code.

These are specified offences for the purposes of sections 266 and 279 (extended sentence for certain violent, sexual or terrorism offences) of the Sentencing Code.

STEP ONE
Determining the offence category

CULPABILITY

In assessing culpability, the court should weigh up all the factors of the case, including the offender's role, to determine the appropriate level. Where there are characteristics present which fall under different categories, or where the level of the offender's role is affected by the very small scale of the operation, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

A- High Culpability	• Leading role in the offending • Expectation of substantial financial or other material advantage • High degree of planning/premeditation • Use or threat of a substantial degree of physical violence towards victim(s) or their families • Use or threat of a substantial degree of sexual violence or abuse towards victim(s) or their families

B- Medium culpability	• Significant role in the offending
	• Involves others in the offending whether by coercion, intimidation, exploitation or reward
	• Expectation of significant financial or other material advantage
	• Some planning/premeditation
	• Use or threat of some physical violence towards victim(s) or their families
	• Use or threat of some sexual violence or abuse towards victim(s) or their families
	• Other threats towards victim(s) or their families
	• Other cases falling between A and C because:
	  ○ Factors in both high and lower categories are present which balance each other out and/or
	  ○ The offender's culpability falls between the factors as described in A and C

C- Lower culpability	• Engaged by pressure, coercion or intimidation, or has been a victim of slavery or trafficking related to this offence • Performs limited function under direction • Limited understanding/knowledge of the offending • Expectation of limited or no financial or other material advantage • Little or no planning/premeditation

HARM

Use the factors given in the table below to identify the Harm category. If the offence involved multiple victims or took place over a significant period of time sentencers may consider moving up a harm category or moving up substantially within a category range.

The assessment of harm may be assisted by available expert evidence, but may be made on the basis of factual evidence from the victim, including evidence contained in a Victim Personal Statement (VPS). Whether a VPS provides evidence which is sufficient for a finding of serious harm depends on the circumstances of the particular case and the contents of the VPS**. However, the absence of a VPS (or other impact statement) should not be taken to indicate the absence of harm.**

Loss of personal autonomy is an inherent feature of this offending and is reflected in sentencing levels. The nature of the relationship between offender and victim in modern slavery cases may mean that the victim does not recognise themselves as such, may minimise the seriousness of their treatment, may see the perpetrator as a friend or supporter, or may choose not to give evidence through shame, regret or fear.

Sentencers should therefore be careful not to assume that absence of evidence of harm from those trafficked or kept in slavery, servitude or in forced or compulsory labour indicates a lack of harm or seriousness. A close examination of all the particular circumstances will be necessary.

Category 1	• Exposure of victim(s) to high risk of death A category 2 offence may also be elevated to category 1 by – • The extreme nature of one or more factors • The extreme impact caused by a combination of factors
Category 2	• Serious physical harm which has a substantial and/or long-term effect • Serious psychological harm which has a substantial and/or long-term effect • Substantial and long-term adverse impact on the victim's daily life after the offending has ceased • Victim(s) deceived or coerced into sexual activity

Category 3	• Some physical harm
	• Some psychological harm
	• Significant financial loss/disadvantage to the victim(s)
	• Exposure of victim(s) to additional risk of serious physical or psychological harm
	• Other cases falling between categories 2 and 4 because:
	  ○ Factors in both categories 2 and 4 are present which balance each other out and/or
	  ○ The level of harm falls between the factors as described in categories 2 and 4

Category 4	• Limited physical harm • Limited psychological harm • Limited financial loss/disadvantage to the victim(s)

STEP TWO

Starting point and category range

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

Harm	Culpability		
	A	B	C
Category 1	**Starting Point** 14 years' custody **Category Range** 10 - 18 years' custody	**Starting Point** 12 years' custody **Category Range** 9 - 14 years' custody	**Starting Point** 8 years' custody **Category Range** 6 - 10 years' custody
Category 2	**Starting Point** 10 years' custody **Category Range** 8 - 12 years' custody	**Starting Point** 8 years' custody **Category Range** 6 - 10 years' custody	**Starting Point** 4 years' custody **Category Range** 3 - 7 years' custody
Category 3	**Starting Point** 8 years' custody **Category Range** 6 - 10 years' custody	**Starting Point** 6 years' custody **Category Range** 5 - 8 years' custody	**Starting Point** 2 years' custody **Category Range** 1 - 4 years' custody
Category 4	**Starting Point** 5 years' custody **Category Range** 4 - 7 years' custody	**Starting Point** 3 years' custody **Category Range** 1 - 5 years' custody	**Starting Point** 26 weeks' custody **Category Range** High level Community Order – 18 months' custody

Where another offence or offences arise out of the same incident or facts concurrent sentences **reflecting the overall criminality** of offending will ordinarily be appropriate: please refer to the *Totality* guideline and step six of this guideline.

Below is a **non-exhaustive** list of additional elements providing the context of the offence and factors relating to the offender. Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.

Care should be taken to avoid double counting factors already taken into account in assessing culpability

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) the **nature** of the offence to which the

conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

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

Other aggravating factors:

A1 – Offending took place over a long period of time (in the context of these offences, this is likely to mean months or years) where not taken into account at step 1
A2 –Steps taken to prevent the victim reporting the offence or obtaining assistance
A3 – Deliberate targeting of victim who is particularly vulnerable (due to age or other reason)
A4 – Victim's passport or identity documents removed
A5 – Gratuitous degradation of victim
A6 – Large-scale, sophisticated and/or commercial operation (where not taken into account at step 1)
A7 – Abuse of trust/responsibility
A8 – Substantial measures taken to restrain the victim
A9 – Victim forced to commit criminal offences (whether or not he/she would be able to raise a defence if charged with those offences)

Factors reducing seriousness or reflecting personal mitigation

M1 – No recent or relevant convictions
M2 – Offender has been a victim of slavery/trafficking in circumstances unrelated to this offence
M3 – Good character and/or exemplary conduct
M4 – Remorse
M5 – Sole or primary carer for dependent relatives
M6 – Age/lack of maturity
M7 – Mental disorder or learning disability
M8 – Physical disability or serious medical condition requiring urgent, intensive or long-term treatment
M9 - Offender co-operated with investigation, made early admissions and/or voluntarily reported offending

STEP THREE
Consider any factors which indicate a reduction for assistance to the prosecution
The court should take into account section 74 of the Sentencing Code (reduction in sentence for assistance to prosecution) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR
Reduction for guilty pleas
The court should take account of any potential reduction for a guilty plea in accordance with section 73 of the Sentencing Code and the *Reduction in Sentence for a Guilty Plea* guideline.

