

15 October 2021

Dear Members

Meeting of the Sentencing Council – 22 October 2021

The next Council meeting will be held via Microsoft Teams, the link to join the meeting is included below. **The meeting is Friday 22 October 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)OCT00 |
| ▪ Minutes of meeting held on 24 September | SC(21)SEP01 |
| ▪ Under age sale of knives | SC(21)OCT02 |
| ▪ Sexual Offences | SC(21)OCT03 |
| ▪ Motoring offences | SC(21)OCT04 |
| ▪ Perverting the Course of Justice | SC(21)OCT05 |
| ▪ Firearms importation | SC(21)OCT06 |

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

COUNCIL MEETING AGENDA

22 October 2021

Virtual Meeting by Microsoft Teams

- | | |
|---------------|-----------------------------------------------------------------------|
| 09:30 – 09:45 | Minutes of the last meeting and matters arising (paper 1) |
| 09:45 – 10:30 | Under age sale of knives – presented by Ruth Pope (paper 2) |
| 10:30 – 11:30 | Sexual Offences – presented by Ollie Simpson (paper 3) |
| 11:30 – 11:45 | Tea break |
| 11:45 – 12:45 | Motoring – presented by Lisa Frost (paper 4) |
| 12:45 – 13:15 | Lunch |
| 13:15 – 14:15 | Perverting the Course of Justice – presented by Mandy Banks (paper 5) |
| 14:15 – 14:30 | Tea break |
| 14:30 – 15:30 | Firearms importation – presented by Ruth Pope (paper 6) |

Sentencing Council

COUNCIL MEETING AGENDA

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MEETING OF THE SENTENCING COUNCIL

24 SEPTEMBER 2021

MINUTES

Members present:

Tim Holroyde (Chairman)
Rosina Cottage
Rebecca Crane
Nick Ephgrave
Michael Fanning
Max Hill
Jo King
Maura McGowan
Alpa Parmar
Beverley Thompson

Apologies:

Rosa Dean
Diana Fawcett
Adrian Fulford
Juliet May

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
Vicky Hunt
Emma Marshall
Ruth Pope
Ollie Simpson

1. MINUTES OF LAST MEETING

- 1.1 The minutes from the meeting of 30 July 2021 were agreed.

2. MATTERS ARISING

- 2.1 The Chairman welcomed Christina Pride who is the new Deputy Director for Bail, Sentencing and Release Policy and attending as the Lord Chancellor's representative.

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

- 3.1 This month the Council considered one final minor change to the proposed Preparation of terrorism acts (Terrorism Act 2006, section 5) and Explosive substances (terrorism only) guidelines. The minor change was an amendment to the guidance on when the new serious terrorism sentence provisions may apply.
- 3.2 The Council then signed off the final package of guidelines and the resource assessment ready for a consultation launch on 22 October 2021.
- 3.3 The Council also discussed one chapter in the consultation document on life sentences in terrorism cases and agreed that this section should be included and approved the wording.

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

- 4.1 The Council considered the draft five-year strategy document that will accompany the response to the *What Next for the Sentencing Council?* consultation. The document's content and format were agreed and will be published in November.

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

- 5.1 The Council considered a letter received from the Herts Fly Tipping Group requesting that the Council consider making changes to the Environmental offences guideline specifically in relation to the way it operates in sentencing fly tipping cases.
- 5.2 The Council observed that many of the suggestions made in the letter were outside the remit of the Council or contrary to legislation. While acknowledging the serious problems caused by fly tipping, the Council found no evidence that changes to the guideline would address those problems.

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

6.1 The Council considered the general approach to revisions of the animal cruelty guideline to reflect the raised maximum penalty. It was agreed in principle that if possible the revised guideline would apply to offences committed under sections 4 to 8 of the Animal Welfare Act 2006. As the guideline is developed any consequent amendments to the existing guideline for section 9 (breach of duty of person responsible for animal to ensure welfare) would be considered.

6.2 The Council considered whether it would be useful to combine work on this guideline with a guideline for the prospective offence of pet abduction; it was agreed to monitor developments on and timing of that new offence.

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

7.1 The Council considered step one and step two factors for the three dangerous driving offences of causing death by dangerous driving, causing serious injury by dangerous driving and dangerous driving.

