Sentencing Council

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12 November 2021

Dear Members

Meeting of the Sentencing Council – 19 November 2021

The next Council meeting will be held via Microsoft Teams, the link to join the meeting is included below. **The meeting is Friday 19 November 2021 from 9:30 to 15:30**. 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)NOV00
▪ Minutes of meeting held on 22 October	SC(21)OCT01
▪ Motoring	SC(21)NOV02
▪ Animal Cruelty	SC(21)NOV03
▪ Perverting the Course of Justice	SC(21)NOV04
▪ Sexual Offences	SC(21)NOV05
▪ Burglary	SC(21)NOV06

Also included for your information is a copy of the Analysis and Research subgroup minutes from their last meeting on 11 October.

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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COUNCIL MEETING AGENDA

19 November 2021
Virtual Meeting by Microsoft Teams

09:30 – 09:45	Minutes of the last meeting and matters arising (paper 1)
09:45 – 10:45	Motoring - presented by Lisa Frost (paper 2)
10:45 – 11:00	Break
11:00 – 12:00	Animal cruelty - presented by Ollie Simpson (paper 3)
12:00 – 12:45	Perverting the Course of Justice - presented by Mandy Banks (paper 4)
12:45 – 13:15	Lunch
13:15 – 14:15	Sex Offences - presented by Ollie Simpson (paper 5)
14:15 – 14:30	Break
14:30 – 15:30	Burglary - presented by Mandy Banks (paper 6)

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COUNCIL MEETING AGENDA

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MEETING OF THE SENTENCING COUNCIL

22 OCTOBER 2021

MINUTES

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

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 24 September 2021 were agreed.

2. MATTERS ARISING

2.1 The Chairman commented on the successful launch of the Terrorism guidelines consultation and thanked Maura McGowan for acting as spokesperson.

3. DISCUSSION ON UNDER AGE SALE OF KNIVES – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

3.1 The Council considered a range of offences relating to underage sales. Taking into account volumes of offences, the views of trading standards and the nature of the offences, it was decided to develop guidelines for the underage sale of knives; one for individuals and one for organisations. The Council agreed to draw on the expertise of National Trading Standards in the development of the guidelines.

3.2 The Council considered the first draft of a guideline for organisations and suggested areas to be explored.

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

4.1 The Council considered responses to the consultation on sexual offences, in particular looking at the principles for sentencing cases where no sexual activity has taken place (including where no real victim exists), the format of the guideline for section 14 (arranging or a facilitating the commission of child sexual offence), some amendments to the wording on sexual harm prevention orders, as well as the wording relating to offences taking place remotely and where victims are overseas.

4.2 The Council agreed changes to the wording in the section 14 guideline and the wording on SHPOs and overseas victims was amended to provide greater clarity.

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

5.1 The Council considered revised culpability factors for dangerous driving offences and looked for the first time at proposed factors for careless driving offences.

5.2 The Council noted that there were similarities between the two types of offence and agreed that three culpability categories should be included

in the revised and new guidelines for careless driving offences. Further consideration would be given to the factors at the November meeting.

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

6.1 The Council considered the amendments that had been made to the draft perverting the course of justice and witness intimidation guidelines that had been made following the last meeting.

6.2 The Council confirmed that it was broadly content with the approach taken to the guidelines, and noted that draft sentence levels would be discussed at the next meeting. After carefully considering the problems with data for assisting an offender offences, the Council concluded that it was not appropriate to try to develop a guideline, given the low volumes of cases sentenced each year, compared to the large amount of resources it would take to develop the guideline.

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

7.1 The Council considered the responses to the consultation relating to sentence levels, aggravating and mitigating factors and general issues. Changes were agreed to the sentence levels in table 2 and to aggravating and mitigating factors.

7.2 The Council noted that following a point raised in response to the consultation, the breakdown of age groups in the data tables published for this and future guidelines would be changed to allow for a more detailed breakdown of the younger adult age groups.

7.3 The Council approved the revised guideline for publication on 24 November to come into force on 1 January 2022. The Council also agreed the resource assessment to be published at the same time.

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Sentencing Council meeting:	**19 November 2021**
Paper number:	**SC(21)NOV02 – Motoring offences causing death or injury**
Lead Council member:	**Rebecca Crane**
Lead official:	**Lisa Frost** **0207 071 5784**

1 ISSUE

1.1 This meeting will ask the Council to consider issues relating to the timescale of the motoring project and ask if the scope of the project should be revised. Further consideration of step one and step two factors for careless driving offences will also be undertaken. Finally, the Council will be asked to confirm the approach to assessing seriousness of causing death by careless driving under the influence.

2 RECOMMENDATION

2.1 The Council is asked to:

- Consider and agree to revise the scope of the motoring project;
- Consider and agree step one and two factors for careless driving offences causing death and serious injury and;
- Consider and confirm the approach to assessing culpability in offences of causing death by careless driving under the influence.

3 CONSIDERATION

3.1 The scope of the motoring project currently includes fifteen guidelines, and it was initially envisaged that more resources would be allocated to development of the guidelines. However, this has not been possible and it is not possible to achieve the current timescale for developing the guidelines with the resources available. The Council is asked to consider a proposal to detach some offences from the project.

3.2 At the last meeting the Council began consideration of step one and two factors for revised guidelines for careless driving offences. It was agreed that further consideration of these would be undertaken at this meeting. The Council is asked to consider revised factors.

3.3 Finally, the Council will be asked to consider the approach to assessing seriousness for the offence of careless driving under the influence to inform development of this guideline. Specifically, the Council is asked to consider if the approach in the existing guideline should be maintained before further work is undertaken to develop this guideline.

Scope of project

3.4 The Council agreed the scope of the Motoring project at the June meeting. It was agreed that fifteen offences should be included, as well as consideration of whether improved drug driving guidance could be developed. The offences within scope are as follows:

1. Dangerous driving
2. Causing death by dangerous driving
3. Causing death by careless driving
4. Causing death by careless driving under the influence of drink or drugs
5. Causing death by driving whilst unlicensed or uninsured
6. Causing death by driving whilst disqualified
7. Causing serious injury by dangerous driving
8. Causing serious injury by careless driving (new offence)
9. Causing serious injury by driving whilst disqualified
10. Wanton and furious driving
11. Aggravated vehicle taking without consent – death caused
12. Aggravated vehicle taking without consent – injury caused
13. Aggravated vehicle taking without consent – dangerous driving
14. Aggravated vehicle taking without consent – vehicle/property damage of £5,000 or over
15. Aggravated vehicle taking without consent – vehicle/property damage of less than £5,000

3.5 The current timetable for the project is to sign off the draft guidelines in April 2022. At the commencement of the project it was envisaged that two policy leads would work on developing the guidelines to achieve the timetable. However, resources have been unable to provide for this and all policy leads are at full capacity on other projects until at least April.

Limited progress has so far been made on the guidelines considered, and there will be further complex issues to discuss over the coming months.

3.6 It is considered that at this point it would be necessary to detach some of the offences to enable the timetable to be achieved, and provide revised guidelines to sentencers for the more common offences as quickly as possible. Another option is to extend the timetable for the project, but as the PCSC Bill is likely to come into force early in 2022, it is thought that the Council will wish to be responsive to proposed legislative changes for some offences as soon as possible.

3.7 It is thought that the guidelines should be split into two projects and offences related to aggravated vehicle taking should be detached and work on their development postponed. These offences have overlap with some other guidelines including theft and criminal damage and could potentially be complex. While the offences involving death and injury are relevant to other guidelines under development, their volumes are low:

	2015	2016	2017	2018	2019	2020[1]
Aggravated vehicle taking without consent – death caused	2	0	0	0	2	1
Aggravated vehicle taking without consent – injury caused	101	90	65	53	55	34

3.8 The offences would remain a workplan priority to be commenced as soon as resources allow, but separating them into a separate project would avoid delaying consulting on draft guidelines for the other ten offences. If the Council agrees it would be clarified in the consultation document that work to develop these guidelines is imminent and the other guidelines have been prioritised to respond to changes to legislation for relevant offences, and to trends in offending.

Question 1: Does the Council agree to revise the scope of the project and that the offences related to aggravated vehicle taking should be undertaken as a separate project and detached from the guidelines under development?

[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.

Careless driving offences

3.9 At the last meeting the Council began consideration of step one factors for careless driving offences. In the existing SGC guideline Careless driving causing death there are three seriousness categories, which are defined as follows:

- Careless or inconsiderate driving falling not far short of dangerous driving
- Other cases of careless or inconsiderate driving
- Careless or inconsiderate driving arising from momentary inattention with no aggravating factors

3.10 It was agreed that three culpability categories should be included in the revised and new guidelines for careless driving offences. It was proposed that many of the dangerous driving culpability factors would also be relevant to careless driving, as cases illustrated that acts within the two offences are often similar. The Council debated some factors and agreed to resume their consideration at this meeting. Decisions made were as follows:

- The highest culpability category should capture offences just under the threshold for dangerous driving. It was agreed that examples should not be provided.
- It was agreed that the lowest culpability category should provide for cases just over the threshold for careless driving, and for momentary lapses of concentration.
- It was agreed that medium culpability should include examples of offences and, based on transcripts which had been considered, it was proposed that many of these should be the same as for dangerous driving factors.

3.11 For context, the dangerous driving factors agreed were as follows:

High

- Deliberate decision to ignore the rules of the road and disregard for the risk of danger to others.
- Prolonged, persistent and deliberate course of dangerous driving
- Consumption of substantial amounts of alcohol or drugs leading to gross impairment
- Offence committed in course of police pursuit
- Racing or competitive driving against another vehicle
- Disregarding warnings of others
- Lack of attention to driving for a substantial period of time
- Speed greatly in excess of speed limit

Medium

- Brief but obviously highly dangerous manoeuvre
- Engaging in a brief but avoidable distraction
- Driving knowing that the vehicle has a dangerous defect or is dangerously loaded

• Driving at a speed that is inappropriate for the prevailing road or weather conditions, although not greatly excessive • Driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs • Disregarding advice relating to driving when taking medication or as a result of a known medical condition which significantly impaired the offender's driving skills • Driving when knowingly deprived of adequate sleep or rest • The offender's culpability falls between the factors as described in high and lesser culpability
Lesser • Standard of driving was just over threshold for dangerous driving • Momentary lapse of concentration

3.12 Discussion took place as to whether some factors for careless driving should be phrased differently than for dangerous driving. One point noted by the Council was that the factor 'brief but obviously dangerous manoeuvre' should be rephrased, as it may suggest a threshold of dangerous driving. It is proposed this factor be rephrased as 'unsafe manoeuvre', which was a phrase used by the Court of Appeal in a number of cases of careless driving which have been considered.

3.13 It was also suggested that medium culpability dangerous factors should be high culpability factors for careless driving offences. Work has been undertaken to test this suggestion.

3.14 Examples of careless driving cases considered by the Court of Appeal, and transcript cases provided at the last meeting, have been cross referenced against medium culpability dangerous driving factors. These illustrate that offences of careless driving involving the same features as may be present in a medium culpability dangerous driving offence are not currently all assessed as just falling short of dangerous driving. As was highlighted at the last meeting the context of the offence is usually the key issue as to whether an offence was dangerous or careless, and not just the act involved. While some careless driving offences involving medium culpability dangerous driving factors are assessed in the highest culpability category, this is not the case for every offence, or even a high proportion of offences.

3.15 A sample of cases is provided below, including categorisations in both first instance and Court of Appeal cases, or points raised which illustrate the difficulty with categorising some offences. It is important to note and take account of current sentencing practice to avoid inflating offence categorisations, as for some offences this would have a considerable impact upon sentences.

Unsafe manoeuvre

R v Geale 2012 EWCA Crim 2663 D, who was a professional driver, had been driving a coach when a white van in the same lane as him slowed down but D continued to move forward on the inside before turning into an access road. The manoeuvre was unsafe as it led to the coach being in the path of oncoming traffic in the access road and to there being a significant blind spot on the coach's nearside. Although the coach was going relatively slowly, at no more than 10 mph, D was unable to avoid a collision with the victim who was walking past and had fallen into the blind spot; he fell down and was run over by the rear wheels of the coach. Held: The nature of D's driving went beyond mere momentary inattention because after he had been distracted by the white van, he continued his inherently unsafe manoeuvre which led both to the coach being in the path of any oncoming traffic in the access road and to the victim being in a blind spot and unnoticed by him. That in turn led to the victim falling underneath the back wheels of the coach. Furthermore, the unsafe manoeuvre was performed by the driver of a large coach which was inherently more likely to cause damage if unsafely manoeuvred. Offence fell between categories 2 and 3 for death by careless driving in the guideline, so far as culpability is concerned, i.e. between "careless or inconsiderate driving arising from momentary inattention with no aggravating factors" and "other cases of careless or inconsiderate driving".

R v Elliot 2012 EWCA Crim 243 D was driving on an A-road, in a 40 mph zone, behind four other vehicles. The vehicles entered a derestricted zone, at which point the vehicle in front of D decided to overtake all the cars in front. D decided to do the same. As he did so he collided with a motor-cycle. The rider fell underneath the following car. D stated that he did not see the motor-cycle, but the accident investigator described a line of sight of 850 metres. D said he had attempted to avoid the motor-cycle when he saw it, but he could not explain why he didn't pull into the gap left by the other overtaking vehicle. The Judge accepted that the accident was partly caused by the other overtaker and said offence was at the top end of the middle category of the guideline.