STEP FIVE
Dangerousness
The court should consider:

1) whether having regard to the criteria contained in Chapter 6 of Part 10 of the Sentencing Code it would be appropriate to impose a life sentence (sections 274 and 285)

2) whether having regard to sections 273 and 283 of the Sentencing Code it would be appropriate to impose a life sentence.

3) whether having regard to the criteria contained in Chapter 6 of Part 10 of the Sentencing Code it would be appropriate to impose an extended sentence (sections 266 and 279)

When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

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

STEP SEVEN
Ancillary orders
In all cases, the court must consider whether to make a compensation order and/or other ancillary orders. The following are most relevant in modern slavery cases:

Slavery and trafficking prevention orders

Under section 14 of the Modern Slavery Act 2015, a court may make a slavery and trafficking prevention order against an offender convicted of a slavery or human trafficking offence, if it is satisfied that

- there is a risk that the offender may commit a slavery or human trafficking offence, and

- it is necessary to make the order for the purpose of protecting persons generally, or particular persons, from the physical or psychological harm which would be likely to occur if the offender committed such an offence.

DROP-DOWN

- *The effect of a slavery and trafficking prevention order is set out in section 17 of the Modern Slavery Act 2015, the power to make such an order on convictions is contained in section 14 of the Act.*

- *An order can only be made if the court is satisfied that (i) there is a risk that the offender may commit a slavery or human trafficking offence and (ii) the order is necessary (not merely desirable or helpful) for the purpose of protecting persons generally, or particular persons, from the physical or psychological harm which would be likely to occur if the offender committed such an offence. The Act does not require the court to apply any particular standard of proof.*

- *The risk that the offender may commit a slavery or human trafficking offence must be real, not remote, and must be sufficient to justify the making of such an order. In considering whether such a risk is present in a particular case, the court is entitled to have regard to all the information before it, including the contents of a pre-sentence report, or information in relation to any previous convictions, or in relation to any previous failure to comply with court orders.".*

- *In determining whether any order is necessary, the court must consider whether the risk is sufficiently addressed by the nature and length of the sentence imposed, and/or the presence of other controls on the offender. The court should consider the ability of a Chief Officer of Police to apply for an order if it becomes necessary to do so in the future.*

- *The criterion of necessity also applies to the individual terms of the order. The order may prohibit the defendant from doing things in any part of the United Kingdom, and anywhere outside the United Kingdom These prohibitions must be both reasonable and proportionate to the purpose for which it is made. The court should take into account any adverse effect of the order on the offender's rehabilitation, and the realities of life in an age of electronic means of communication.*

- *The terms of the order must be clear, so that the offender can readily understand what they are prohibited from doing and those responsible for enforcing the order can readily identify any breach.*

- *The order can be for a fixed period of at least 5 years or until further order. The order may specify that some of its prohibitions have effect until further order and some for a fixed period and may specify different periods for different prohibitions.*

- *A draft order must be provided to the court and to all defence advocates in good time to enable its terms to be considered before the sentencing hearing.*

Slavery and trafficking reparation orders

Where a confiscation order has been made by the Crown Court under section 6 of the Proceeds of Crime Act 2002 the court may make a slavery and trafficking reparation order under section 8 of the 2015 Act, requiring the offender to pay compensation to the victim for any harm resulting from an offence under sections 1, 2 or 4 of that Act. In practice, the reparation will come out of the amount taken under

the confiscation order. **In every eligible case, the court must consider whether to make a slavery and trafficking reparation order, and if one is not made the judge must give reasons.** However, a slavery and trafficking reparation order cannot be made if the court has made a compensation order under section 134 of the Sentencing Code.

Restraining order
Where an offender is convicted of any offence, the court may make a restraining order (section 360 of the Sentencing Code). The order may prohibit the offender from doing anything for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from further conduct which amounts to harassment or will cause a fear of violence.

The order may have effect for a specified period or until further order.

Forfeiture

A court convicting someone on indictment of human trafficking under section 2 of the 2015 Act may order the forfeiture of a vehicle, ship or aircraft used or intended to be used in connection with the offence of which the person is convicted (see section 11 of the 2015 Act).

STEP EIGHT
Reasons
Section 52 of the Sentencing Code imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE
Consideration for time spent on bail
The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003 and section 325 of the Sentencing Code.

Committing offence with intent to commit a human trafficking offence Slavery

Modern Slavery Act 2015 section 4

Triable only on indictment (if kidnapping or false imprisonment committed), otherwise triable either way

Maximum: Life imprisonment (if kidnapping or false imprisonment committed), otherwise 10 years' custody

The starting point and range should be commensurate with that for the preliminary offence actually committed but with an enhancement to reflect the intention to commit a human trafficking offence. The enhancement will vary depending on the nature and seriousness of the intended trafficking offence, and the seriousness of the preliminary offence, and the extent to which the offender was themselves the victim of modern slavery, pressure, coercion or intimidation, but up to 2 years' custody is suggested as a suitable enhancement. Sentencers should also take into account the totality of offending (see the Totality guideline in particular where the preliminary offence or other modern slavery offences are to be sentenced alongside the section 4 offence.

Breach of a Slavery and Trafficking Prevention Order/ Breach of a Slavery and Trafficking Risk Order

Modern Slavery Act 2015, s.30

Triable either way
Maximum: 5 years' imprisonment

In sentencing an offence under section 30, a court is entitled to use, and may be assisted by, a guideline for an analogous offence subject to differences in the elements of the offences and the statutory maxima. Depending on the nature of the particular slavery and trafficking risk, an analogous offence may be one or more of the following:

- Breach of a sexual harm prevention order
- Breach of a criminal behaviour order

The court will also wish to consider the General guideline.