7.2 The Council considered the current approach to assessing the seriousness of offences in existing guidance, and considered relevant factors and the approach to assessing culpability in the new guidelines. Aggravating and mitigating factors were also discussed, and it was agreed that a further review of factors would be undertaken based on points raised at the meeting. The approach to assessing harm for each offence was agreed.

8. DISCUSSION ON WITNESS INTIMIDATION AND PERVERTING THE COURSE OF JUSTICE – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL

8.1 The Council discussed draft guidelines for perverting the course of justice and witness intimidation offences. The Council was broadly content with the approach of the proposed drafts, albeit with some minor amendments and rewording to some of the factors.

8.2 The Council discussed the extent to which the factors should be similar to one another within the guidelines, and asked that this be considered in the redrafting of some of the factors. The Council also agreed that the Serious Crime Act Offences discussed at the last meeting would not be included within the scope of the project.

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

9.1 The Council considered responses to the consultation relating to harm and culpability factors. A short survey had been conducted with judges to test some of the points raised by respondents. Taking into account the consultation responses and the survey findings, the Council agreed some changes to the culpability and harm factors to ensure that the guideline works as intended and to achieve consistency with existing firearms guidelines.

Sentencing Council meeting:

22 October 2021

Paper number:

SC(21)OCT02 – Underage sale of knives

Lead Council member:

TBC

Lead official:

Ruth Pope

1 ISSUE

1.1 In May 2020 the Council considered a submission (attached at Annex A) on behalf of the London Borough of Barking and Dagenham regarding the need for a sentencing guideline for the offence of selling knives to persons under the age of eighteen, contrary to s.141A of the Criminal Justice Act 1988 and agreed to add this to the list of future guidelines.

1.2 This is the first meeting to discuss the scope of this project and to consider a proposed approach to a guideline for underage sale of knives.

2 RECOMMENDATION

2.1 The Council is asked to:

- Agree to limit the scope of the project to underage sale of knives.
- Agree to seek input from trading standards professionals in the development of the guideline.

3 CONSIDERATION

Underage sales generally

3.1 The provision of a variety of goods and services are subject to age restrictions. This may not be a definitive list, but those listed on Trading Standards websites (for example [Haringey](#)) are:

- Alcohol
- Cigarettes, tobacco, shisha and other smoking based products
- E Cigarettes and Vaping Products
- Fireworks - sparklers, party poppers, caps, cracker snaps
- Dangerous chemicals - cigarette lighter fuel, glue, aerosols
- Acids
- DVDs, Blu Rays and computer games
- Dangerous Weapons - air weapons, crossbows, knives
- Lottery tickets and scratch cards
- Petrol
- Bookmakers
- Sunbeds

3.2 The only sentencing guideline for these offences that currently exists covers [sale of alcohol to children](#). The submission at Annex A sought to persuade the Council to develop guidelines for the sale of knives to under 18s in particular and under age sales in general. We have separately in the past received representations regarding offences relating to the sale of tobacco to under 18s.

3.3 Data from the Court Proceedings Database indicates that volumes for many of these offences are low (although we have not confirmed these numbers with the prosecuting authorities).

Number of adult offenders sentenced for age restricted sale offences, all courts, 2016-2020

	Year					Total
	2016	2017	2018	2019	2020	
Alcohol	54	30	37	43	13	100
Cigarettes, tobacco, shisha and other smoking based products	19	15	12	14	9	52
E Cigarettes and Vaping Products	0	0	0	0	0	0
Fireworks - sparklers, party poppers, caps, cracker snaps	2	1	1	2	0	4
Dangerous chemicals - cigarette lighter fuel, glue, aerosols	0	0	1	0	0	1
Acids ¹	..	..	..	..	..	0
DVDs, Blu Rays and computer games	0	0	0	0	0	0
Dangerous Weapons ²	14	5	12	27	14	43
Lottery tickets and scratch cards	0	0	0	0	0	0
Petrol	0	0	0	0	0	0
Bookmakers	0	0	0	0	0	0
Sunbeds	7	2	0	2	0	6

Number of organisations sentenced for age restricted sale offences, all courts, 2016-2020

	Year					Total
	2016	2017	2018	2019	2020	
Alcohol	6	3	8	6	1	24
Cigarettes, tobacco, shisha and other smoking based products	3	5	3	7	7	25
E Cigarettes and Vaping Products	0	0	0	0	0	0
Fireworks - sparklers, party poppers, caps, cracker snaps	.	.	1	1	1	3

¹ Information not available

² Includes all Criminal Justice Act 1988 s141A offences (selling to a person under age of 18 years a knife, knife blade, razor blade, axe or any other article which has a blade, that is sharply pointed and which is made or adapted for use for causing injury to the person).