R v Ritchie 2014 EWCA Crim 2114 Court said it is difficult to understand precisely how this accident could have occurred. The weather was fine and bright. The expert analysis established that there was nothing wrong with either vehicle. D was driving well within the speed limit. He had initially alleged that V was driving at an excessive speed and that was his impression, supported to some extent by the impression of another witness. Conclusion of the expert investigator was that the only realistic cause of the collision was the result of the car being driven by D losing control and going into a spin. For reasons which remain quite inexplicable, the appellant seems to have carried out some kind of steering or swerve manoeuvre at a point when V was not in fact in view. This caused the car to go into the spin

and it ended on the incorrect side of the carriageway. Judge categorised as level 2: Court of Appeal upheld and said “It was your steering input that caused the loss of control. And such a failure cannot be described as ‘momentary inattention’ or ‘standard carelessness'.”

Motorcyclist was trying to overtake when he thought it was quite safe. D decided, as he had indicated he was going to do albeit late in the day, that he was going to undertake a U-turn and go back in the opposite direction by turning across the carriageway into a layby on the other side of the road. Signs saying no u turns - ill-judged and careless. No contributing factors such as defects or speeding, failed to see what was behind him. Level 2 - Flagrantly ignoring warning signs, disobeying a traffic sign and attempting manoeuvre.

D was driving an HGV vehicle in the course of employment, along a single-carriageway road. D saw an HGV vehicle coming in the other direction, and moved vehicle off the road, onto the verge. Weight of HGV combined with the gradient of the verge caused vehicle to tip; D over-corrected and steered back towards the road, veering onto the opposite side of the road and tipped over in collision with V's car. Level 2 - Judge initially says it's at the top of cat 3, but then says that it crosses the custody threshold, and due to the circumstances of the case, appropriate starting point is category 2.

Engaging in a brief but avoidable distraction

V came off her bike as she was about to leave the roundabout at a time when D on the roundabout approaching from behind her. D driving a pickup intending to take the same route as her, did not see her either before she came off her bike or after she had done so and was lying towards the side of the road in his path. As a result, his vehicle drove over her. D had been distracted by mobile phone seconds before collision, other driver had seen him looking to his left, and using one hand to drive. Pleaded to careless driving as alternative to dangerous. Level 2 - Middle category - not a momentary lapse but avoidably distracted.

Disregarding advice relating to driving when taking medication or as a result of a known medical condition which significantly impaired the offender’s driving skills

R v Rigby 2013 EWCA Crim 34 Another motorist saw D’s car drifting from lane to lane. D’s car stopped at some red lights and the motorist left her car and remonstrated with D about his driving. D’s car then rolled back into the car behind him. The driver of that car found D unresponsive. D was described as messing about with the gear stick looking straight ahead. The police were called. D continued to drive. It was dark but the streets were illuminated. The pavements were covered with ice and pedestrians were walking in the road. V was walking in the road, which was straight and subject to a 30 mph limit. There was no problem

with visibility. D hit and killed V. D claimed he suffered a hypoglycaemic episode without warning. He had been suffering stress as wife had had surgery for breast cancer. His blood sugar level was unusually high and he did not know how to correct it. Court of Appeal said trial judge wrong to say culpability high and same as someone who drinks and drives, but held D had chosen to drive knowing there was some risk of a hypoglycaemic attack. They said sentencing guidelines were not applicable to the case, where culpability lay in the failure to take precautions before driving, rather than in the driving itself, which in the instant case could be termed unconscious.

Driving at a speed that is inappropriate for the prevailing road or weather conditions, although not greatly excessive

R v Waseem 2014 EWCA Crim 247 D pleaded to death by careless driving. One evening V, aged 9½ years, was sitting on the handlebars of his brother's mountain bike. The two, neither helmeted, had travelled the wrong way along a residential road. D drove his car along a road to a T-junction with the road V was on. The speed limit was 20 mph. Nearby, there was a well-used park and there was a good deal of pedestrian traffic. V and his brother travelled into D's road. D braked and tried to steer clear but struck the front wheel of the bike. V hit the windscreen and was thrown into the air before landing on the ground. D lost control of the car and drove into a parked vehicle. D and his passenger decamped. An expert placed D's speed at between 33 and 39 mph, not only in excess of the limit, but too fast for the prevailing conditions. Higher end of category 2.

Driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs[2]

R v Williams 2014 EWCA Crim 147 D pleaded to death by careless driving when over the prescribed limit. After drinking in a pub with some friends, at about 1.45 am he drove home. The journey was about 2 miles. There were four passengers in his car. They were driving on a narrow country road and, having left the 30 mph restricted zone, D increased his speed. He approached a right-hand bend and failed to manoeuvre the car correctly as he went around the bend. He tried to correct the manoeuvre but lost control of the car and it mounted the verge. The car overturned and came to rest on the passenger side. D had been driving at 35-39 mph around the bend. An expert concluded that the maximum speed at which the

[2] Careless driving under the influence of alcohol or drugs offences causing death would be charged as the substantive offence. However, a factor to capture cases under the new offence which is imminent of causing serious injury by careless driving may be appropriate. Examples of offences related to the existing under the influence offence are included to demonstrate the levels which may still result in a careless driving (rather than a dangerous driving) charge.

bend could be safely negotiated was 39 mph. At 4.50 am, reading was 57µg in breath, which was just over 1.5 times the legal limit. D's driving came within the lowest level of carelessness. The driving amounted to an error of judgement as he travelled around a bend at speed. It was a bad error but it was not combined with any bad driving beforehand, nor was the speed so excessive as to elevate it into the next category. This should not have been elevated to the middle category of the guidelines.

R v Samuel 2015 EWCA Crim 487 D pleaded to drink-related causing death by careless driving. D spent the evening celebrating V's 22nd birthday. V was D's cousin and friend. V had set up his own successful business and was due to be married. At about 5 am, they tried to book a taxi but were told it would take 50 minutes. V asked D to drive them to his home in V's car and V gave D the keys. On the way, D managed to negotiate a series of bends and then failed to identify a bend or miscalculated a bend due to intoxication. There was no evidence of excessive speed. The car hit a tree and V died. A backtracked blood test had an alcohol reading of 159 mg. The legal limit is 80 mg. Level 3. Court of Appeal held there was no evidence of excessive speed. Because of the alcohol reading, offence at the very top of the range for lowest category. In truth it was on the cusp between the two categories as there were considerable aggravating factors.

Driving when knowingly deprived of adequate sleep or rest

R v Crew 2009 EWCA Crim 2851

D pleaded to causing death by careless driving. D arrived at Heathrow airport following a flight. In the preceding 24 hours D had 4½ to 5 hours' sleep. D hired a car and began driving with his two young children in the car to Lincolnshire. V, aged 21, was travelling in the opposite direction. D momentarily fell asleep, veered across the road and collided head-on with V's vehicle, forcing it off the road and into a tree. The carelessness was of a high order bordering on dangerous driving. There were no aggravating features but D's culpability was very high.

R v Fleury 2013 EWCA Crim 2273

Frenchman living in France. Drove to UK to visit girlfriend. Awake for 16 hours, travelling for 6 or 6½ hours. Short period of sleep whilst crossing the channel. Head-on collision with another car after driving on the wrong side of the road for 200-400 metres. Both cars travelling at 40 mph. 60 mph limit. Held. Terribly serious careless driving, but culpability markedly lower than if he was a British driver.

3.16 To avoid inflating offence categorisations and sentences it is not proposed that the suggestion to include medium culpability dangerous factors as high culpability careless factors is adopted. However, an alternative approach could be to ensure serious or extreme examples of medium culpability factors are assessed as high culpability, which is an approach used in other guidelines. This could be provided for by expanding the high culpability factor 'standard of driving was just below threshold for dangerous driving' to:

'Standard of driving was just below threshold for dangerous driving and/or includes extreme example of a medium culpability factor.'

This would enable cases involving such features and not far short of dangerous to be categorised appropriately while avoiding inflating seriousness categorisations for other offences.

3.17 At the last meeting the Council discounted the suggestion that a similarly flexible model to the existing guideline be included, with very broad definitions for each category. An alternative approach would be not to define medium culpability factors, but to define high and low culpability and for medium culpability to provide for cases falling between these. However, this could also result in inflated categorisations as offences falling just short of dangerous driving are very difficult to define as the facts and circumstances of the offence are highly relevant. Lesser culpability cases would be equally difficult to define explicitly.

3.18 Proposed culpability factors are as follows:

High • Standard of driving was just below threshold for dangerous driving and/or includes extreme example of a medium culpability factor
Medium • Unsafe manoeuvre • Engaging in a brief but avoidable distraction • Driving at a speed that is inappropriate for the prevailing road or weather conditions, although not greatly excessive • Driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs • Disregarding advice relating to driving when taking medication or as a result of a known medical condition which significantly impaired the offender's driving skills • Driving when knowingly deprived of adequate sleep or rest • The offender's culpability falls between the factors as described in high and lesser culpability
Lesser • Standard of driving was just over threshold for careless driving • Momentary lapse of concentration

Question 2: Does the Council agree with the proposed culpability factors?

Other medium culpability/current level 2 cases

3.19 Case analysis has also identified other examples of careless driving offences. As discussed at the last meeting, it is not possible to provide an exhaustive list of every act which may constitute an offence and ensure it is appropriately categorised, as the context of the offence is highly relevant to assessing seriousness.

3.20 The following examples illustrate the point regarding the breadth of acts which can constitute careless driving, and how the context is relevant to the seriousness categorisation. The Council is asked to consider if these situations should specifically be provided for by factors, or if the proposed guideline would provide sufficient flexibility to assess seriousness.

Stopped carelessly

R v Gordon 2012 EWCA Crim 772

D drove his flatbed lorry across the central reservation of a dual carriageway to turn right into the southbound carriageway. It was 6.30pm in January and the road was unlit. There was no signage at the entries to the central reservation. He waited there but the back of the lorry protruded into the northbound carriageway by 1.8 metres. D knew it was so protruding. A number of motorists saw the hazard and avoided it. V in his car did not, and hit the lorry. 1st instance Judge assessed as higher end of middle category, but Court of Appeal said middle category not top end.

R v Jenkins 2012 EWCA Crim 2909

D working as a delivery driver for a builder's merchant. He was making a delivery to a property on a single carriageway two-lane A-road. The driveway was inaccessible partly because vehicles were already parked there and partly because snow had collected on the sides of the carriageway. The sky was clear but the sun was very low. Several witnesses who had driven towards D had stated that visibility was seriously impaired. D parked his lorry on the road adjacent to the address and in doing so blocked the majority of that side of the road. The lorry was parked at or just before a right-hand bend in the road. D had left the engine running, his headlights and hazard lights on and was away from the vehicle for about 10 minutes. V was driving a van in the same direction as D had been driving and collided with his vehicle. It was impossible to be precise about the speed but it was estimated at 50-

60 mph. V suffered catastrophic injuries and died. Another vehicle had earlier had to execute an emergency stop to avoid hitting D's vehicle. Court of Appeal said could not fault the Judge's placing of the case in the highest category. It was little short of dangerous driving to park on that bend in those conditions.

Inadvertent mistake

R v Coveney 2012 EWCA Crim 843

D drove his 34-ton lorry on a motorway with the cruise control engaged. He left the motorway at a proper speed at an uphill slip road which led to a roundabout. D disengaged the cruise control at a suitable time. He meant to press the brake pedal but in fact he pressed the accelerator at 100, 70 and 40 metres from the junction and again virtually at the point of impact. D thought his brakes had failed. He waved and sounded his horn but hit the vehicle in front. The lorry 'toppled over' and hit another car. Held. This case was at the upper part of the middle category or in the lower/middle of the upper category.

Lost control or did not react appropriately

R v Smart 2014 EWCA Crim 1119

At about 1.30 pm, D was driving along a road. She was not speeding, nor was she distracted by a mobile phone or other distraction. V was crossing the road. A witness stated that V seemed unaware of D's vehicle approaching but also saw that D made no attempt to avoid V or to brake or stop. It seemed that D simply did not see V. She drove into V, who suffered a spinal injury and subsequently died. D brought her car to a stop and remained at the scene. When interviewed, she admitted that she had not seen V but could not explain why. D would have had a clear view of V for six seconds before impact. Judge determined that it fell within the top category, saying that since the victim had been in her sight for six seconds, this gave ample opportunity to stop or swerve and the fact that she had not seen him for what he described as an extended period of time put the case into the category of careless driving falling not far short of dangerous driving. Held. This was not a Category 1 case. In this case, D was driving in a perfectly lawful fashion without any aggravating features and her fault was an unexplained failure to stop or steer her vehicle during the six seconds that V was in her sight.

V driving home in good weather when without explanation D's car drove onto the carriageway where V was driving in the opposite direction. Nothing in relation to V's driving a concern - both cars were driving between 40-50 mph. No difficulties with road surface, visibility or traffic and no evidence of earlier bad driving, rush or distraction. No explanation for D's car to cross over white line and cause a head on collision. Judge inferred D ceased to concentrate on the road and drifted into opposing carriageway. Level 2 - Judge struggled with categorisation - was unable to say that 'it falls not far short of dangerous driving' - the fact the car was fully in the other carriageway suggests not a momentary inattention that would bring it into the lowest category, so not categories 1 or 3.