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Sentencing Council

Sentencing Council meeting:	**30 July 2021**
Paper number:	**SC(21)JUL07 – Miscellaneous guideline amendments**
Lead Council member:	**Jo King**
Lead official:	**Ruth Pope**

1 ISSUE

1.1 The Council agreed in May to have an annual consultation on overarching issues and miscellaneous minor updates to guidelines and that the first consultation would run from September this year. A number of issues were considered for inclusion and a provisional list was drawn up.

1.2 A working group met in June to discuss the detail of the proposals and to make recommendations to the full Council. The aim is to sign off the project for consultation at this meeting.

1.3 The plan is for the consultation to run from September to November. Responses can then be considered at the December and January meetings with changes coming into effect from 1 April 2022.

2 RECOMMENDATION

2.1 That the Council agrees to consult on the following amendments to guidelines:

i. Breach of SHPO: Adding a note to make clear that it is not open to the court to vary the SHPO or make a fresh order of its own motion for breach.

ii. Compensation and confiscation: Adding wording relating to giving reasons if compensation is not awarded and providing fuller information on confiscation

iii. Racially or religiously aggravated offences: making the uplift for racial/ religious aggravation a separate step

iv. Domestic Abuse overarching guideline: revising the definition of domestic abuse to align with the Domestic Abuse Act 2021 and expanding it to include a wider range of relationships.

v. Adding an interim note to the Animal cruelty guideline relating to the increase in the maximum sentence [**subject to any decision made to proceed with revising the guideline].**

2.2 The Council will also be asked to confirm that no action should be taken at present in relation to

i. The expanded explanation for the mitigating factor 'Involved through coercion, intimidation or exploitation'

ii. The Vehicle licence/registration fraud guideline

2.3 Finally the Council will be asked to confirm that the Identity documents – possess false/ another's/ improperly obtained guideline can be deleted from the MCSG without consultation.

3 CONSIDERATION

Breach of a sexual harm prevention order

3.1 The Council agreed to add 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 issue that remained to be resolved was the wording of that note – the proposed wording 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.

3.2 In 2019[1] around 930 offenders were sentenced for breaching orders to which this guideline would apply. The change that is proposed will not affect sentence levels, the only impact it may have is to prevent courts falling into error.

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

Compensation and confiscation

3.3 The Council agreed to use the following wording in at the ancillary orders step of all relevant guidelines (additional wording highlighted):

[1] Figures on volumes presented in this paper are based on 2019 data instead of 2020. This is because volumes of offenders sentenced in 2020 are generally lower and are likely to have been affected by the pandemic.

In all cases, the court should consider whether to make compensation and/or other ancillary orders. The court must give reasons if it decides not to order compensation (Sentencing Code, s.55).

3.4 In 2019, around 130,000 offenders were sentenced to pay compensation. The additional wording is not expected to effect the number of compensation orders made or the amounts awarded, however, if it did, it would be a result of courts carrying out a statutory duty rather than as a result of the change to guidelines.

3.5 Consultation responses for the forthcoming Trade mark guideline showed that there was some confusion (particularly among magistrates) about confiscation. To address this the Council agreed the following wording relating to confiscation and compensation:

> **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.
>
> Where the offence has resulted in loss or damage the court must consider whether to make a **compensation order** and must give reasons if it does not do so (section 55 of the Sentencing Code).
>
> If the court makes both a confiscation order and an order for compensation and the court believes the offender will not have sufficient means to satisfy both orders in full, the court must direct that the compensation be paid out of sums recovered under the confiscation order (section 13 of the Proceeds of Crime Act 2002).

3.6 The Council agreed that it would be useful to review the wording on confiscation in other guidelines and to consult on using similar wording.

3.7 There are 21 other guidelines that mention confiscation:

Guideline	Existing wording
Production of a controlled drug/ Cultivation of cannabis plant Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug	In all cases, the court is required to consider confiscation where the Crown invokes the process or where the court considers it appropriate. It should also consider whether to make ancillary orders.

Importing or exporting a psychoactive substance Permitting premises to be used Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it to another Supplying, or offering to supply, a psychoactive substance/ Possession of psychoactive substance with intent to supply	
Individuals: Unauthorised or harmful deposit, treatment or disposal etc of waste/ Illegal discharges to air, land and water Organisations: Unauthorised or harmful deposit, treatment or disposal etc of waste/ Illegal discharges to air, land and water	Confiscation must be considered if either the Crown asks for it or the court thinks that it may be appropriate. Confiscation must be dealt with before any other fine or financial order (except compensation). (See sections 6 and 13 Proceeds of Crime Act 2002)
Fraud Benefit Fraud Bribery Possession of articles for use in frauds/ Making or supplying articles for use in frauds Money laundering Revenue fraud Abstracting electricity Going equipped for theft or burglary Handling stolen goods Making Off Without Payment Theft – general Theft from a shop or stall	The court must proceed with a view to making a confiscation order if it is asked to do so by the prosecutor or if the court believes it is appropriate for it to do so. Where the offence has resulted in loss or damage the court must consider whether to make a compensation order. If the court makes both a confiscation order and an order for compensation and the court believes the offender will not have sufficient means to satisfy both orders in full, the court must direct that the compensation be paid out of sums recovered under the confiscation order (section 13 of the Proceeds of Crime Act 2002). The court may also consider whether to make ancillary orders.
Corporate offenders: fraud, bribery and money laundering	Confiscation must be considered if either the Crown asks for it or the court thinks that it may be appropriate. 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)

3.8 The working group considered that the fullest wording should be used in all guidelines:

> Where the offence has resulted in loss or damage the court must consider whether to make a **compensation order** and must give reasons if it does not do so (section 55 of the Sentencing Code).
>
> **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.