Dangerous chemicals - cigarette lighter fuel, glue, aerosols	0	0	0	0	0	0
Acids ¹	..	..	..	..	..	0
DVDs, Blu Rays and computer games	0	0	0	0	0	0
Dangerous Weapons ²	7	3	17	46	15	88
Lottery tickets and scratch cards	0	0	0	0	0	0
Petrol	0	0	0	0	0	0
Bookmakers	1	0	0	0	0	1
Sunbeds	2	2	0	0	0	4

3.4 As can be seen from the tables above, aside from alcohol and weapons, the only other type of sale that appears to be regularly prosecuted is sale of tobacco/ cigarettes.

3.5 The request to produce guidelines came from Trading Standards, and they were approached for views on whether the scope should be limited to offences contrary to s141A of the Criminal Justice Act 1988 (underage sale of knives) or expanded to cover other underage sales. Their view was that priority should be given to producing a guideline for underage sale of knives as this is the area of particular concern.

3.6 Although the elements of any guideline for underage sales may be similar – the underlying issue relating to the sale of knives is quite different to, for example, the sale of cigarettes. As can be seen from the submission at Annex A the impetus behind the call for a guideline is concern about the rise in knife crime and how young people having access to knives can have serious consequences.

3.7 When developing the guidelines for possession of bladed articles and offensive weapons in 2017 the Council took the decision not to include underage sales as volumes were low. While still not high, volumes have increased since then and the Council was persuaded in 2020 that development of a guideline for this offence was now justified.

3.8 The particular concern with current sentencing practice identified at Annex A relates to the sentences imposed on large organisations. The existing guideline for underage sale of alcohol is for sentencing individuals and so offers little assistance for the approach to setting fines for organisations.

The scope of the project

3.9 Four suggested options for the scope of the project are set out below (though there may be others):

Option 1: Do nothing. This would allow time for other high priority projects, but there is no existing guidance for underage sale of knives and there is evidence of inconsistent

sentencing and under-sentencing. The Council has already said that it would produce this guideline and some preparatory work has been done.

Option 2: Produce a guideline for sentencing organisations for underage sale of knives only. This would satisfy the main request made by Trading Standards and cover the majority of offenders who commit this offence, but would offer no guidance for sentencing individuals or for other under age sale offences.

Option 3: Produce a guideline for sentencing organisations and individuals for under age sale of knives only. This would provide comprehensive guidance for the offence of underage sale of knives, but no guidance for other under age sale offences – notably tobacco.

Option 4: Produce guidelines for all under age sale offences (subject to a minimum level of prosecutions). This would provide comprehensive guidance, but it would be the most time and resource intensive of the options and may be difficult to fit in around other projects. Trading Standards have asked us to prioritise the s141A offence.

3.10 The recommendation is to go with option 3 – this would meet the commitment that the Council has made, be achievable in a reasonable time frame and not be too resource intensive.

Question 1: Does the Council agree to develop guidelines for the underage sale of knives; one for individuals and one for organisations?

Working with Trading Standards

3.11 These offences are prosecuted by Trading Standards departments within local authorities and almost all prosecutions appear to be as a result of test purchases. This means that the volume of prosecutions is very closely linked to the resources that Trading Standards departments decide to devote to this aspect of their work.

3.12 Our experience of working on the Trade mark guidelines indicates that it may be useful to engage with National Trading Standards and the Association of Chief Trading Standards Officers (ACTSO) at an early stage. These offences are sentenced in magistrates' courts and therefore we are unable to obtain transcripts of sentencing remarks, but we hope that Trading Standards will be able to provide case studies as well as useful background information, data and views on relevant factors to include in guidelines.