D was working as a taxi driver; driving with passenger in the dark but good weather conditions. Drove through a red traffic light at pedestrian crossing and hit the victim who was crossing the road. Level 2 - D should have taken care around crossing, was working as a professional, carrying passenger, potential hazards clearly marked.

Failed to see V as he stepped into the road to cross it; in the road for something between six or nine seconds before the collision occurred. D must have seen V at the very last moment because he braked and swerved and the impact was at a very low speed. Not speeding but driver behind saw V, so D should have done. Not under influence of alcohol or drugs. Issues with vision (incipient cataracts) but no issues raised that he shouldn't have been driving. Bottom of level 2/top of level 3 - not momentary lapse of concentration.

D's vehicle crossed the central white line of a relatively narrow A-road which winds its way through the countryside and collided with V's motorcycle. V had no prospect of avoiding D. Quite why vehicle crossed central white line 'a mystery'. Driving before not inappropriate as evidenced by dashcam of vehicle behind, and not speeding. Road conditions were good, spring day in March, light good, nothing to contribute to vehicle collision other than driver error or fault. No alcohol, no mobile phone to distract him, no pre cons. Had his daughter in back of car. Level 3 – momentary lapse of concentration.

D aged 19, had been driving four of her friends, aged 19-22, in her car. While going round a bend on the approach to a junction, D lost control of the car which swerved several times, collided with trees and spun round onto the opposite carriageway. Two of the passengers were thrown from the car and killed instantly, a third passenger was thrown from the car and knocked unconscious. She was in coma for several weeks and suffered life-changing injuries. A fourth passenger was unhurt physically, but suffered psychology trauma. D was

unharmed. The road conditions and visibility had been good and there had been no aggravating factors. The appellant said she could not remember what had happened and did not accept responsibility for the incident. Level 2.

Question 3: Should any other culpability factors be included or does the Council think the model and factors agreed provide sufficient flexibility to ensure appropriate seriousness assessments?

Aggravating and mitigating factors

3.21 Existing SGC aggravating and mitigating factors for careless driving causing death or injury are as follows:

Additional aggravating factors	**Additional mitigating factors**
1. Other offences committed at the same time, such as driving other than in accordance with the terms of a valid licence; driving while disqualified; driving without insurance; taking a vehicle without consent; driving a stolen vehicle 2. Previous convictions for motoring offences, particularly offences that involve bad driving 3. More than one person was killed as a result of the offence 4. Serious injury to one or more persons in addition to the death(s) 5. Irresponsible behaviour, such as failing to stop or falsely claiming that one of the victims was responsible for the collision	1. Offender seriously injured in the collision 2. The victim was a close friend or relative 3. The actions of the victim or a third party contributed to the commission of the offence 4. The offender's lack of driving experience contributed significantly to the likelihood of a collision occurring and/or death resulting 5. The driving was in response to a proven and genuine emergency falling short of a defence

3.22 Proposed factors reflect those agreed for dangerous driving offences save for some minor differences.

3.23 Proposed aggravating factors are as follows:

- 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

- Victim was a vulnerable road user, including pedestrians, cyclists, horse riders
- Driving for commercial purposes
- Driving LGV, HGV, PSV
- Other driving offences committed at the same time as the careless driving
- Blame wrongly placed on others
- Failed to stop or summon assistance
- Passengers, including children
- More than one person killed as a result of the offence *(death by careless only)*
- Serious injury to one or more victims, in addition to the death(s) (*death by careless only)*
- Offence committed on licence or while subject to court order(s)

Question 4: Does the Council agree with the proposed aggravating factors for careless driving offences causing death or serious injury?

3.24 Proposed mitigating factors are as follows:

- No previous convictions or no relevant/recent convictions
- Impeccable driving record
- The victim was a close friend or relative
- Actions of the victim or a third party contributed significantly to collision
- Offence due to inexperience rather than irresponsibility (where offender qualified to drive)
- Genuine emergency
- Efforts made to assist or seek assistance for victim(s)
- Remorse
- Serious medical condition requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

Question 5: Does the Council agree with the proposed mitigating factors for careless driving offences causing death or serious injury?

Causing death by careless driving under the influence

3.25 This point was included in the paper for the last meeting but the Council did not have time to consider.

3.26 Section 3A of the Road Traffic Act 1988 provides for the offence of Causing death by careless driving under the influence:

(1) If a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, and—

(a) he is, at the time when he is driving, unfit to drive through drink or drugs, or

(b) he has consumed so much alcohol that the proportion of it in his breath, blood or urine at that time exceeds the prescribed limit, or

(ba) he has in his body a specified controlled drug and the proportion of it in his blood or urine at that time exceeds the specified limit for that drug, or

(c) he is, within 18 hours after that time, required to provide a specimen in pursuance of section 7 of this Act, but without reasonable excuse fails to provide it, or

(d) he is required by a constable to give his permission for a laboratory test of a specimen of blood taken from him under section 7A of this Act, but without reasonable excuse fails to do so,

he is guilty of an offence.

(2) For the purposes of this section a person shall be taken to be unfit to drive at any time when his ability to drive properly is impaired.

3.27 The culpability model for the offence of causing death by careless driving under the influence will differ from the other careless driving offences, as both the standard of driving and the level of impairment or manner of failing to provide a specimen for analysis are intrinsic elements of this offence.

3.28 The existing guideline for this offence includes all elements in the seriousness assessment:

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

It is proposed that the approach to assessing seriousness should be maintained in the revised guideline (although the model is likely to differ due to more specific culpability factors), with reference to both the driving standard and drug or drink driving levels. As the Council is aware, work is being undertaken to explore whether improved guidance can be provided in respect of drug driving offences, which will be relevant to proposals in respect of this guideline. Before further development work is undertaken the Council is asked to confirm if it agrees with maintaining the existing approach.

Question 6: Does the Council agree the culpability assessment for careless driving under the influence should relate to the standard of driving and the level of impairment or failure to provide a specimen for analysis?

4 IMPACT AND RISKS

4.1 Given the complexities of assessing the seriousness of careless driving it is important to note the risk of categorisation inflation and increased sentences. Research will be undertaken to identify the impact of any factors agreed during the consultation period.

4.2 The passage of the Police, Crime, Sentencing and Courts Bill continues to be monitored closely as will have an impact upon when some draft guidelines can be finalised.

4.3 There are no equality and diversity issues identified in relation to points covered in this paper.

Sentencing Council

Sentencing Council meeting:	**19 November 2021**
Paper number:	**SC(21)NOV03 – Animal Cruelty**
Lead Council member:	**Rosa Dean**
Lead official:	**Ollie Simpson** **ollie.simpson@sentencingcouncil.gov.uk**

1 ISSUE

1.1 The first meeting looking at the substance of the revised animal cruelty guideline. We have a further discussion scheduled for December to finalise it, before sign-off with a resource assessment in March (subject to decisions about drafting a guideline on animal abduction).

1.2 Considering a draft guideline for animal cruelty offences.

2 RECOMMENDATIONS

2.1 That:

- Council approve the draft guideline at **Annex A** for consultation;
- the guideline should cover the offences of mutilation, tail-docking and poisoning; and
- we should not undertake work on a guideline for the new offence of animal abduction for consultation at this time

3 CONSIDERATION

3.1 In September, Council agreed that we should consider a new animal cruelty guideline in the round, in light of the increase in the maximum penalty from six months to five years. The draft at **Annex A** considers step one and step two factors anew. These draw on the existing guideline where still appropriate, but also consider precedents in other guidelines, in particular child cruelty and assault. The draft moves away from a six box sentencing grid (i.e. two levels of harm and three of culpability) to a nine box grid (three levels each of harm and culpability).

Step one factors

3.2 Informed by discussions with Defra and the RSPCA and comments made in Parliament, I propose that the new maximum penalty (i.e. sentences between six months and five years) should be targeted at particularly sadistic, wanton behaviour, and/or offending carried out in the context of commercial or organised criminal activity.

3.3 The current guideline distinguishes the highest culpability as:

- Deliberate or gratuitous attempt to cause suffering;
- Prolonged or deliberate ill treatment or neglect;
- Ill treatment in a commercial context;
- A leading role in illegal activity.

These may capture too much activity, so the draft takes the first three elements and places them in medium culpability (although sentencing levels for such medium culpability cases will be similar to, or a little higher than they are now when classified as high culpability). The proposed highest culpability elements are:

- Prolonged and/or multiple incidents of serious cruelty and/or sadistic behaviour;
- Use of very significant force;
- A leading role in illegal activity.

3.4 The first two elements are taken from the guidelines for causing or allowing a child to suffer serious physical harm, causing or allowing a child to die and child cruelty (the "child-related guidelines"), with some modifications. In child cruelty the first includes the phrase "including serious neglect". This might be relevant in section 4 cases, but strictly speaking should be covered by a separate section 9 offence, ensuring that the needs of an animal are met.

3.5 In the child-related guidelines, use of very significant force is complemented by "use of a weapon". I considered including it at step one, but on balance I think the current guideline is right to include it as an aggravating factor at step two given the legitimate use of weapons to harm and kill animals.

3.6 In the current guideline medium culpability is only defined as anything falling between high and low. I propose expanding this, firstly with the elements moved from high culpability (see above), then an additional element adapted from the child-related guidelines "deliberate disregard for the welfare of the animal". I have suggested adding "including failure to seek treatment" to this as that is a common factor in these cases. However, this element does run the risk of double-counting what may be covered by a separate section 9 offence.

3.7 Finally, I suggest retaining the equivalent of "All other cases …" alongside these other elements for full coverage of different circumstances ("Other cases that fall between categories A or C because: factors are present in A and C which balance each other out; and/or the offender's culpability falls between the factors as described in A and C").

3.8 In lower culpability I propose retaining the two elements in the current guideline “well-intentioned but incompetent care” and “mental disorder or learning disability, where linked to the commission of the offence”. I would add to these two factors from the child-related guidelines “Momentary or brief lapse in judgement” and “offender is victim of domestic abuse, including coercion and/or intimidation, where linked to the commission of the offence”, although for the latter I suggest removing the explicit reference to domestic abuse: it is not present in the cases I have seen, and if we include it in this guideline we would come under pressure to include it in all guidelines. Coercion/intimidation would be broad enough to cover this scenario in any case.

Question 1: are you content with the proposed culpability table?

3.9 The current harm table has the benefit of simplicity. Greater harm involves either: death or serious injury/harm to animal; or a high level of suffering caused. Lesser harm is all other cases. The proposal at **Annex A** splits this out into three levels, which are drawn from the existing guideline, the child-related guidelines and assault guidelines indicated as follows:

Category 1

- Death (including injury leading to euthanasia) [adapted from existing guideline];
- Particularly grave or life-threatening injury caused [from grievous bodily harm guideline];
- Offence results in a permanent, irreversible injury or condition which has a substantial and long-term effect [adapted from grievous bodily harm guideline];
- Very high level of pain and/or suffering caused [adapted from existing guideline]

Category 2

- Offence results in an injury or condition which has a substantial and/or lasting effect [adapted from grievous bodily harm guideline];
- Substantial level of pain and/or suffering caused [adapted from existing guideline].

Category 3

- Little or no physical, developmental and/or emotional harm [from child cruelty guideline]
- All other levels of pain and/or suffering [adapted from existing guideline]

3.10 This does mean that cases of quite serious and substantial harm could be classified as category 2. This reserves category 1 for the very worst cases and acknowledges that for a case to have been prosecuted a degree of harm is inherent.

3.11 Splitting up harm in this way does open up the possibility of requiring more subjective judgement, and the difficulties of assessing the suffering (including mental suffering) of a victim who cannot give evidence. It may be in practice that courts seek to rely on the injuries sustained.

3.12 Nonetheless, I believe we would be expected to capture in some way the non-physical suffering experienced by animals. That could be captured by a permanent or long-term condition (for example a dog who is perpetually frightened or unable to socialise), but this would not capture the immediate distress caused by some offending. It may be the case that "suffering" is a sufficient catch-all. In many guidelines we would refer to "psychological harm": I am a little wary of this phrase in the context of animals, and have borrowed "emotional harm" from the child cruelty guidelines above. Another possibility may be "distress".

3.13 There are a number of ways we could deal with the question of multiple animal victims. It is quite common in the case of offending on farms, or in a commercial context for there to be tens of animals involved. We could be silent on the point and let totality take the strain, or treat it as an aggravating factor. However, I think it is important to acknowledge upfront that some offending causes widespread harm and the sentencer will have to consider tricky comparisons between (say) one animal with very serious, life-changing injuries and 50 animals who have faced unnecessary suffering, but who make full, or differing levels of recoveries.

3.14 I therefore propose the following wording before the harm table, which is adapted from the modern slavery guideline:

> *"If the offence involved significant numbers of animals sentencers may consider moving up a harm category or moving up substantially within a category range".*

Question 2: are you content with the proposed harm table?

Question 3: do you agree that sentencers should take into account multiple victims as part of the consideration of harm?

Step two

3.15 My guiding principle in setting sentence levels has been to identify the class of serious cases which go beyond the previous six-month limit (based heavily on the culpability of the offender), provide some consequential uplift in medium cases to reflect the increase in

maximum penalty, but ensure that not too many cases are unnecessarily sent to the Crown Court, or result in custodial sentences.