3.9 There are no published figures for the number of confiscation orders made, but the best information we have suggests that around 2,200 offenders were sentenced to a confiscation order in 2019 (we would not be able to quote that figure in any published document). The proposed changes to wording in guidelines is unlikely to affect the number of confiscation orders made – the changes simply seek to aid clarity and transparency.

Question 2: Is the Council content to consult on using the above wording in all relevant guidelines?

Uplift for racially or religiously aggravated offences

3.10 The Council previously agreed that existing guidelines should be amended 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)

3.11 In 2019 around 4,600 offenders were sentenced for racially or religiously aggravated offences covered by these guidelines. The proposals will not make a substantive change to the guidelines but creating a separate step will improve clarity and transparency.

Victims of modern slavery

3.12 During the consultation on the modern slavery guidelines, a magistrate provided some valuable input related to academic research he had undertaken on different types of modern slavery victim. He wanted to ensure that sentencing guidelines generally took into account the possibility of offenders themselves being the victims of modern slavery/coercion. This point was echoed in a response to the 'What Next for the Sentencing Council' consultation by another magistrate, who cited modern slavery as well as domestic coercion and control as matters magistrates should be aware of.

3.13 Since 2019, we have had an expanded explanation for the mitigating factor 'Involved through coercion, intimidation or exploitation' which states:

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

3.14 The Council previously agreed to explore whether there was anything in the academic research referred to above to indicate that changes should be made to the expanded explanation. In the limited time available, we have looked at the research and it appears that the expanded explanation covers the relevant points albeit without going into great detail or giving a comprehensive list of examples. It is not immediately apparent without more evidence what changes could be made that would address the concerns raised.

3.15 An evaluation of the expanded explanations will be undertaken in 2022, and the working group agreed that it was preferable to await evidence from that before making changes.

Question 3: Does the Council agree that any changes to the expanded explanation should await the evaluation to be conducted in 2022?

The Domestic Abuse Act

3.16 The Domestic Abuse Act 2021 creates a statutory definition of domestic abuse; we understand that this will be commenced this summer.[2] The Domestic abuse – overarching principles guideline currently states:

[2] The definition is in force from 5 July 2021 for the purposes of: sections 75 (strategy for prosecution and management of offenders), 76 (polygraph conditions for offenders released on licence) and 83

1. This guideline identifies the principles relevant to the sentencing of cases involving domestic abuse. There is no specific offence of domestic abuse. It is a general term describing a range of violent and/or controlling or coercive behaviour.

2. A useful, but not statutory, definition of domestic abuse presently used by the Government is set out below. The Government definition includes so-called 'honour' based abuse, female genital mutilation (FGM) and forced marriage.

Any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality. The abuse can encompass, but is not limited to: psychological, physical, sexual, financial, or emotional.

3. 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.

4. 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.

5. 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.

6. 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.

3.17 The definition in the legislation is:

1 Definition of "domestic abuse"

(1) This section defines "domestic abuse" for the purposes of this Act.

(2) Behaviour of a person ("A") towards another person ("B") is "domestic abuse" if—

(a) A and B are each aged 16 or over and are personally connected to each other, and
(b) the behaviour is abusive.

(3) Behaviour is "abusive" if it consists of any of the following—

(a) physical or sexual abuse;
(b) violent or threatening behaviour;
(c) controlling or coercive behaviour;
(d) economic abuse (see subsection (4));
(e) psychological, emotional or other abuse;

(report on the use of contact centres in England) of the Act; and sections 177 (whether it is reasonable to continue to occupy accommodation), 179 (duty of local housing authority in England to provide advisory services), 189 (priority need for accommodation) and 198 (referral of case to another local housing authority) of the Housing Act 1996 and article 6 of the Homelessness (Priority Need for Accommodation) (England) Order 2002.

and it does not matter whether the behaviour consists of a single incident or a course of conduct.

(4) "Economic abuse" means any behaviour that has a substantial adverse effect on B's ability to—

(a) acquire, use or maintain money or other property, or
(b) obtain goods or services.

(5) For the purposes of this Act A's behaviour may be behaviour "towards" B despite the fact that it consists of conduct directed at another person (for example, B's child).

(6) References in this Act to being abusive towards another person are to be read in accordance with this section.

(7) For the meaning of "personally connected", see section 2.

2 Definition of "personally connected"

(1) For the purposes of this Act, two people are "personally connected" to each other if any of the following applies—

(a) they are, or have been, married to each other;
(b) they are, or have been, civil partners of each other;
(c) they have agreed to marry one another (whether or not the agreement has been terminated);
(d) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);
(e) they are, or have been, in an intimate personal relationship with each other;
(f) they each have, or there has been a time when they each have had, a parental relationship in relation to the same child (see subsection (2));
(g) they are relatives.

(2) For the purposes of subsection (1)(f) a person has a parental relationship in relation to a child if—

(a) the person is a parent of the child, or
(b) the person has parental responsibility for the child.

(3) In this section—

"child" means a person under the age of 18 years;

"civil partnership agreement" has the meaning given by section 73 of the Civil Partnership Act 2004;

"parental responsibility" has the same meaning as in the Children Act 1989 (see section 3 of that Act);

"relative" has the meaning given by section 63(1) of the Family Law Act 1996.

3.18 The working group considered changes that could be made to the guideline to align it with the new statutory definition. The working group also recommended consulting on a slightly wider definition of domestic abuse such as that in AG Ref R v Tarbox [2021] EWCA Crim 224. This would make clear that the guideline may apply in situations were there is no 'personal connection' as defined in the Act.

3.19 The proposed new wording (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. This guideline may also apply to persons who are in the same household whose relationship, while not one of those described in paragraph 2 above, could be described as domestic.

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 While we do not have sentencing volumes for offences that involve domestic abuse within MoJ figures, figures from the CPS indicate that domestic abuse was a factor in around 48,000 convictions in the year 2019/2020 and although different counting rules apply, it is indictive that the Domestic abuse guideline may be relevant to a similar number of sentences per year. The changes proposed which incorporate the statutory definition of domestic abuse are not expected to have an impact on sentence levels. The addition of wording to expand the application of the guideline to situations where there is no familial or intimate personal relationship could result in a slight uplift in sentence levels for such cases. There is no data on how often this definition would apply, but is unlikely to be common. Additionally, this change reflects case law and so any changes in sentencing practice would be attributable to legislation and case law.