Question 2: Should officials involve ACTSO and National Trading Standards in the guideline development process?

Legislation and current sentencing practice for underage sale of knives

3.13 Some initial information has been obtained for the underage sale of knives – if the Council decides to expand the project, similar information will be provided for other offences at a future meeting.

3.14 The relevant legislation states:

Criminal Justice Act 1988 141A.— Sale of knives and certain articles with blade or point to persons under eighteen.

- (1) Any person who sells to a person under the age of eighteen years an article to which this section applies shall be guilty of an offence and liable on **summary conviction** to imprisonment for a term not exceeding **six months**, or a fine not exceeding level 5 on the standard scale, or both.
- (2) Subject to subsection (3) below, this section applies to—
 - (a) any knife, knife blade or razor blade,
 - (b) any axe, and
 - (c) any other article which has a blade or which is sharply pointed and which is made or adapted for use for causing injury to the person.
- (3) This section does not apply to any article described in—
 - (a) section 1 of the Restriction of Offensive Weapons Act 1959.
 - (b) an order made under section 141(2) of this Act, or
 - (c) an order made by the Secretary of State under this section.
- (4) It shall be a defence for a person charged with an offence under subsection (1) above to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (5) The power to make an order under this section shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

3.15 The majority of offences are punished by way of a fine. In 2019, of 27 adult offenders sentenced 24 were fined, two were made subject to a community order and one received a suspended sentence order. Of 46 organisations sentenced in 2019, one was sentenced to a discharge and 45 were fined.

3.16 Fine levels for individuals in 2019 ranged from £34 to £2,000 (the mean was £409 and the median £281). For organisations in 2019, the range was £276 to £50,000 (the mean was £5,585 and the median £2,000). All of these fine amounts are after any reduction for a guilty plea.

Draft guideline for organisations

3.17 A first (very preliminary) draft of a guideline for organisations is provided at **Annex B**. The approach is based on that in the [health and safety guideline for organisations](#) as there are some similarities in that these are offences that organisations generally commit by failing to have or enforce adequate measures. As can be seen above, s141A(4) provides a defence of 'all reasonable precautions' having been taken and so the lowest level of culpability represents a position just short of that.

3.18 The culpability factors are designed to apply to both in store and online sales and to guide the sentencer as to what the relevant standards are – this is an area where input from Trading Standards would be really helpful. Experience from the trade mark guidelines indicates that sentencers would be helped by a guideline that sets out the features of each level of culpability.

3.19 Harm in these cases is almost always the risk of harm (as most prosecutions relate to test purchases) and so two of the suggested harm factors relate to the age of the child or the number of items sold. These are very similar to the factors in the [underage sale of alcohol](#) guideline. Again, input from Trading Standards would be helpful to determine if different or additional factors should be included.

3.20 As with the Health and Safety guideline, the suggested approach to sentence levels is to have four sentence tables: for micro, small, medium and large organisations. The sentence levels in the table are illustrative only – work would need to be done to set appropriate levels. To do this we would need to look at sentenced cases with reference to the size of the organisation. The Council will then be invited to consider whether current sentencing practice takes sufficient account of the means of the offending organisation and sentencing levels can be set accordingly.

3.21 The aggravating and mitigating factors are based loosely on those in the health and safety guideline and again, these could be reviewed in the light of information about real cases from Trading Standards.

Question 3: Does the Council agree with the general approach proposed for a guideline for underage sale of knives for organisations?

Next steps

3.22 The aim is to have two further meetings to develop draft guidelines for consultation (currently scheduled for November and January) and then to consult in spring 2022. This timetable will depend on the scope of the project agreed today – if more guidelines are to be included more time will be needed.

4 IMPACT AND RISKS

4.1 There are risks associated with the decision made regarding the scope of this project. In particular, there is a clear demand from Trading Standards for the underage sale of knives to be prioritised, but there have also been requests in the past for guidelines relating to tobacco products.

4.2 As has been noted above, the majority of these offences are sentenced by way of a fine and so there is unlikely to be any impact on prison and probation resources from a guideline for underage sale of knives.