3.16 The current and proposed sentencing tables are set out here for comparison:

Current

	High culpability	**Medium culpability**	**Low culpability**
Higher harm	**Starting point** 18 weeks' custody	**Starting point** Medium level community order	**Starting point** Band C fine
	Category range 12-26 weeks' custody	**Category range** Low level community order – High level community order	**Category range** Band B fine – Low level community order
Lesser harm	**Starting point** High level community order	**Starting point** Low level community order	**Starting point** Band B fine
	Category range Low level community order – 12 weeks' custody	**Category range** Band C fine – Medium level community order	**Category range** Band A fine – Band C fine

Proposed

	High culpability	**Medium culpability**	**Low culpability**
Harm 1	**Starting point** 18 months' custody	**Starting point** 26 weeks' custody	**Starting point** Low level community order
	Category range 26 weeks' custody – 3 years' custody	**Category range** 18 weeks' – 12 months' custody	**Category range** Band B fine – Medium level community order
Harm 2	**Starting point** 26 weeks' custody	**Starting point** 12 weeks' custody	**Starting point** Band C fine
	Category range 18 weeks' – 12 months' custody	**Category range** Medium level community order – 26 weeks' custody	**Category range** Band B fine – Low level community order
Harm 3	**Starting point** 12 weeks' custody	**Starting point** Medium level community order	**Starting point** Band B fine
	Category range Medium level community order – 26 weeks' custody	**Category range** Low level community order – High level community order	**Category range** Band A fine – Band C fine

3.17 This is an asymmetric table, but intentionally so with low culpability offenders dealt with by fines or community orders, high culpability offenders by custodial sentences and medium culpability offenders a mix of custody and community orders. The three top left hand categories could merit a sentence outside the powers of the magistrates courts.

3.18 Lower culpability offences are set apart with almost no overlap with medium culpability. This reflects the fact that lower culpability offenders are marked by their misguided or mistaken approach to animal welfare, whereas those in the proposed medium culpability are knowingly and deliberately inflicting unnecessary suffering. Indeed, many of those being categorised as medium culpability would have been in high culpability under the current guideline.

3.19 Current sentencing practice tends towards the upper end of the (previously) available penalties. In a typical year before the increase in penalty, a third of section 4 offenders would receive a custodial sentence (roughly 10% immediate, and 25% suspended). Over a third (and sometimes as many as four in ten) would receive a community order and just over a fifth would receive a fine. Of those that received immediate custody in 2020, it appears that over three quarters received sentences, pre-guilty plea, of over four months. We should therefore be cautious about inflating sentences too far in the table.

3.20 A potential criticism is that the top box does not fill the space of the new maximum penalty. This argues in favour of including the rider “A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below” before the table, to demonstrate that in the most serious cases courts will have the option to select higher starting points.

3.21 However, another reason for caution here is the comparison with sentence levels where the victim of violence, abuse or neglect is a human, including children. As well as being on a par with the lowest levels of GBH with intent, the levels proposed high culpability, Harm 1 category equate roughly with the levels for:

- Causing or allowing a child to suffer serious physical harm: this would equate to category C2 or B3 offending – either serious physical or psychological harm, reduced life expectancy, permanent condition as a result of something just above a mistake, or serious physical harm by (eg) someone who employed significant force, or prolonged multiple incidence of cruelty.
- Child cruelty: compares to a serious A3, B2 or C1 offence. For example, sadistic behaviour, using a weapon, but with no harm; use of force or prolonged/multiple incidents resulting in some harm, or risk of high harm;

something above a mistake/victim of DA resulting in serious physical or psychological harm.

- Grievous bodily harm: equivalent to A3, B2, or C1: this could be a leading role, a premeditated attack, use of serious weapon etc resulting in no permanent injury; use of a lesser weapon, a lesser role, resulting in grave injury or a permanent (but not very serious) condition; or spontaneous self defence resulting in a serious permanent condition and/or lifetime care.
- Actual bodily harm: A2 or B1. Premediated, a leading role, the use of a highly dangerous weapon, or asphyxiation resulting in medium harm; or a lesser role, the use of some sort of weapon, resulting in serious physical injury or psychological harm.

Question 4: are you content with the proposed sentencing levels?

3.22 I do not think there is any pressing need to rework the aggravating and mitigating factors in the current guideline. I mention above the reasons why I think use of a weapon is rightfully an aggravating factor, rather than a culpability factor. I have proposed refining "Offender in position of responsibility" to "Offender in position of professional responsibility for animal" to reflect better the intention to capture farmers, vets, pet shop owners etc as opposed to people who have general responsibilities.

3.23 One factor which was discussed in Parliament related to offenders who film their offending and circulate it on social media (see extracts from the Commons Committee debate at **Annex B**). The existing aggravating factor is worded "Use of technology to publicise or promote cruelty". During the Bill's passage, the Minister suggested using the aggravating factor found in the youth guidelines:

> "Deliberate humiliation of victim, including but not limited to filming of the offence, deliberately committing the offence before a group of peers with the intention of causing additional distress or circulating details/photos/videos etc of the offence on social media or within peer groups".

3.24 Additional distress and humiliation caused by the presence of others or the distribution of video footage would not appear to be relevant to animal victims. Rather, it is the risk of promoting cruelty and copycat violence. The present wording captures this I believe, but if "use of technology" is seen as too broad we could particularise it as follows:

> "Use of technology, including circulating details/photos/videos etc of the offence on social media to publicise or promote cruelty".

Question 5: are you content with the proposed aggravating and mitigating factors?

Question 6: would you like to amend the aggravating factor relating to using technology to publicise or promote cruelty?

3.25 The additional steps would be the standard ones, and the offence has not been added to those for which a dangerousness consideration is necessary.

Mutilation, tail docking and poisoning

3.26 The elements in the draft guideline are primarily aimed at the section 4 cruelty offence but are general enough to be able to cover both the offence of fighting (already covered by the animal cruelty guideline) and the other offences of mutilation, tail docking and poisoning (which are not currently).

3.27 As with fighting, it is perhaps less possible to imagine mutilation or tail docking undertaken as a minor lapse of judgement or as well-intentioned but incompetent care. Nonetheless, it is arguably fitting that the deliberate and calculated injury caused in such cases should be reflected in a finding of at least medium culpability.

3.28 There is a question over more passive participants in these types of offending. For example, it is an offence not just to mutilate or dock a dog's tail, but also to allow this to happen to an animal for which one has responsibility. Arguably there is very little difference in culpability between those cases.

3.29 There is probably a greater question (and one which already exists under the current guideline) about the difference between those who organise dog fights and those who attend. I suspect the courts would interpret "leading role" as being reserved for those who organise fights, with mere attendance falling into medium culpability. I do not propose dealing with this explicitly, particularly given the low volumes of offences, but it is open for discussion.

Question 7: do you agree that the revised guideline can cover mutilation, tail docking and poisoning?

New offence – animal abduction

3.30 We expect the new offence of animal abduction to the be introduced via amendment to the Police, Crime, Sentencing and Courts Bill imminently. It would become law in early 2022 although we do not yet know when it would come into force. Depending on how we progress with animal welfare, we are due to have a further discussion at the December Council, followed by sign off (with a consultation stage resource assessment) in March, with consultation running from April to June. Following consideration of responses that would see publication of a definitive guideline in January 2023, coming into force in April of that year.

3.31 There is a timing imperative with producing revised animal welfare guidelines, given that cases will be starting to reach the courts for offending taking place after the maximum penalty was increased in June. Based on our understanding of pet theft prosecution numbers we would not expect many cases of the new animal abduction offence to be sentenced every year.

3.32 A new guideline for animal abduction would coincide with the introduction of the offence. There will be no existing cases to draw on, and certainly no authorities from the higher courts. It is a hybrid of abduction and theft where the victim is a combination of animal and human. This makes it quite an unusual offence and to a large extent we would be defining the terms of the offending before the courts see any cases of it. This may make drafting of a guideline a more complex matter, requiring more heavy input from (eg) the RSPCA and other experts.

3.33 If we made swift progress on an animal abduction guideline then our timetable need not be affected (even pessimistically the in-force date would only slip by three months in 2023). However, the novelty of animal abduction offence may mean that we draft elements of a guideline which are otiose and miss others which would have been useful. On balance, I do not believe we should prioritise producing a guideline for the new offence.

Question 8: do you agree not to consult on a new guideline for animal abduction alongside the revisions to the animal cruelty guideline?

4 EQUALITIES

4.1 There is very limited data on the demographics of animal cruelty offenders because until earlier this year (2021) the offence was summary only. In the vast majority of cases (85 per cent of offenders sentenced in 2020) the ethnicity of the offender was either not recorded or not known. Most offenders sentenced for section 4 offences are under 40 and in a typical year, over a third of offenders are female, which corresponds with the average proportion across all summary non-motoring offences.

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

5 IMPACT AND RISKS

5.1 We will present a resource assessment to Council in due course ahead of finalising the guideline, setting out the expected impacts. As well as potential impacts on prison places, this will consider the impact on Crown Court case load.

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

Sentencing Council

Sentencing Council meeting:	**19 November 2021**
Paper number:	**SC(21)NOV04 - 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 fourth meeting to discuss the guidelines and will focus on proposed sentencing levels. There is one further meeting to sign off the guideline and to look at the proposed draft resource assessment (RA) ahead of a planned consultation next Spring.

2 RECOMMENDATION

2.1 At today's meeting the Council are asked:

- To consider and agree the sentence levels for the two guidelines

3 CONSIDERATION

Perverting the Course of Justice (PTCJ)

3.1 The proposed sentence levels for this offence can be seen at page 4 of **Annex A.** These have been developed after considering current sentencing practice, reading transcripts of sentenced cases and after discussion with Juliet, the guideline lead. The draft sentence ranges have been tested by resentencing cases from transcripts using the draft guideline, to see what the sentence would be using the guideline, compared to the actual sentence given. The ranges proposed are based on current sentencing practice, with the assumption that the Council does not wish to alter sentencing practice. Page one of **Annex B** tells us that the average custodial sentence (ACSL) in 2020 was 14 months (mean) and 8 months (median).

3.2 The Council will see from page two that the vast majority of offenders received custody for this offence (51 per cent received immediate custody and 42 per cent suspended sentence (SSO) in 2020). Quite a large proportion of offenders received an SSO and this has been accounted for in the sentencing tables by having starting points and ranges around two years, which allows for these sentences to be suspended. Only 4 per cent of offenders received a community order, with just a handful of offenders receiving either a discharge or fine (less than 1 per cent). For this reason, the bottom of the range in C3 starts at a community order, if required courts could depart from the guideline to impose a fine or discharge.

3.3 The spread of sentence lengths can be seen on page two, and the Council will note that in 2020, the majority of offenders were sentenced to 12 months or less (68 per cent). This perhaps reflects the principle stated in *Abdulwahab*[1] that although these offences generally call for a custodial sentence, it doesn't have to be a sentence of great length. Currently, the top of the range is proposed at six years, in A1. Given that the statutory maximum is life imprisonment, this may seem low, but it reflects the sentences being imposed for this offence, 98 per cent of offenders got a sentence of six years or less. If the Council confirms that it does not want to change sentencing practice, but is concerned that six years might seem low, an option might be to have some wording similar to that used in other guidelines:

'For cases of particular gravity, sentences above the top of the range may be appropriate'

This allows courts to sentence above the top of the range for particularly serious cases, while allowing the top of the range to reflect current sentencing practice.

Question 1: Does the Council wish to maintain current sentencing practice for this offence? If so, does the Council agree with the proposed sentence ranges for this offence?

Question 2: Does the Council wish to add the wording regarding cases of particular gravity?

Witness Intimidation

3.4 The proposed sentence levels for this offence can be seen at page 4 of **Annex C.** As with PTCJ, these have been developed after considering current sentencing practice, reading transcripts of sentenced cases and after discussion with Juliet. The draft sentence ranges have been tested by resentencing cases from transcripts using the draft guideline, to see what the sentence would be using the guideline, compared to the actual sentence given. The ranges proposed are based on current sentencing practice, with the assumption that the Council does not wish to alter current sentencing practice. Page six of **Annex B** tells us that the ACSL in 2020 was 9 months (mean) and 8 months (median).

3.5 As with PTCJ, most offenders received a custodial sentence of some kind, however a higher proportion received immediate custody (63 per cent compared to 26 per cent receiving an SSO). Of those sentenced to immediate custody, 72 per cent received a custodial sentence of 12 months or less. The top of the range is proposed at 4 years, just below the statutory maximum of five years. In 2019, the longest sentence given was four years and in 2020 it was three years. Slightly more offenders receive a community order (7

[1] Abdulwahab [2018] EWCA Crim 1399.

per cent) than those for PTCJ offences, which is reflected within the draft ranges. The amount of offenders receiving a fine or disposal again is very low (less than 1 per cent) so these disposals have not been included as an option.

Question 3: Does the Council wish to maintain current sentencing practice for this offence? If so, does the Council agree with the proposed ranges for this offence?

3.6 At the last meeting the Council discussed the low culpability factor of '*unsophisticated nature of conduct'* in the Witness Intimidation guideline, and asked that it be reworded, perhaps looking at what the corresponding factor was in the MCSG guideline. The MCSG factor is '*sudden outburst in chance encounter'.* Arguably this type of low level offending behaviour is already captured in the other low culpability factor of '*unplanned and limited in scope and duration'.* It is difficult to think of types of offending that wouldn't be captured by the factor '*unplanned and limited in scope and duration'* so the suggestion is that we remove '*unsophisticated nature of conduct'* from the draft guideline, and leave the existing three low culpability factors, as can be seen on page two of **Annex C**.