Question 4: Does the Council agree to consult on the proposed changes to the domestic abuse guideline?

Animal Cruelty

3.21 The Animal Welfare (Sentencing) Act 2021 increases the maximum sentence for some offences covered by the Animal cruelty guideline (in the MCSG) from six months to five years. The guideline covers offences under sections 4, 8 and 9 of the Animal Welfare Act 2006. The 2021 Act which came into effect on 29 June increases the maximum sentence for sections 4 to 8 but not section 9. This means that ultimately there would need to be two guidelines to replace the existing one.

3.22 The Council agreed that when the changes come into effect to add a note to the existing guideline saying that the sentence levels no longer apply to offences under sections 4 and 8 and, as part of this consultation, to consult on an interim note that suggests how the existing guideline should be adapted pending revised guidelines.

3.23 A meeting has been held with officials from Defra and the Welsh Government to establish the rationale behind the change. The chief motivation for the change appears to be that current sentencing powers are insufficient in the most serious cases and that sentencing powers in England and Wales are significantly lower than elsewhere in the UK and Europe. **Annex A** contains a summary of some background information on the Act.

3.24 According to officials, the expectation was that there would not necessarily be more offenders sentenced to prison for these offences, but that prison sentences would be longer in the worst cases. However, it was acknowledged that sentencing could not be a ‘cliff edge’ whereby most offenders received non-custodial sentences but those who did go into custody would receive sentences of several years.

3.25 An analysis of 2019 sentencing data shows that the majority of cases covered by the guideline (around 550 offenders accounting for 80 per cent) were sentenced under section 4 (causing, permitting or failing to prevent unnecessary suffering), the remaining 20 per cent were sentenced for section 9 offences. For section 4 offences in 2019, 36 per cent of offenders received a community order, 27 per cent received suspended sentence orders and 11 per cent were sentenced to immediate custody.

3.26 The following note was added to the guideline in the MCSG on 30 June:

Note

For offences under section 4 (unnecessary suffering) and section 8 (fighting etc) **committed on or after 29 June 2021** the maximum penalty is five years' custody. The sentence levels in this guideline are therefore unlikely to apply to these offences and very serious cases should be committed to the Crown Court for sentence.

3.27 The working group agreed to consult on adding the following interim guidance to the MCSG and the Crown Court sentencing guidelines:

Interim guidance – offences committed on or after 29 June 2021.

The maximum penalty for the following offences increased from six months to five years from 29 June 2021:

- Causing unnecessary suffering (section 4, Animal Welfare Act 2006);
- Carrying out a non-exempted mutilation (section 5, Animal Welfare Act 2006);
- Docking the tail of a dog except where permitted (section 6(1) and 6(2), Animal Welfare Act 2006;
- Administering a poison to an animal (section 7, Animal Welfare Act 2006); and
- Involvement in an animal fight (section 8, Animal Welfare Act 2006).

The offences listed above **committed on or after 29 June 2021** will be triable either way (they can be dealt with in magistrates' courts or the Crown Court).

Currently offences contrary to section 4 (causing unnecessary suffering) and section 8 (involvement in an animal fight) are covered by a Sentencing Council guideline.

The guideline also applies to offences contrary to section 9 (breach of duty of person responsible for animal to ensure welfare) – the maximum sentence for the section 9 offence remains six months' custody and the guideline therefore remains in force for that offence.

The Sentencing Council will develop and consult on a revised guideline for the offences with a five year maximum. Until that revised guideline is available, courts may continue to refer to the existing guideline to assist in the assessment of the level of seriousness of a case, but the sentence table will be of limited use in determining the sentence.

Information from the passage of the legislation in Parliament indicates that the increase in the maximum sentence was designed to provide for higher penalties for the most serious offences. It was not intended to increase significantly the number of offenders who receive custodial sentences.

Examples of what **may** constitute the most serious cases can include, but are not limited to:

- Deliberate, calculating and sadistic behaviour
- The use of dog fighting to fuel organised crime
- Other organised or systematic cruelty

If considering a community or custodial sentence, courts **must** follow the Imposition guideline. For cases of lower seriousness, a fine may continue to be the most appropriate sentence.

Question 5: Subject to any decision to prioritise a revision of the Animal Cruelty guideline does the Council agree to consult on the proposed interim guidance?

Vehicle licence/registration fraud

3.28 In July 2018 the Council decided, subject to checking with key stakeholders, to remove the Vehicle licence/registration fraud guideline in the MCSG. The decision was made because the guideline was one of the few remaining Sentencing Guidelines Council (SGC) guidelines for an either way offence in the MCSG and data at the time showed that the offence was rarely sentenced. The number of cases had dropped from around 860 in 2006 to around 40 in 2016. This was assumed to be because of changes to the legislation in 2014 which reflected the removal of the requirement to display a 'tax disc' and less reliance being placed on paper documents generally.

3.29 Contact was made with DVLA in 2018 and we were told that they had no objection to the removal of the guideline, provided that it was not a barrier to the offence being prosecuted. Despite this the guideline was not removed. Looking at it again recently with a view to possibly consulting on removing it as part of this exercise, it appears that volumes have increased back up to 2011 levels (around 100 per year) and so the rationale for removing it is less clear. The guideline on the website was viewed around 8,700 times in the last year.

3.30 The working group considered that the guideline should be retained and consideration be given to revising it at a later date.

Question 6: Does the Council agree that the Vehicle registration fraud guideline should be retained pending revision at a later date?