5 EQUALITY AND DIVERSITY

5.1 These are low volume offences the majority of which are committed by organisations and it is therefore unlikely that the data will provide any meaningful demographic trends for offenders. There may be wider considerations relating to those affected by this offending: knife crime may have a disproportionate impact on certain communities and certain demographic groups. As pointed out in Annex A, a young person who purchases a knife is liable to prosecution for possessing it and the prosecution and sentencing for that offence may be subject to disparities.

5.2 It could be argued that guidelines that provide organisations with a clear indication of an appropriate level of sentencing for the offence of underage sale of knives could help to ensure that all the necessary steps are put in place to avoid offending.

Question 4: Are there any issues relating to equality and diversity that should be explored in the development of the guidelines?

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Submission to the Sentencing Council by the London Borough of Barking and Dagenham

Re: the need for a sentencing guideline for the offence of selling knives to persons under the age of eighteen, contrary to s.141A of the Criminal Justice Act 1988

1. Proposal

1.1. Having regard to the principles adhered to by the Sentencing Council in determining which areas warrant the provision of a Definitive Sentencing Guideline (“Guideline”), we seek to invite the Council to draft and consult on a Guideline for the offence of selling knives to persons under the age of eighteen, contrary to s.141A of the Criminal Justice Act 1988, as amended.

1.2. We consider that sentencing tribunals in the magistrates’ court would be greatly assisted by a Guideline for this offence (and more generally for all offences concerning age-restricted sales), which would ensure greater clarity and consistency in the sentencing process.

1.3. Whilst this submission is drafted by the London Borough of Barking and Dagenham, it enjoys the support of the Trading Standards Community, from lawyers practising in this area of law and other stakeholders.

1.4. In June 2019, the Mayor of London Office for Policing and Crime (“MOPAC”) wrote to the Lord Chief Justice, Lord Burnett, and members of the Sentencing Council inviting the development of sentencing guidance for the ‘illegal sale of knives’. In that letter, MOPAC expressed the following concern:

“Relatively few retailers are prosecuted but for those convicted, the sentence needs to send a clear message that selling knives to children will have significant consequences and not just a limited financial penalty that can be absorbed as an operating cost.”

1.5 We have appended the outcomes of several prosecutions that have taken place in London.

2. Legislative Background

- 2.1. Section 6 of the Offensive Weapons Act 1996 amended the Criminal Justice Act 1988 (“the Act”) to insert section 141A. By the new s.141A, it became a criminal offence to sell a knife to a person under the age of sixteen.
- 2.2. Parliament legislated following a series of high-profile murders by young persons, including the notorious murder of the headmaster, Philip Lawrence, who was stabbed to death as he intervened during a fight outside his school’s gates¹. The complex causes of knife crime were reflected in the parliamentary and public debates at the time, including the then much quoted comment by Frances Lawrence, the widow of Philip Lawrence, that *"A knife is an inanimate object, and it needs a human being to invest it with murderous properties."*
- 2.3. The Offensive Weapons Act 1996 was not originally intended to introduce age restrictions on sales of knives, but rather to increase penalties for carrying weapons in public and to introduce an offence of having a blade on school premises. However, it was stated that although weapons could still be found by young persons in kitchen drawers, the introduction of a ban would be a deterrent to some people and would send *"...a powerful message of disapproval of such weapons"*².
- 2.4. Furthermore, it was reported there were calls by retailers at the time for a clear ban on sales to young persons as it removed the need for retailers to make on the spot assessments of the reason for purchase³. Parliament decided, therefore, to introduce an amendment to the Bill to restrict the age of sales of knives⁴.

¹ http://news.bbc.co.uk/onthisday/hi/dates/stories/december/8/newsid_2536000/2536661.stm

² Lady Olga Maitland Hansard HC Deb 26 January 1996 vol 270 para 591 - <https://api.parliament.uk/historic-hansard/commons/1996/jan/26/offensive-weapons>

³ Lady Olga Maitland Hansard HC Deb 26 January 1996 vol 270 para 594 - <https://api.parliament.uk/historic-hansard/commons/1996/jan/26/offensive-weapons>

⁴ Hansard Lords 5th June 1996 column 1346 - <https://publications.parliament.uk/pa/ld199596/ldhansrd/vo960605/text/60605-11.htm>