In the category one harm factors for PTCJ we have '*serious impact on administration of justice'* and *'conduct succeeded in perverting the course of justice',* with '*some impact on administration of justice' and 'conduct partially successful in perverting the course of justice'* in harm category two. Juliet has raised a concern as to whether both factors are necessary, what the distinction between the two is, as they seem to be different ways of expressing the same thing. Her suggestion is to remove the factor '*succeeded in perverting the course of justice'.* The factors referring to the success or otherwise in perverting the course of justice came from the factors set out in *Abdulwahab.* Also, the factors have evolved as the guideline has developed, prior to '*serious impact on administration of justice'* we had '*high level of financial costs (police/prosecution/court) incurred as a result of the offence***'.**

Question 4: Does the Council agree to remove 'unsophisticated nature of conduct' from low culpability?

Question 5: Does the Council wish to remove the three factors in harm that refer to the success or otherwise in perverting the course of justice?

4 EQUALITIES

4.1 Statistics showing sentencing outcomes by demographic group, (sex, age group and ethnicity of offenders) are attached at **Annex C** (page three for PCTCJ and page seven for witness intimidation.)

4.2 In 2020, the majority of adult offenders sentenced for perverting the course of justice were male (around three quarters). However, female offenders made up a larger proportion of offenders than the overall average for indictable offences. Across all offenders sentenced for indictable offences in 2020, 8 per cent were female compared to 26 per cent of perverting the course of justice offenders. This suggests that female offenders are over-represented for this offence compared with other indictable offences, however, the volumes of female offenders are still low.

4.3 When looking at sentencing outcomes, a higher proportion of males received an immediate custodial sentence than females (58 per cent compared to 31 per cent of females), whereas a higher proportion of females received a suspended sentence (56 per cent compared to 37 per cent of males). The ACSL was fairly consistent between the sexes, at around 14 months.

4.4 Of the adult offenders sentenced in 2020 whose ethnicity was known, 74 per cent were White and the majority of offenders of all ethnicities received a custodial sentence. The proportion of Black and Mixed ethnicity offenders receiving an immediate custodial sentence was higher than for White offenders (64 per cent compared to 53 per cent), however, the volume of Black and Mixed ethnicity offenders sentenced in 2020 was small, so care should be taken when drawing conclusions from this data.

4.5 The volume of adult offenders sentenced for intimidating a witness each year are low and in 2020 the majority of those sentenced were White males (making up 81 per cent of offenders where both sex and ethnicity was known in 2020).

4.6 To note, figures presented here are from 2020, for which volumes were affected by the COVID-19 pandemic, however, the demographic trends seen above are consistent with those seen in 2019.

Question 6: Does the Council have any comments or questions around this data?

5 IMPACT AND RISKS

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

Sentencing Council

Sentencing Council meeting:	**19 November 2021**
Paper number:	**SC(21)NOV05 – Sexual Offences**
Lead Council member:	**Adrian Fulford**
Lead official:	**Ollie Simpson** **07900 395719**

1 ISSUE

1.1 Further consideration of responses to the consultation on revisions to the sexual offence guidelines.

2 RECOMMENDATIONS

2.1 That:

- changes are made to the step one and step two factors in the s15A guideline as set out below but that sentencing levels remain as proposed;
- the drop down on "severe psychological harm" is amended, but that on abuse of trust remains as proposed in the consultation;
- the added/amended mitigating factors on youth and ill-health are added as proposed in the consultation;
- that the guidance on how current guidelines are applied to historical cases is brought further into line with the wording in the case of *RvH*.

3 CONSIDERATION

3.1 This is the second meeting considering responses to the consultation on revisions to the sexual offences guidelines which ran between 13 May and 13 August this year. This paper covers responses received on i) the new section 15A guideline (sexual communications with a child); ii) the drop down expanded explanations proposed on abuse of trust, psychological harm, and mitigating factors age/lack of maturity and physical disability or serious medical condition requiring urgent, intensive or long-term treatment; and iii) principles for sentencing historical sexual offences.

Section 15A guideline

3.2 A copy of the draft section 15A guideline is at **Annex A**, with the amendments proposed in this paper in red. A summary of the findings from road-testing is at **Annex B**. Road testers generally applied the guidelines consistently in terms of arriving at a starting

point, although there was some inconsistency in how the reduction to reflect the lack of a real victim was (or was not) applied. Variations in final sentences depended heavily on how mitigating factors were applied.

3.3 Looking first at the harm factors, a number of responses asked us to look at the section 15 guideline (meeting a child following sexual grooming) for consistency of approach. For example, where we had proposed “sexual images sent or received”, they suggested “sexual images exchanged”. Although consistency may be desirable, I would defend “sent or received” in this context because it would be quite possible for an offender to send unsolicited images without receiving anything in return.

3.4 Other factors from the section 15 guidelines suggested for inclusion here were “child is particularly vulnerable due to personal circumstances” and “continued contact despite victim’s attempts to terminate contact”.

3.5 The former is already at least partially covered by the culpability factor “targeting of a particularly vulnerable child”, although this is equally true in the section 15 guideline. As well as the risk of double counting, there is scope for uncertainty by including a harm factor on vulnerability: in the apparent majority of cases the child will be fictional, so such a harm factor should not apply (rather the “targeting” culpability factor would be relevant). We have an aggravating factor “Victim particularly vulnerable (where not taken into account at step one)” and this seems to me the most appropriate place for this to be considered.

3.6 “Continued contact despite victim’s attempts to terminate contact” is similar to our proposed aggravating factor “offence involved sustained or persistent communication”. Whether this comes at step one or step two is finely balanced. I would argue that the section 15 guideline is designed for a different type of offending, i.e. a course of conduct intended to result, or which has resulted in, contact offending. The seriousness of a section 15A offence may be realised either in a one-off communication or in a longer course of conduct (though still not resulting in contact offending), often without a real victim to attempt to terminate contact, and so it may be better for the duration of the offending to remain at step two.

3.7 One further harm element from section 15 mentioned by a respondent is “victim exposed to extreme sexual content (for example, extreme pornography)”. This links with a concern raised by Professor Alisdair Gillespie that even the exchange of sexual content risks confusing prosecutors into pursuing a section 15A prosecution rather than the more appropriate section 12 (causing a child to watch a sexual act). While I doubt inclusion within the guidelines would confuse prosecutors, I believe this is covered adequately by “sexual images sent or received”.

3.8 One respondent suggested we should be clear on our definition of the word “sexual” noting the differing definitions used in the law on disclosing images, voyeurism, and upskirting, recently explored by the Law Commission in its consultation on intimate image abuse. I do not believe the guidelines need to employ or signpost more of a definition than the reasonable person test which appears on the face of the statute for this offence:

“For the purposes of this section, a communication is sexual if—

(a) any part of it relates to sexual activity, or

(b) a reasonable person would, in all the circumstances but regardless of any person's purpose, consider any part of the communication to be sexual;

and in paragraph (a) “sexual activity” means an activity that a reasonable person would, in all the circumstances but regardless of any person's purpose, consider to be sexual.”

3.9 Some respondents suggested broadening “images” to be clear it could refer to other material such as videos or sound recordings. Professor Gillespie suggested “stories” as well, but I would be concerned that that would elevate too much of what is inherent in the offence. I believe in most cases “images” would be understood to include video footage. We could use the word “content” from the section 15 guideline but with this (or the word “material”) we risk catching the basic communication.

3.10 On balance, I believe “images” captures what we want it to, and if another form of media is used, the sentencer will have flexibility to consider whether that has caused particular harm.

3.11 Several respondents, including the Justice Select Committee, were concerned about the use of the phrase “significant psychological harm” arguing that it was a subjective term, that harm might not manifest itself till later on in life, and that harm is inevitably caused in all such offences. The last point argues in favour of including some kind of qualifier and a base level of harm is assumed by the sentencing levels in these cases. We cannot direct sentencers to assume a significant level of harm which may only manifest itself later, and I believe in practice it is possible to distinguish between differing levels of harm evidenced in victims.

3.12 We would be using here the proposed drop-down text on the assessment of psychological harm (and I propose some refinements to this below, based on consultees’ responses). However, we could add some wording to that which is found in a similar piece of text in the child cruelty harm table: “It is important to be clear that the absence of such a finding does <u>not</u> imply that the psychological harm suffered by the victim is minor or trivial”. We can consider that as part of the amendments proposed to the drop-down.

3.13 I have considered whether the term “significant” could be replaced with an alternative. Other sexual offence guidelines refer to “severe” psychological harm and the child cruelty guidelines refer to “serious” psychological harm. Given the nature of this (non-contact) offending, these adjectives would set the bar too high. “Significant” is used in harassment/stalking guidelines and I believe is pitched at the right level.

3.14 The Justices’ Legal Advisers and Court Officers Service suggested:

> “We would propose that rather than the additional wording [at the top of the harm table], that “significant number of victims” be added to category 1 Harm. “Significant” would avoid the inclusion of merely more than one (which multiple would include); an additional other aggravating factor (at step 2) could be added “ more than one victim where not already taken into account “ would cover more than one but less than significant.”

I do not believe this offers more flexibility than we currently have to reflect the differing circumstances of different cases where there may be more than one victim (for example where very low-level messaging is sent to various victims).

3.15 Some responses suggested that there be more detail and examples given for lower harm (which we propose to be anything that does not come under raised harm). I believe we can defend this two-category/four-box system as being clear and appropriate for a sexual offence with a relatively low maximum penalty and where common elements are found across much of the offending.

3.16 Finally, some sentencers in road testing found it difficult to assess harm when there was no real child, given that one of the two existing raised harm factors is “significant psychological harm or distress caused”. I do not think this is necessarily a problem although in such scenarios it does leave sending images as the only factor to mark out raised harm.

Question 1: are there any changes you would like to make to the harm table, as proposed by consultees?

3.17 Turning to culpability factors, again, several respondents looked to section 15 for possible additions. It was conceded that “offender acts together with others to commit the offence” may be rare but was still thought to be worthy of higher culpability. We had viewed “offender lied about age/persona”, alongside a disparity in age, to be a fairly fundamental aspect of the offending (therefore putting the former as an aggravating factor) but several respondents thought this should go at step one.

3.18 It is certainly the case that there will usually be a significant disparity in age in these offences (although the Justice Select Committee asks us to consider the difference between an 18 year old and a 58 year old targeting a 15 year old victim). However, reviewing the 31

transcripts we have only three cases remark on the use of deceit as to age or identity (and in one of those the offender claimed to be 57 when he was 59). On that basis, it is open to us to include "offender lied about age/persona" as a step one factor.

3.19 It was also suggested to bring the wording of "use of threats (including blackmail)" in line with the section 15 guideline factor "use of threats (including blackmail), gifts or bribes". I agree that this would be welcome for consistency purposes.

3.20 The CPS suggested the culpability factor "sexual images of victim recorded, retained, solicited or shared" which appears in other child sexual offence guidelines. (We already include soliciting images as a raised culpability factor.) My concern with including this is it double counts the high harm factor "images sent or received" as any images are highly likely to be recorded and retained in some form. In the cases I have seen there is no suggestion that images are shared with third parties in these cases (and this in any case would amount to a separate offence).

3.21 Professor Gillespie revived his suggestion for the other child sexual offence guidelines for a culpability factor involving asking a victim to lie or conceal the offending while it is happening (for example asking the victim not to tell their parents and to delete messages). I suggest this may properly be an aggravating factor rather than something for raised culpability.

Question 2: do you agree to add/amend the culpability factors as follows:

- **offender acts together with others to commit the offence;**
- **offender lied about age/persona;**
- **use of threats (including blackmail), <u>gifts or bribes;</u>**

Question 3: are there any other changes you would like to make to the culpability table, as proposed by consultees?

3.22 Most respondents were content with our proposed sentencing levels, some explicitly agreeing with our proposals for all categories to have a custodial starting point and for the upper end of the sentencing range to be the maximum penalty.