Identity documents

3.31 We recently received an email from a district judge suggesting that the Identity documents – possess false/ another's/ improperly obtained guideline should be removed. He said as follows:

> It is concerned with the offence contrary to s.6 of the Identity Documents Act 2010. Strictly, there is no guideline for that offence, but there remains a guideline for the

offence that it repealed and replaced in section 25(5) of the Identity Cards Act 2006. That guideline states that it was effective from 4 August 2008 (which was when the first iteration of the MCSG issued by the then Sentencing Guidelines Council had effect). I do not know whether there was a corresponding guideline in the Magistrates Association Guidelines that had been in effect from 1 January 2004 and replaced by the MCSG. I also note that there is no corresponding guideline in the Crown Court Guidelines.

The reason that I raise this is not just because the guideline refers to the repealed offence. I do so mainly because the levels of sentence in the guideline are very much lower than those identified by the Court of Appeal in a number of cases. It probably suffices simply to refer you to §§ 22-57 and following in Archbold Crown Court. The guideline makes no differentiation between different types of document (false passports etc being more serious for example than a false gym membership card). The case of Zenasni [2007] EWCA Crim 2165; [2008] 1 Cr. App. R.(S.) 94 for instance makes the point that simple possession of a false passport will ordinarily result in an immediate custodial sentence. Applying the guideline, in my view, could lead to a very different outcome. In theory, magistrates' court should be applying the guideline instead of the decisions of the Court of Appeal. This is problematic, because it creates different sentencing outcomes between magistrates' courts and the Crown Court.

I have a working theory that the guideline was not prepared with false passport cases particularly in mind, that it has been superseded by the various decisions of the Court of Appeal, and that it has existed largely forgotten in the MCSG. I am supported in that view, I think, by the fact that it refers to the repealed offence.

If I am right about that, my suggestion, ultimately, is that this particular guideline should simply be removed from the MCSG. It would, of course, be helpful for all if there was a new guideline for all offences in the 2010 Act; but I recognise that the Council has many other competing priorities.

3.32 The point made is a good one. The timing of a project to produce a suite of immigration offences guidelines has been considered separately but pending that work, in view of the potential for the existing guideline (which was viewed around 5,000 times on the website in the last year) to be misleading, the working group considered that it should be removed and that there is no need to consult on that. If it is removed that fact will be logged on our minor revisions and corrections log which is published on the website and sent to publishers.

Question 7: Does the Council agree to delete this guideline without consulting?

4 EQUALITIES

4.1 As noted at the May meeting, the consultation does not include any proposals expressly relating to equalities. Any suggestions for changes to guidelines specifically related to issues of equality and diversity are being considered separately by the Equality and Diversity working group.

4.2 Most of the proposals within this paper are for relatively minor or technical changes which are unlikely to have any impact on equality issues. A question can be included in the consultation paper asking if there are any equality issues relating to the proposals that we have missed

5 IMPACT AND RISKS

5.1 The impact on prison and probation resources from the changes proposed in this consultation would be negligible. Any increase in sentence levels for animal cruelty offences would be due to the change in legislation rather than any action taken by the Council. In view of the nature of the consultation, no resource assessment will be produced but the consultation document will contain a section on impact which will briefly address the potential impact of each proposal.

5.2 As the number of guidelines and associated material produced by the Council has increased, there is increasingly a risk that guidelines may contain errors or become out of date. The rationale for conducting an annual consultation on miscellaneous issues is to ensure that the guidelines remain current, accurate and useful. It is possible that by carrying out an annual consultation on miscellaneous changes to guidelines the Council will create unrealistic expectations of what changes can be brought about in this way, but this can be addressed in the consultation document and the communications that we issue.

Question 8: Is this an appropriate way to address impact and risks?

Annex A – background to the increase in the maximum sentence for animal cruelty offences

The text of the Animal Welfare (Sentencing) Act 2021 is as follows:

> **1 Mode of trial and maximum penalty for certain animal welfare offences**
>
> (1) Section 32 of the Animal Welfare Act 2006 (post-conviction powers: imprisonment or fine) is amended as follows.
>
> (2) In subsection (1) (penalty for offence under any of sections 4, 5, 6(1) and (2), 7 and 8 of the Animal Welfare Act 2006), for the words from "on summary conviction" to the end substitute
>
> "—
>
> (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine, or to both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both."
>
> (3) After subsection (4) insert—
>
> "(4A) In relation to an offence committed before the commencement of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020, the reference in subsection (1)(a) to 12 months is to be read as a reference to 6 months."
>
> (4) In subsection (5), omit "(1)(a),".

A Commons Library Briefing of 10 March 2021 sets out the background to and the history of the legislation. It gives the following information on sentencing trends:

> In 2018, 633 people were sentenced for offences under sections 4 to 8 of the Animal Welfare Act 2006 in England and Wales. Of these, 65(10%) were sentenced to immediate custody. In each of the past 10 years, between 6% and 11% of people convicted of these offences were sentenced to immediate custody.
>
> Sentencing guidelines for animal cruelty were reviewed in April 2017 with the aim of ensuring “that the most serious cases of animal cruelty receive appropriate severe sentences, within the available maximum penalty”.

Custodial Sentencesfor Offences Under Sections 4-8 of the Animal Welfare Act 2006

England and Wales

	2010	2011	2012	2013	2014
Proceeded against	1,095	1,306	1,429	1,295	1,039
Found guilty	874	1,028	1,132	1,022	814
Sentenced	875	1,027	1,132	1,021	815
of which:					
Total Immediate Custody	52	87	108	84	82
% of total sentenced	6%	8%	10%	8%	10%
of which:					
Less than 3 months	29	47	39	32	33
3 months to less than 6 months	22	38	66	47	48
6 months	1	2	3	5	1
Continued...	**2015**	**2016**	**2017**	**2018**	**2019**
Proceeded against	800	768	744	799	717
Found guilty	622	585	607	635	567
Sentenced	624	585	608	634	570
of which:					
Total Immediate Custody	58	63	50	65	63
% of total sentenced	9%	11%	8%	10%	11%
of which:					
Less than 3 months	22	27	18	21	23
3 months to less than 6 months	33	33	30	43	36
6 months	3	3	2	1	3

Source: Ministry of Justice, Outcomes by Offence Data Tool, May 2020

Second Reading took place on 23 October 2020. Introducing the Bill, its sponsor, Chris Loder MP (Con), set out how it would amend the sentencing currently available to courts under the under the Animal Welfare Act 2006.

I am pleased to say that the Bill introduces one of the toughest punishments in the world and will bring us into line with the maximum penalties available in other Commonwealth countries, including those in Australia, Canada, New Zealand and India, which are all at five years' imprisonment. With this Bill, we will lead the way in Europe on animal sentencing, where the average custodial sentence for animal welfare offences is currently just two years. It is a simple, yet vital measure that will ensure perpetrators who harm an animal by, for example, causing unnecessary suffering, mutilation or poisoning, face the full force of the law. That includes cases of systematic cruelty, such as the deliberate, calculating and callous behaviour of ruthless gangs who use dog fighting to fuel organised crime. The Bill will mean that the courts will have sentences at their disposal commensurate with the most serious cases, so that the punishment fits the crime. This will send a clear signal.

Shadow Secretary of State, Luke Pollard (Lab), moved amendment 1 in clause 127 which would require the seriousness of an offence to be increased in cases where a person found guilty had also filmed the offence or posted a video online of themselves committing the offence. He explained that the reason was to stop encouraging others from repeating similar acts. This simple amendment would make it a more serious animal cruelty offence for the

purpose of sentencing if the guilty person had filmed themselves committing the abuse. In a digital age, we see more and more cases of people filming abuse of animals, partly for their own perverse enjoyment, partly because they want to share the film on social media, and partly because they fail to recognise that in so doing they encourage others to do the same.

Luke Pollard went on to give examples of specific cases of animal cruelty that had been posted online and highlighted research from the RSPCA that showed “at least 46% of young people have witnessed animal cruelty: 28% have seen it on TV or in a film, and 18% have witnessed it on social media.”

In response, Victoria Prentis (Parliamentary Under-Secretary of State for Environment, Food and Rural Affairs) commented that the sentencing guidelines, drawn up by the sentencing Council had been reviewed in 2017 after public consultation. She went on to say that they include guidelines on the “the use of technology to publicise or promote cruelty” which is already considered to be an aggravating factor. She also highlighted Section 127(1) of the Communications Act 2003 which, “creates a specific offence of sending grossly offensive, indecent, obscene or menacing messages over a public electronic communications network.” In her concluding remarks the Minister stated that:

...there are existing options to ensure that the offenders who film and upload or distribute footage of their animal cruelty are met with an appropriate response. This is an horrific crime, and filming it to share with others is beyond comprehension. We will discuss this matter further with the Sentencing Council, and when it reviews the guidelines we will ensure that this point is raised during the public consultation. On that basis, I ask the hon. Gentleman not to press the amendment.

Luke Pollard withdrew the amendment explaining that the opposition would be seeking explore it further on Report.

The Explanatory Notes state as follows:

Overview of the Bill

1. The Bill increases the maximum penalty for specific offences related to animal welfare in England and Wales. It does so by extending the current maximum penalty, specified under the Animal Welfare Act 2006, of six months and/or an unlimited fine to a penalty of five years and/or an unlimited fine. These offences therefore become triable either way, and may be heard in a magistrates' court or the Crown Court.

Policy background

2. This Bill amends the Animal Welfare Act 2006 (“the Act”). The Act sets out a maximum penalty of six months imprisonment and/or an unlimited fine for the more serious 'prevention of harm' offences. There are five such offences under section 32(1) of the Animal Welfare Act 2006:
    a. causing unnecessary suffering (section 4, Animal Welfare Act 2006);
    b. carrying out a non-exempted mutilation (section 5, Animal Welfare Act 2006);
    c. docking the tail of a dog except where permitted (section 6(1) and 6(2), Animal Welfare Act 2006);
    d. administering a poison to an animal (section 7, Animal Welfare Act 2006); and
    e. involvement in an animal fight (section 8, Animal Welfare Act 2006).
3. There have been a number of recent cases related to these offences in which judges have expressed a desire to impose a higher penalty than that currently provided for under the Animal Welfare Act 2006. There is a particular desire to increase the

penalties available in the case of crimes that relate to deliberate, calculating and sadistic behaviour.

4. Members of Parliament, wider stakeholders and the public have also sought to increase maximum penalties for animal welfare offences so that they exceed the current European average of 2.04 years. The Bill meets both of these needs by increasing the maximum penalties for the most serious offences under the Animal Welfare Act 2006 to five years and/or an unlimited fine.
5. The increase in maximum penalties will not apply to those offences listed in section 32(2) of the Animal Welfare Act 2006: not taking reasonable steps to ensure welfare (section 9); breach of a licence condition (section 13(6));and breach of a disqualification order (section 34(9)). These offences are generally considered less serious, and rarely receive the existing maximum penalty. Moreover, the level of fine applied to these offences has recently been increased since the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which converted existing level 5 fines into unlimited fines.
6. The draft sentencing clauses were published for public consultation and pre-legislative scrutiny on 12 December 2017 as part of the Government's Animal Welfare (Sentencing and Recognition of Sentience) Bill. The consultation closed on 31 January 2018 and the summary of responses document published on 7 August 2018. Defra received 9,084 direct responses to the consultation. 70% of respondents agreed with the new maximum penalties. In the summary of responses document, Government committed to bring forward the sentencing clauses in a separate Bill as recommended by the EFRA Committee's scrutiny report on the Bill.
7. On 26 June 2019, the Animal Welfare (Sentencing) Bill was introduced to Parliament in the House of Commons. Passage of the Bill beyond Committee Stage was disrupted due to Parliamentary activity at this time where it fell following prorogation and then later dissolution of Parliament.
8. Chris Loder MP introduced the Animal Welfare (Sentencing) Bill as a Private Member's Bill on 5th February 2020.