3.23 However, a few respondents thought the levels were too high:

"As a Bench experienced in sitting in the youth court, and noting the guidance referred to earlier in the consultation about age and/or lack of maturity, we wonder whether it is right that the starting point for all such offences should be at least 6 months' custody…One can envisage many cases involving, for example, a relationship between an 18-year-old and a

15-year-old where sexual communications take place on a (factually, if not legally) consensual basis…

We note, for example, that sexual activity with a child (section 9) and causing or inciting a child to engage in sexual activity (section 10) are clearly serious offences – they carry up to 14 years' custody - yet these offences both envisage category 3B offences with a starting point of a community order.. it is unusual, for an offence carrying 'only' two years' custody, for the Sentencing Council to provide an offence range which reaches the maximum sentence. Having regard to the guidelines for voyeurism and exposure, which also carry the same maximum sentence, we note that the offence ranges only reach 18 months' and 12 months' custody respectively. We do note that the guideline for the offences of penetrative sex with an adult relative (sections 64 and 65 of the Sexual Offences Act 2003) do have a range up to the maximum sentence of 2 years' custody, but these are offences involving actual (and penetrative) sexual activity, which the section 15A offence does not." -- HM Council of District Judges (Magistrates Courts)

"Category 2A could start at 9 months with a range of high level community order to 15 months. Category 2B start at 4 months with a range of medium level community order to 9 months" – Suffolk Magistrates Bench

"We do not agree that all forms of offending for an offence with a two year maximum should carry a starting point sentence of six months custody. The consequence is likely that all convictions will result in a sentence of imprisonment. We propose a three month starting point. This is much more realistic, given that around one-third of cases currently receive an suspended sentence order. There should be a link to the Council's Imposition guideline, thereby increasing the likelihood that courts may impose a suspended sentence order or a high-level community order where appropriate". – Sentencing Academy

3.24 Given the balance of opinion, I believe we should stick to our proposed starting points. It is unclear how the rate of suspended sentences is an argument for reducing the lowest starting point to three months, which in any case still means all starting points are custodial. One risk of lowering the Harm Category B levels too low is that many fairly serious offenders may fall into this category because they were not communicating with a real child. Where an offender is 18 they will be able to rely on the mitigation of youth, and if the relationship is "ostensibly consensual" it is inevitably going to fall into culpability B (if prosecution has been found to be in the public interest at all).

3.25 One response suggested specifying certain requirements to be attached to a community order or suspended sentence order:

> *"Consideration should also be given to the fact that these offenders will need rehabilitative intervention, which will not be available for any of the custodial terms above. Therefore I would recommend specific factors to be applied to community sentences given to offenders of sexual offences which mandate engaging in structured intervention. Clearly this would require additional availability of probation interventions, or better engagement with mental health commissioners to enforce mental health services engaging with MHTRs and community intervention."* – Dr Nici Grace

3.26 I would be wary of mandating certain treatments in a guideline because of the risks associated with local availability and it would be contrary to our general approach of not specifying or mandating specific interventions. In practice, most sentencers will have a good sense of what they can and should impose as part of a rehabilitation requirement.

Question 4: are you content to leave the sentencing levels as they stand?

3.27 For step two factors, again a common theme was consistency with section 15 and other child sexual offence guidelines. The following additions/amendments were suggested:

- add "presence of others, especially children"; this appears in several child sexual offence guidelines, although not in section 15. Our view had been that this was not generally relevant to this offence (and would it refer to presence at the offender's end, the victim's end, or both? Would it include an online presence?);
- add "demonstration of steps taken to address offending behaviour"; this appears in some but not all child sexual offence guidelines. I can see no reason not to include it in this guideline;
- if we add "offender lied about age/person" as a culpability factor (see above), we should remove "offender lied about age or used a false identity" as an aggravating factor;
- the Prison Reform Trust asked us to remove "commission of offence whilst under the influence of alcohol or drugs" as part of a wider point they have made (i.e. "*There is clear evidence that misuse of drugs and alcohol is often related to an underlying mental health disorder, a learning disability or autism…Access can be particularly problematic for people from black and minority ethnic communities who experience poor mental health, and for women who commonly have histories of abuse and trauma. Consequently,*

individuals may self-medicate by using drugs and alcohol"). Council may wish to consider this in the round but we will include the standard dropdown on this aggravating factor.[1] I do not believe there is a good reason to single this guideline out now as one where this factor is not relevant;

- the Sentencing Academy proposed "single or transitory communication with victim". We currently have "isolated offence" which is a slightly broader concept. I would argue that whilst sustained or persistent communication is aggravating, a single communication should not be mitigating. (One respondent thought that sustained or persistent communication was inherent in almost all examples of offending, but from the transcripts I have seen this is not the case);
- quite a few respondents suggested removing "physical disability or medical condition" as a mitigating factor. Linked with our proposed drop-down explanation (see below) there were concerns that this could be a "get out of jail free card" and there were suggestions it more properly goes to the question of whether to suspend a sentence, or what sort of disposal to impose, but should not be part of the assessment of seriousness. However, I believe it is clearly relevant to personal mitigation;
- two respondents proposed we remove good character, given how this can be used to facilitate offences. It was suggested that the court should only be concerned about previous convictions. However, we do include the standard text being clear that the more serious the offence the less weight should be applied to this factor, and that where it has been used to facilitate the offence it may be aggravating;
- remove age/lack of maturity (see below discussion on the proposed drop-down text);
- Professor Gillespie had suggested a culpability factor about "pre-concealing" – asking a child to cover up the offending whilst it takes place. This seems closely related with the existing aggravating factor "attempts to dispose of or conceal evidence", but I can see the case for particularising it: "attempts to

[1] This includes the wording *"In the case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary, but the court should have regard to the extent to which the offender has sought help or engaged with any assistance which has been offered or made available in dealing with the addiction."*

dispose of or conceal evidence **(including asking the victim to conceal the offending)**"

Question 5: do you want to:

- **add the mitigating factor "demonstration of steps taken to address offending behaviour";**
- **remove the aggravating factor "offender lied about age or used a false identity" (if this becomes a culpability factor); and**
- **amend the aggravating factor "attempts to dispose of or conceal evidence", as above?**

Question 6: are there any other changes you would like to make to the step two factors, as proposed by consultees?

Drop-down expanded explanations

3.28 We proposed an expanded explanation about the assessment of psychological harm at step one of various sexual offence guidelines (see **Annex C** for the text of the drop downs we consulted on). Although most responses agreed with the proposal, some questioned the premise of the explanation.

"While the text states that the assessment of psychological harm 'may be assisted by expert evidence', we are not sure that the sentencer's 'observation of the victim whilst giving evidence' should be said to be sufficient for a judgment of psychological harm, severe or not. Perhaps there may be clear cases where such observation may be sufficient, but surely there should also be some cautionary words." – Sentencing Academy

"The Criminal Law Solicitors' Association are concerned about the broad based construction as to what is harm and that there is no consistent approach. The sentencing judge is not able as either a psychologist or a psychiatrist to assess harm on the basis of evidence including the evidence of a victim personal statement or his or her observation of the victim. Harm is a subjective issue which in the view of the criminal law solicitors Association should be objective as opposed to being a subjective and therefore the above text contained in the drop-down box should not be adopted." – Criminal Law Solicitors' Association

3.29 Others felt that the explanation needed further expansion:

"The guidance quoted in the consultation from the case of Chall is vague and unlikely to be helpful, amounting to little more than shrugging the shoulders and saying "it's up to you". It is also incomplete - whilst the sections of Chall quoted might be likely to encourage more

judges to make a finding of severe psychological harm based on a VPS alone, the court in Chall also made a number of comments which serve to moderate such an approach, including

- pointing out that, to justify an increase in sentence, harm caused must be "significantly greater than would generally be seen" in cases of the type in question, since the expected level of harm is taken into account in the guideline (at [26])

- that judges should be cautious as to the risk of VPSs overstating the objective reality, given their intensely personal nature, as well as noting the real difficulty that the defence would face in challenging such a VPS (at [32])" – Giles Fleming, Drystone Chambers

"We wonder whether, in addition, the text should set out that a clear justification should be given if severe psychological harm is found, to ensure the assessment is undertaken with appropriate care as per R v Chall [2019] EWCA Crim 865." – Judges at Kingston Crown Court

3.30 The essential point being made by our drop down is that expert evidence is not necessary for a finding of severe psychological harm, so I do not feel the drop down needs to contain a full repetition of the findings in Chall but I suggest some additions below which make some of these points. On a related note, some respondents did wish to have a certain level of harm assumed, including harm which only manifests itself later in life. The answer to this may like at least partially in the fact (also made in Chall, paras 25-6) that sentence levels are designed with the inherent harm in the offence in mind. Again, I propose some text which could help make this clear:

The sentence levels in this guideline take into account a basic level of psychological harm which is inherent in the nature of the offence. The assessment of psychological harm experienced by the victim **beyond this** is for the sentencer. Whilst it may be assisted by expert evidence, such evidence is not necessary for a finding of psychological harm, including severe psychological harm. **Such a finding may be made on the basis of a dispassionate and careful assessment** ~~A sentencer may assess that such harm has been suffered on the basis~~ of evidence from the victim, including evidence contained in a Victim Personal Statement (VPS), or on **the sentencer's** ~~his or her~~ observation of the victim whilst giving evidence. **It is important to be clear that the absence of such a finding does not imply that the psychological harm suffered by the victim is minor or trivial.**

3.31 The National Police Chiefs' Council suggested an amendment to the drop down to cover cases where there was no real victim, to include reference to an assessment of "'likely' harm caused as if from a subjective viewpoint". I would not recommend we go this far. This would undermine the fact that each assessment needs to be made carefully on its facts and the based on the evidence before the court. In most child sexual offence guidelines the harm is assessed in relation to the activity, and the harm done to the victim is factored into the sentence levels. A downward adjustment is made precisely *because* no harm has been done and to then adjust for a notional degree of harm seems inconsistent.

Question 7: are you content to make the suggested amendments to the drop down on severe psychological harm?

3.32 We proposed adding the existing drop-down on abuse of trust at step one of the sexual offence guidelines where it appears as a culpability factor. Most respondents were content, although some thought there was scope for confusion:

"The position regarding (for example) relatives of a child or close family friends of a child and whether they have the same level of responsibility or accountability for the child as would a teacher seems somewhat unclear to us. The first paragraph says it is something more than behaving properly, with which we agree, and the second paragraph gives examples where a relationship or duty of care of some sort exists. Indeed, Forbes says that abuse of trust "plainly includes" pupil / teacher relationships, but then goes on to say that "it may also" occur in "parental or quasi-parental relationships" – to us, this seems to imply a lesser likelihood for a level of responsibility exists and so a breach of trust to occur. We are sure this is not meant to imply that in no cases can abuse of trust take place by a relative, neighbour or close family friend. We cannot think of a situation or "relationship" in which the responsibility and accountability for another is stronger than that between a parent (or quasi-parent or someone acting in loco parentis) and a child. Nowhere else can the duty of care and protection for a child be stronger than with their parents or guardians. So how is this to be reconciled?" – West London Magistrates Bench

"The proposed text in the consultation reads:

Examples MAY include relationships such as teacher and pupil, parent and child, employer and employee, professional adviser and client, or carer (whether paid or unpaid) and dependant. It MAY also include ad hoc situations such as a late-night taxi driver and a lone passenger.

(emphasis added)

By using "may" in both places, the suggested text gives the impression that abuse of trust is equally likely to be found in both types of situation, which is not the case." – Giles Fleming

"Abuse of trust is in the context of these offences a rather vague concept. It should perhaps simply be replaced with 'abuse of position'. That is then more victim/complainant oriented- they may 'look up' to the D or follow his or her instructions, even though nobody else has placed D in a position of 'trust" – HHJ Colin Burn

3.33 Professor Gillespie suggested splitting this out so that "familial relationship" becomes a new culpability factor, thereby defining "abuse of trust" more tightly. This proposition may have merit but it could clearly have broader implications, even beyond sexual offence guidelines, so I believe this should be considered as part of a broader review in due course.

3.34 I am not persuaded that the existing dropdown is the source of much confusion and the "may/plainly" wording from Forbes does not need to be followed slavishly to be clear. "Abuse of position" seems to be a narrower concept than what we want to cover.

Question 8: are you content to leave the drop down explanation for abuse of trust as it is?

3.35 Most respondents were content to add (or amend) the now standard mitigating factors "Age and/or lack of maturity" and "Physical disability or serious medical condition requiring urgent, intensive or long-term treatment". A small number, including the Justice Select Committee, were concerned that they could be overused resulting in unduly lenient sentences. The Law Society thought they would be of use in limited numbers of cases and that the expanded explanations would just add unnecessary reading. The Prison Reform Trust queried whether age/lack of maturity should more properly sit under step one culpability.

3.36 One respondent had an interesting objection to the age/lack of maturity proposal:

"Although young people under 16 might be affected by this, young persons over 16 are reaching sexual maturity and at 25 will be very sexually mature. Carrying out sexual offences at 25 is very different to carrying out sexual offences at 15. If it is legal to consent to sex at 16, and be considered mature enough to consent, then age and maturity should only be considered up to this age." – Member of the public

3.37 However, young people can still be distinguished from older people in terms of control over their behaviour. Where victims are very young this may carry little weight but it is arguably more relevant for teenage offenders with victims approaching 16. In short, I believe none of the arguments against outweigh the interest in consistent guidelines and we can

assure the Justice Committee (and others) in the response document that these factors are present across a broad range of guidelines and we do not expect them to have a disproportionate impact on sentencing in sexual offence cases.

Question 9: are you content to include the mitigating factors "Age and/or lack of maturity" and "Physical disability or serious medical condition requiring urgent, intensive or long-term treatment" and accompanying expanded explanations as proposed?

Historical sexual offences

3.38 Our aim with the amendments to the guidance on sentencing historical sex offences (as set out at **Annex D**) was to bring it closer into line with Court of Appeal case law. However, it led some respondents, including Professor Gillespie, the Magistrates Association and the Justice Select Committee to question why in historical cases youth and immaturity would be treated as a matter of culpability as opposed to personal mitigation.

3.39 I suspect this is more a semantic distinction than anything that would substantially affect sentence outcomes. Nonetheless, we can defend our proposal to treat immaturity as a pure culpability factor in historical cases, given that it will be irrelevant to personal mitigation for an older offender. In terms of the disparity with present-day cases, the mitigating factor of youth (which applies both to the offending and the circumstances of the offender) will in practice result in significant downward adjustment. Youth may well also be indirectly relevant to an assessment of lower culpability (eg no significant disparity in age).