Legal background

9. The majority of the relevant legal background is explained in the policy background section of these Notes. Two additional legal issues are raised below, one in relation to the current drafting of section 32(1) of the Animal Welfare Act 2006, and the second in relation to the requirement to change the mode of trial.
10. The current drafting of section 32(1) of the Animal Welfare Act 2006 lists the maximum penalty as imprisonment for a term not exceeding 51 weeks or a fine, as opposed to the maximum imprisonment for a term not exceeding six months as discussed above. This is explained by section 32(5) of the Animal Welfare Act 2006. Section 32(5) provides that in relation to an offence committed before the commencement of section 281(5) of the Criminal Justice Act 2003, the reference in section 32(1)(a) to 51 weeks is to be read as a reference to six months. As at the date of the publication of the Bill, section 281(5) of the Criminal Justice Act 2003 has not been commenced. The maximum imprisonment term for offences under section 32(1) of the Animal Welfare Act 2006 therefore remains six months.
11. Magistrates' courts do not have the power to impose penalties greater than six months.1As a result of increasing the maximum penalty available for the offences under section 32(1) of the Animal Welfare Act 2006 to a period of five years it is necessary for the Bill to make these offences triable either way.

Territorial extent and application.

12. Clause 2 sets out the territorial extent of the Bill, that is the jurisdictions which the Bill forms part of the law of. The extent of a Bill can be different from its application. Application is about where a Bill produces a practical effect. This Bill both extends and applies to England and Wales. The commentary on individual provisions (or groups of provisions) of the Bill includes a paragraph explaining their extent and application.
13. There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly without the consent of the legislature concerned. Issues concerning animal welfare in Wales are considered to be within the legislative competence of the National Assembly for Wales. The Bill requires a Legislative Consent Motion from the National Assembly for Wales. See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

Commentary on provisions of Bill

Clause 1: Mode of trial and maximum penalty for certain animal welfare offences

14. Section 32(1) of the Animal Welfare Act 2006 provides that particular offences should carry a maximum penalty of 51 weeks imprisonment and/or a level 5 fine.
15. In practice, this is as a maximum penalty of 6 months and an unlimited fine. This is because section 32(5) specifies a maximum penalty of 6 months for offences committed before the commencement of section 281(5) of the Criminal Justice Act 2003. To date, this section has not been commenced.
16. This clause changes the maximum penalty available for the following offences only:
    a. Causing unnecessary suffering (section 4, Animal Welfare Act 2006);
    b. Carrying out a non-exempted mutilation (section 5, Animal Welfare Act 2006);
    c. Docking the tail of a dog except where permitted (section 6(1) and 6(2), Animal Welfare Act 2006;
    d. Administering a poison to an animal (section 7, Animal Welfare Act 2006); and
    e. Involvement in an animal fight (section 8, Animal Welfare Act 2006).
17. The existing maximum penalty, outlined above, is retained if the offender is summarily convicted. However offenders may now receive a higher penalty of up to 5 years imprisonment and/or an unlimited fine if they are convicted on trial by indictment.
18. Magistrates' courts do not have the power to impose penalties greater than six months. Section 154(1) of the Criminal Justice Act 2003 was to increase the maximum custodial sentence imposable by a magistrate's court to12 months. Section 154(1) will be repealed by the Sentencing Act 2020 but an equivalent provision is contained in paragraph 24(2) of Schedule 22 to the 2020 Act. Section 32(4A) of the Animal Welfare Act 2006 inserted by this clause ensures that the appropriate penalties are available to magistrate's courts until the relevant provisions are commenced.

Clause 2: Extent, Commencement and Short Title

19. This clause provides for the Bill to extend to England and Wales; that the Bill will come into force two months after Royal Assent; and that the application of revised

maximum penalties is not retrospective and does not apply to offences committed before the Bill comes into force. The clause also specifies the short title of the Bill.

Commencement

20. The Bill is due to commence two months after Royal Assent.

Sentencing Council

Sentencing Council meeting:	**30 July 2021**
Paper number:	**SC(21)JUL08 - Archiving guidelines**
Lead officials:	**Phil Hodgson, Gareth Sweny**

1. Issue

1.1 This paper considers how the Council should treat guidelines that have been superseded and are no longer in effect.

2. Recommendations

2.1 That the Council considers:

(a) whether the Sentencing Council should retain an archive of guidelines; and

(b) whether that archive should:

i include Sentencing Guidelines Council (SGC) guidelines; and

ii be directly available to the public via the website or made available on request only.

3. Consideration

Retaining copies

3.1 When this topic has occasionally come up in Council conversations members have previously indicated a general desirability for retaining records of past guidelines in order to be transparent and for it to be clear to all what guidelines were in force on any given date. But we have never had an explicit discussion to confirm that as a formal decision or to decide how such record retention might work in practice. Hence this paper today.

3.2 In addition, we have been advised by the Departmental Library and Records Management Service at the Ministry of Justice that sentencing guidelines should be considered to be public records. If this were to be the case, we would have an obligation under the Public Records Act 1958 to keep copies of the Council's sentencing guidelines so that they may be transferred to the National Archives as required.

3.3 All current and past Sentencing Council guidelines are available on the Council website as individual web pages or as pdfs, which are held in the research and resources section. SGC guidelines are available on the archive copy of the SGC website, which is hosted by the National Archives.

Guidelines no longer in effect

3.4 The Council's website includes sentencing guidelines that have been superseded or for other reasons are no longer in effect. These guidelines are hidden from public view in that they are not listed in the A to Z of guidelines and do not show up in searches, but they can be seen by anyone who has the direct web address/url.

Pdf guidelines

3.5 The website also currently includes copies of guidelines that the Council produced prior to going fully digital. These guidelines were originally published in print as "booklets" but have since been converted to pdf.

3.6 These guidelines are available to the public via the research and resources section of the website; the individual pdfs are marked: "For reference only".

Printed guidelines

3.7 The Council has a small collection of printed Sentencing Council and SGC guidelines, which are stored at the RCJ. We treat these as a resource for the office and no longer distribute them.

4. Questions

4.1 We recommend that the Office should create and maintain a single, complete, digital archive of superseded Sentencing Council guidelines.

(a) Does the Council agree that we should create a single archive?

4.2 If so, do members think that the archive of sentencing guidelines should:

(a) include SGC guidelines, and

(b) be available directly to the public via the website or available on request only?