3.40 The Justice Select Committee asked for "*clarification on whether the assessment of this will just be based on age, as it would be difficult to assess maturity retrospective for historic offences.*" We can provide something on this in the response document. In practice it will be for the defence to make a case on immaturity if they wish to rely on it and for the prosecution to argue against. The judge can make an assessment on the evidence before them, although in many cases it may be that immaturity will be assumed to go hand in hand with youth.

3.41 Other responses picked up on the wording of how the Court is meant to use current guidelines. HM Council of District Judges (Magistrates' Courts) rightly pointed to the plethora of formulations in use:

> *"(i) "Sentence will be imposed…by measured reference to any definitive sentencing guidelines relevant to the situation revealed by the established facts" (R v H EWCA Crim 2753 at [47]).*

(ii) "A court should have regard to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003" (Current Sentencing Council guideline, confirmed by R v Forbes [2016] 2 Cr.App.R.(S.) 44 at [9] to mean the same as (i).

(iii) "…use the guideline in a measured and reflective manner to arrive at the appropriate sentence…to guard against too mechanistic approach…Whilst a judge should have regard to the current guidelines in this way, the judge should go no further and should not attempt…to construct an alternative notional sentencing guideline" (further observations in R v Forbes at [9]-[10]).

(iv) "The court should sentence by reference to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003" (current proposal for Sentencing Council guideline).

(v) "Where there is no definitive sentencing guideline for the offence…the court should take account of…definitive sentencing guidelines for analogous offences…apply these carefully, making adjustments for any differences in the statutory maximum sentence and in the elements of the offence. This will not be a merely arithmetical exercise." (Sentencing Council's General Guideline: Overarching Principles).

We query whether the proposed new wording, at (iv), adds yet another phrase to the possibilities. We wonder whether it would be sensible for the wording either to be consistent with that used by the Court of Appeal (either in H or Forbes) or to be consistent with that used by the Sentencing Council itself in its overarching principles guideline."

3.42 The judges from Kingston Crown Court also suggested that we follow the wording in *R v H*. I agree that it is counterproductive for the sake of a word to add another formula for sentencers to follow, so recommend we add "measured", to become: "*The court should sentence by* ***measured*** *reference to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003*".

3.43 Professor Gillespie proposed a further principle for inclusion in the historical sexual offences guidance:

"In R v Webber *the Court of Appeal said something which is very pertinent:*

'Of course, a sentence of 32 years' imprisonment on a man of 79 years of age, who is, we understand, in infirm health and who is now registered blind, will have a serious impact on him. It will be more difficult for him to cope in prison than it would be for a younger or healthier man. Nevertheless, while his victims have been suffering in the way we have described, the appellant has had the benefit of living a life in the community for many years as a respected member of society.'

This is an important point. While the impact on an offender must be taken into account, it must also be recognised that, particularly in cases of historic abuse, a person has enjoyed their life in a way that their victims have not. To an extent, this is reflected in the third bullet point of your drop-down text:

"There will always be a need to balance issues personal to an offender against the gravity of the offending (including the harm done to victims), and the public interest in imposing appropriate punishment for serious offending."

If the Council are confident that the inclusion of this note in other guidance has not led to inappropriate sentencing, then it should be included within the sexual offences guideline. However, I respectfully submit that the comment in Webber *should be referenced in the historic offences guideline."*

3.44 I believe that this point is sufficiently complex and controversial that it would need to be the subject of further consultation and, again, could be picked up in a broader review of sexual offence guidelines. However, I would like to limit changes to this guidance to points of wording to ensure no disparity with case law.

3.45 Finally, it was helpfully pointed out that the current guidance is entitled "Approach to sentencing **historic** sexual offences", and we refer throughout to them in this way. However, they would better be called **historical** sexual offences (as they happened in the past, rather than being significant events).

Question 10: should the guidance refer to youth and immaturity as elements relevant to culpability rather than personal mitigation?

Question 11: do you agree that the guidance should direct Courts to sentence by measured reference to any applicable guidelines?

Question 12: do you agree to amend the guidance to refer to historical sexual offences?

4 EQUALITIES

4.1 The consultation asked

- Do you consider that any elements of the draft guidelines and revisions presented here, or the ways in which they are expressed, could riskbeing interpreted in ways which could lead to discrimination against particular groups?

- Are there any other equality and diversity issues these guidelines and revisions should consider?

We discussed at last month's meeting the suggestion from one response that offending by women should be treated as more seriously, and that there was not particularly clear evidence of disparities in sentencing different ethnic groups. No further changes to the guidelines are proposed.

5 IMPACT AND RISKS

5.1 We will present a revised resource assessment to Council in January ahead of finalising the revisions, setting out the expected impacts of the guideline as revised in light of consultation responses.

Sentencing Council

Sentencing Council meeting: 19 November 2021
Paper number: SC(21)NOV06 – Burglary Revision
Lead Council member: Rebecca Crane
Lead officials: Mandy Banks
0207 071 5785

1 ISSUE

1.1 This is the first meeting to discuss the burglary guideline post the consultation earlier this year. There are four meetings scheduled to discuss the guideline, ahead of publication in May, with an in force date of July 2022. These dates need to be adhered to as the data collection in the magistrates and Crown Courts starts in October 22, so the guideline needs to have been in force for three months prior to collecting data as part of the exercise.

2 RECOMMENDATION

2.1 That the Council:

- Considers the responses to culpability factors across the three guidelines
- Considers the responses in relation to equality and diversity issues

3 CONSIDERATION

3.1 The consultation ran from the 9th June to the 1st September. In total 32 responses were received, the list of respondents is at **Annex A**. In general, the proposals consulted on were well received, particularly the change to three levels of culpability and harm. Road testing was conducted on the proposals, the report is attached at **Annex B.** In road testing the guidelines tested well, with judges and magistrates finding the guidelines clear and useable.

3.2 As many of the comments that respondents made on culpability issues are applicable across the three guidelines, all culpability issues will be considered at this meeting, later meetings will look at harm, sentence levels and aggravating and mitigating factors across all three guidelines.

3.3 The first comments relate to targeting within non-domestic burglary (attached at **Annex C**). The Council may recall that due to concerns about too many cases

being captured within high culpability, non-domestic burglary does not refer to targeting within high culpability, and aggravated and domestic burglary have the factor 'of *targeting of vulnerable victim.'* The original guideline had a high culpability factor of deliberate targeting of pharmacies etc. A number of magistrates and the Magistrates Association (MA) questioned this, saying they think the reference to deliberate targeting should be retained, and that this type of offending would not always be captured by the significant degree of planning factor, and that the deliberate nature of offending was key here.

3.4 West London Magistrates Bench discuss the effect of this type of targeted offending on the local community, with temporary or permanent closure of pharmacies or corner shops as a result. They suggest that a distinction should be made between premises that provide an essential service and those that do not, and that there should be a new medium culpability factor of: '*deliberate targeting of premises providing an essential service',* thus acknowledging the concern about too many cases going into high culpability so suggesting it goes into medium culpability. However the definition of what is an essential service and what isn't may prove problematic, and could vary over time, thinking about how 'essential services' was defined during the pandemic.

3.5 The JCS argue that targeting of a vulnerable victim should be added to high culpability in non-domestic burglary, that this type of offending goes beyond being an aggravating feature, and that sentencers could be trusted to only use this factor in appropriate cases. The Justice Committee (JC) also thought that targeting of a vulnerable victim should be added to high culpability in non-domestic burglary.

3.6 One magistrates' bench suggested that there should be an additional high culpability factor related to repeat deliberate targeting, of the same premises by the same offender, within domestic burglary **(Annex D**). This is done after a short space of time, often with elderly victims, but after having allowed sufficient time to pass so that the victim has replaced the stolen items. There could be a new factor of '*vulnerable victim and/or repeat targeting of same premises.'*

Question 1: Does the Council wish to add targeting of a vulnerable victim to high culpability in non-domestic burglary?

Question 2: Does the Council wish to add a new medium culpability factor of 'deliberate targeting of premises providing an essential service' within non domestic burglary?

Question 3: Does the Council want to add a new high culpability factor relating to repeat targeting of same premises in domestic burglary? Or if not as a culpability factor, as an aggravating factor instead?

3.7 The CPS suggest that the wording 'where not charged separately' is removed from the high culpability factor *'knife or other weapon carried (where not charged separately)* within domestic and non-domestic burglary, stating that carrying a weapon or knife may make a burglary more serious, depending on the facts, whether or not possession is charged separately. They say the appropriate way for any issue of double counting to be addressed is by application of the principles of totality.

Question 4: Does the Council wish to remove the wording 'where not charged separately' in domestic and non-domestic burglary'?

3.8 The Criminal Law Solicitors' Association (CLSA) query whether if what should be classed as a weapon, (as opposed to a piece of equipment used in order to commit the offence) should be defined or not. The JCS also state that there is potential for inconsistent categorisation of implements, such as Stanley knives and screwdrivers. Some sentencers may see the presence of these as an indication that the offender was equipped for burglary, to strip copper wiring, loosen door hinges etc, so medium culpability. However, other sentencers may determine items such as Stanley knives to fall into 'other weapon carried', so high culpability. The JCS concede these instances may be rare and in most cases it will be obvious which category the items fall into.

3.9 If the Council wished to clarify this issue, it could place an asterisk next to weapon in the guideline, and add text in a footnote, for example:

* for the purposes of this guideline a weapon is any article which is made or adapted for use for causing injury, or is intended by the person having it with him for such use'.

Question 5: Does the Council wish to define what should be classed as a weapon, perhaps by way of the footnote shown?

3.10 The Prison Reform Trust (PRT) queried the need for '*equipped for burglary'* to be included as a medium culpability factor in both domestic and non-domestic burglary, stating that it could already be captured within the planning factor, and so potentially could lead to double counting. A couple of magistrates also questioned going equipped, suggesting that most offences needed some form of being equipped, so were likely to be captured within planning.

Question 6: Should 'equipped for burglary' be removed from domestic and non domestic burglary?

3.11 A small number of magistrates queried the lower culpability factor across all three guidelines of '*offence committed on impulse, with limited intrusion into property'*. This factor was in the original guideline. They suggest that they are two separate considerations, and should be separated, that limited intrusion is more relevant to harm, an offender could commit the offence on the spur of the moment but could go through ransacking an entire property looking for items of value. So the suggestion is that just '*offence committed on impulse'* remains in low culpability, with 'limited intrusion' being added to the category three harm factor so it becomes '*limited damage or disturbance or intrusion into property,'*

Question 7: Does the Council wish to separate the offence committed on impulse factor in the way suggested across the three guidelines? And add reference to limited intrusion to the harm factor?

3.12 PRT made a number of suggestions for additions to lower culpability. They suggest that *'severe financial hardship when linked to the commission of the offence'* should be added, they say in recognition that people from lower socio-economic backgrounds are over represented within the criminal justice system, with acquisitive crime seen by some as necessary for survival.

3.13 They also feel that age and lack of maturity should be referred to not just at step two, but at culpability at step one, that where maturity is linked to the commission of the offence, it should be recognised as a factor indicating lower culpability. They cite various sources of evidence which recognise that development of the brain does not cease until 25 and point to the fact that the factor is a lesser culpability factor in the child cruelty guideline: '*offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity'.*

3.14 However, as the Council may recall, the factor was at step one in the child cruelty guideline for specific reasons relating to that offence, and these reasons do not apply in this context. Oher than the sources of evidence PRT refer to regarding brain development, they offer few other compelling reasons to support their suggestions for changes to culpability.

Question 8: Does the Council wish to add severe financial hardship as a lower culpability factor?

Question 9: Does the Council want to add age/lack of maturity to the lower culpability factors across all three guidelines?

The Council may recall that the existing guideline had '*member of a group or gang'* as a high culpability factor, but this was moved to become a step two factor due to concerns that it would increase the amount of offenders falling into high culpability. The word gang was removed due to the negative connotations associated with this word, as has been done in other guidelines. A magistrate and barrister commented on this, saying it should remain as a high culpability factor.

Question 10: Does the Council want the factor relating to group to remain an aggravating factor or move to step one?

3.15 '*Offence committed at night'* is an aggravating factor across all three guidelines, one Crown Court Judge stated that if a domestic or aggravated burglary was committed at night, this ought to be a specific feature of culpability, and hence attract a greater sentence, rather than being aggravated within a range at step two.

Question 11: Should offence committed at night remain as an aggravating factor or be moved to become a culpability factor?

3.16 PRT in their response raise concerns around extended determinate sentences (EDS), saying that one could be imposed for a domestic and non-domestic burglary which involved damage to property, even in cases where no physical harm was caused to a victim. This is technically true but is a consequence of legislation, not the guidelines. They also mention that our resource assessments generally contain no analysis of EDS. The A&R team can add more clarity into resource assessments on assumptions around EDS. There is wider work in progress on a review of resource assessment methodology which this issue could feed into, if the data is found to be of sufficient quality.

4 EQUALITIES

4.1 The consultation paper outlined the findings of the available data in relation to volumes of offenders sentenced grouped by sex, self-identified ethnicity and age. The data had shown that Black offenders seemed to represent a larger proportion of those sentenced for aggravated burglary. Further analysis of police recorded crime statistics and prosecution statistics found that Black defendants were over-represented in all three types of burglary, suggesting that the over-representation is happening further upstream of sentencing, at the prosecution stage and possibly before. It seemed that the differences observed are in the volumes of offenders coming before the courts and not in sentencing practice itself.

4.2 The consultation asked for views on equality and diversity issues and the guidelines, if there was a risk that the guideline could be interpreted in ways which could lead to discrimination against any particular group. Very few people answered this question, the Howard League being one of them. They noted that the overrepresentation may be occurring 'upstream' from sentencing but point out that nothing is being suggested to remedy the over representation at the point of sentencing. They suggest that the aggravated burglary guideline should expressly remind sentencers that Black people are disproportionally charged with aggravated burglary offences and sentencers should take this into account. As variances in volumes of offenders coming before the courts are not the responsibility of the Council, it is suggested that it is not appropriate to act on this suggestion by PRT. We have previously added wording to guidelines on disparities within sentencing, but this would be on a completely different point.

Question 12: Does the Council agree not to include the reference suggested by the Howard League within aggravated burglary?

4.3 They also point to the data within the data tables published alongside the consultation which showed that 95 per cent of Black offenders sentenced for aggravated burglary were given immediate custodial sentences (20 out of 21), compared to 90 per cent of White offenders, (101 out of 112), although the sample size was too small to tell whether this is a significant difference. They suggest that the Council should analyse sentencing outcomes for aggravated burglary over a longer period, to assess whether Black people are also more likely to be sentenced to immediate custody. The A&R team will be considering the latest data on burglary offences, including looking at a longer time series and volumes for 2020, in preparation for the publication of the definitive guidelines. If there has been any change in trends from the evidence considered at the draft stage, these will be highlighted for discussion at a future meeting

4.4 The Howard League also suggest that the guideline reminds sentencers of the accumulated disadvantage that Black defendants[1] may have faced which should be explored and factored in as a mitigating factor. This suggestion needs careful consideration, and it could apply to other guidelines, as well as burglary. Therefore, instead of considering this suggestion at pace and in isolation within burglary, it is suggested that this point is considered by the Equality and Diversity sub-group.

[1] A-guide-for-antiracist-lawyers.pdf (howardleague.org)

Question 13: Does the Council agree that this issue should be remitted to the Equality and Diversity sub- group for detailed consideration?

4.5 PRT also commented on the findings and asked that the Council do not just pay attention to individual factors or how they are expressed but actively work with criminal justice partners such as the Judicial College to ensure that possible factors underlying disproportionate outcomes are properly addressed, through better training and guidance to sentencers. In the response document we could discuss some of the work we have done in this area, such as the seminar with sentencers that Juliet and Amber spoke at regarding the research into disparities in the drugs guideline.

4.6 They also suggest that the Council seeks to ensure that its own procedures for recording and analysing data meet the standards set by the Lammy review. The Lammy review made a number of recommendations for the CJS, including around collecting and publishing data on all protected characteristics. We do not have control over the variables recorded in the CPD and are limited by the data that is collected at the police station, which covers just age, sex and ethnicity. MOJ and HMCTS are aware of the limitations in this area. In terms of our data collections, we have committed to an action on equality and diversity in our five year strategy around collecting, analysing and publishing data, where this is available, and undertaking more in-depth analytical work where resources permit, as was done with drugs offences.

4.7 The Howard League also point to the statistics in the bulletin that accompanied the consultation that showed that young adults under the age of 21 make up a significant proportion of those sentenced for burglary offences. They point to the expanded explanation for age and/or lack of maturity which instructs courts to consider young adult's development stage in assessing their culpability and the impact of sentence. They suggest that the guideline should contain a reference reminding sentencers to refer to the expanded explanation in the case of young adults, that offenders sentenced for burglary are likely to have previous convictions for the same offence, and that these convictions should be viewed differently in the case of young adults, as the expanded explanation states: '*a young adult's previous convictions may not be indicative of a tendency for further offending.'*

Question 14: Does the Council wish to include a reference relating to young adults and previous convictions?

4.8 PRT commented that they were concerned with the lack of consistent reliable data on disability, particularly with regards to mental health and learning disability.

However, there is a lack of data on this issue as the data is not recorded at the police station.

Sentencing Council

ANALYSIS AND RESEARCH SUBGROUP MEETING
11 OCTOBER 2021
MINUTES

Members present:	Tim Holroyde Rebecca Crane Maura McGowan Alpa Parmar
Members of Office In attendance:	Eliza Cardale Charlotte Davidson Jenna Downs Emma Marshall Harriet Miles Kate Kandasamy Caroline Kidd Gail Peachey
Apologies:	Jo King Nic Mackenzie

1. WORK UPDATES

1.1 The subgroup were updated on recent work in the team. Charlotte (CD) outlined recent statistical work on guideline development, including resource assessments covering guidelines on perverting the course of justice, motoring offences, animal cruelty offences, underage sale of knives and terrorism offences. Work on evaluations of the Intimidatory offences and Imposition and Bladed articles and offensive weapons guidelines are also either planned or underway.

1.2 We have been recruiting for a replacement for CD who is now covering Amber's post while she is on maternity leave. We have also issued an advertisement for a temporary 12-month statistician. We hope to have at least one new member of staff in post before Christmas.

1.3 CD also updated members on issues related to data storage in MoJ. Changes to this are likely to take place before Spring 2022 when data is moved to a new location. We are aware of this and the implications it may have and are putting in place mitigations to ensure that it does not significantly disrupt our work.

1.4 Gail (GP) updated on social research activity, including the publication of the judicial attitudes to guidelines report during the summer which were published alongside two reports

on consistency in sentencing and one on the cumulative impacts of the Council's evaluated guidelines. We also published the totality research report in September.

1.5 The team have been supporting guideline development through road testing exercises for the sexual offences, terrorism, and burglary offences guidelines and through transcript analysis of motoring offences. Analysis has been started on the evaluation of the Breach guideline. Work has been completed on a short survey to feed into development of the draft Firearms importation guideline which was presented at the September Council meeting.

1.6 Work has also progressed on commissioning external contractors to undertake the Council's equality and diversity project. A contractor – the University of Hertfordshire – has been selected and we have held an inception meeting to discuss the details of the work. Beverley joined that meeting to help advise on the type of issues we need to cover in the work and the type of organisations we should engage in roundtable discussions.

1.7 The research 'pool' has been refreshed; it now contains 850 contacts, including 500 magistrates, 70 District judges and 150 Circuit Judges who have all volunteered to take part in research exercises to support the Council.

1.8 Planning is underway for the next data collection which is due to run from October 2022 to March 2023. This will support the evaluation of the Assault, Burglary, Drug and Motoring offences guidelines. The team is also continuing discussions with HMCTS over how we might make use of the Common Platform in the future to streamline processes and create and access more timely and better quality data.

2. REVIEW OF RISK REGISTER

2.1 Emma (EM) talked through the relevant risks:

- *Risk 1: Guidelines have impact on correctional resources that cannot be assessed or the resource assessment does not anticipate*. Controls in place include: bespoke data collections; road testing; exploring use of the Common Platform for data collections; scoping work on how we collect data in the future; reviewing our approach to resource assessments. Further controls include accounting for the fact that data will have been affected by changes in the courts during the pandemic. Currently, the 'impact' rating is at 4 and 'likelihood' is at 3. The target is 'impact' at 3 and 'likelihood' at 2, to reduce the risk from 'high' to 'medium'. Members agreed to retain the current risk scores.

- *Risk 2: Sentencers interpret guidelines incorrectly.* Controls include: building in road testing for as many guidelines as possible; procuring equality and diversity work; work on user testing. The group discussed the issue of training in relation to this and whether we could offer more to the Judicial College – for example a training video for sentencers on using the guidelines, more speakers for seminars. It was agreed that EM would feed this back to policy colleagues. It was also agreed that a note would be added on this to the risk register, with the caveat that anything further that we do in relation to this needs to be within the remit of the Sentencing Council.

Action: EM to discuss with policy colleagues the issue regarding training and to update the risk register.

3. ANALYSIS AND RESEARCH BUDGET

3.1 Kate (KK) noted there is £80,000 in the Analysis and Research budget for various projects over the remainder of the 2021/22 financial year. This has been allocated as follows: £20,000 for the equalities and diversity research; £10,000 for public confidence

questions (re-running those undertaken previously with ComRes); and £50,000 for an evaluation project (this will probably form part of an evaluation of the domestic abuse guideline). A further £2,500 is budgeted for transcripts of sentencing remarks.

4. VISION – FORWARD LOOK

4.1 EM updated on progress with the Vision strategy work and explained that the Analysis and Research team had already started working on some of the actions in this.

4.2 As part of this, we have a commitment to publish a digest of evidence on effectiveness of sentencing by September 2022. The team plans to send the subgroup early drafts of this by late Spring 2022. This will complement another action in the strategy to scope out qualitative work with offenders to explore their experiences of different sentences. The scoping study will consider if it would be more appropriate to explore this more generally or in relation to specific guidelines. We will be starting to consider this next year and will come back to the subgroup at that stage with further information and to obtain feedback on early ideas. Maura (MM) commented that she supported this area of work, but cautioned that we needed to be careful how we draft and handle any work of this nature.

4.3 We have also started work on our actions on the review of resource assessments and local area data. These were discussed in more detail in separate items in the meeting.

4.4 Tim (TH) thanked the team for their hard work.

Action: the team to update the subgroup at the next meeting on progress with Vision actions.

5. REVIEW OF RESOURCE ASSESSMENTS

5.1 Jenna (JD) presented a paper on the review of resource assessments that is an action in the Vision five-year strategy. The paper and discussion focused on three key areas: understanding and improving how we use the data we can/ may be able to access; improving and adapting methodologies and analysis; and improving communication with users about our methodology.

5.2 JD outlined some considerations that will be relevant in taking this forward and also that the review will require resources to be allocated to it within the Analysis and Research team's workplan. It is estimated that a level of staffing resources similar to our allocation for road testing exercises would be needed for this. TH asked if this would take resource away from other areas. EM reassured the group that we will not be cutting back in other areas but will dedicate 'unallocated' resource to this.

5.3 On methodology, it was agreed that the review would consider if we should/ could include systematic reviews from academics in resource assessments. TH suggested research into the overall resource implications of different types of prison sentences looking at, for example, how long different prisoners actually serve (e.g. time in prison and on licence), what the implication is of supporting people on licence, and what the implication is for the prison service if sentences are longer (e.g. older people becoming infirm and needing medical attention etc). The group considered this and concluded that at the moment there is insufficient data to cover these issues.

5.4 Alpa (AP) asked if the team is still using a methodology that looks at current prison places versus what might happen with new guidelines using current transcripts. JD confirmed that we are still using that approach and that the review will look at whether this is the best approach available.

5.5 The group agreed that the paper coming out of the review of resource assessments should be peer reviewed. AP also felt it would also be helpful to have a focus group of academics to feed into this work. The group also acknowledged that the findings of the review might impact on future resource assessments and could increase the amount of resource needed to undertake them.

Action: JD to present a paper outlining options/ progress on the review of resource assessments at the next subgroup meeting.

6. OPTIONS REGARDING THE COUNCIL'S LOCAL AREA DUTY

6.1 The Council agreed to include an action in their 5-year strategy around undertaking work on the statutory duty relating to local area data. The action committed the Council to reviewing whether work should be done in this area in the future and if so, what we might do.

6.2 CD talked through a paper of potential options for progressing for this work noting that there are issues around the wording of the duty and its subsequent interpretation. TH commented that this is a difficult area and that this should be a very low priority given the Council's limited resources, a concern that others agreed with. There are risks that any analysis in this area could be potentially misleading if it is not possible to control for all relevant factors and that it could affect response rates for future data collections if courts perceive that 'performance' in their local area is being analysed. The subgroup considered whether data could be provided which be analysed at a local level but with the name of the court anonymised. It was felt that this would not be practicable.

6.3 Having considered the issues, the subgroup decided that no further work should be undertaken on this duty at present. Given that we have an action in the strategy to consider this area by March 2022, we will draft a note that we can publish on the website outlining the relevant issues and explaining the Council's decision on this. This will be circulated to the subgroup prior to publication as the wording will need careful thought.

Action: CD to draft a note regarding the Council's decision on this action and circulate it to the subgroup for their comments.

7. CHANGE OF PUBLISHED AGE GROUP BREAKDOWN

7.1 JD talked through a paper outlining a rationale for proposing changes to the age group breakdowns that we use in our statistical publications. Consideration of this is a result of a point raised in one of the responses to the consultation on the Firearms importation guideline. If agreed, the plan is to publish the updated breakdowns alongside the publication of this.

7.2 JD outlined the changes, which the subgroup agreed to. The subgroup did, however, comment on the older age group and whether it would be sensible to move away from the MoJ categories here and split this into one group covering offenders aged 60-69 years and another for the 70+ category.

7.3 The subgroup also agreed that an explanatory note should be published alongside the Firearms importation data tables, which will be circulated to it for comment ahead of publication.

Action: JD to draft an explanatory note regarding the changes in age breakdowns and to circulate this for comment to the subgroup.

8. DATE OF NEXT MEETING

8.1 It was agreed that we would look to convene another meeting of the subgroup in early 2022.

Action: JD to canvass dates for the next subgroup meeting.

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