- 2.5. Commentators on the Offensive Weapons Act 1996 provisions have referred to them as a form of preventative justice⁵.
- 2.6. The primary purpose of more recent changes to knife sales age restriction legislation appears to have been to assuage public concerns. During the second reading of the Violent Crime Reduction Bill in October 2006, then Home Office Minister, Greg Clark, stated:
- “Comprehensive legislation is in place to deal with knives and other offensive weapons, but public concern remains, so we intend to raise the age limit of who can be sold a knife from 16 to 18 to limit the distribution of knives among young people.”*⁶
- 2.7. More recently, in the debate on the Offensive Weapons Act 2019, Victoria Atkins, the Minister for Crime, Safeguarding and Vulnerability, stated that the purpose of introducing measures to restrict online sales of knives to young persons was:
- “...to address the concern expressed to us by charities, the police and others about the ability of young people to get hold of knives.”*⁷
- 2.8. As discussed below, the Offensive Weapons Act 2019 has introduced a number of new offences relating to the sale of knives.
- 2.9. It is apparent that there are powerful public policy considerations underpinning the motivation for age restricting the purchase of knives, the fact of which is not reflected in any guidance the courts are required to have regard to. As such, these are considerations which can remain unspoken at the sentencing stage or, of more concern, not acknowledged.

⁵ Judith Rowbotham, Kim Stevenson *Behaving Badly: Social Panic and Moral Outrage - Victorian and Modern Parallels*, Routledge 2003

⁶ Hansard Commons 20 Jun 2005: Column 557 <https://bit.ly/2pShjtH>

⁷ Hansard Commons 2018-11-28 <http://bit.ly/30SIS3U>

3. Rise in Knife Crime

- 3.1 It is uncontroversial to observe that the endemic problems with knife crime in London and across England and Wales remain prominent and well-documented.
- 3.2 Since the year ending March 2011, there has been a volume increase of 44% in the number of recorded offences involving a knife or sharp instrument⁸. In the year ending June 2019, there was a 7% volume rise to 44,076 offences.
- 3.3 The above figures do not include the simple offence of ‘possession of an article with a blade or point’, in respect of which during the same period there was a 5% increase in the number of offences dealt with by the Criminal Justice System⁹.
- 3.4 The total number of 22,306 offences concerning possession of an offensive weapon or knife is the highest in the last ten years, and is driven by possession of an article with a blade or point offences. Nearly a quarter of those offences were committed by offenders between the age of 10 and 17.
- 3.5 Whilst there are Guidelines for the court to follow in sentencing youths caught carrying, or worse, using a knife or bladed article, there is no Guideline for sentencing those that might have sold the knife.

4. Absence of a Definitive Guideline

- 4.1 The absence of a Guideline creates an anomaly in sentencing practice, which, it is respectfully submitted, is inimitable to the interests of justice, for the reason that its absence leads to the occurrence of inconsistent and arbitrary outcomes¹⁰.

⁸ Office of National Statistics Report on ‘Crime in England and Wales: year ending June 2019’

⁹ Ministry Of Justice Report on Knife and Weapon Sentencing Statistics, England and Wales, published 24 October 2019

¹⁰ See Appendix A

- 4.2 Our research demonstrates, with one notable exception, that fines are disproportionately low having regard not only to the public interest factors referred to at paragraph 2 above, but also having regard to the size of the organisation before the court; a factor upon which modern sentencing practice has come to place substantial emphasis.
- 4.3 It should be observed that there is a gulf between the highest fine imposed and the next highest fine imposed for the s.141A offence, which could not be attributable solely to the difference between the turnovers of the respective defendant companies. We address this in further detail at paragraph 6 below.
- 4.4 The Sentencing Council's consultation on the Health & Safety Guideline in November 2014 followed a review of sentencing practice across the UK that revealed inconsistencies in the way sentencing decisions were being reached. In addition, the Food Standards Agency had conveyed concerns to the Sentencing Council that penalties being imposed were not reflecting the seriousness of the matters before the court, and that fines being passed on corporate offenders in particular were too low.
- 4.5 The vast majority of defendants in prosecutions for offences contrary to s.141A are corporate bodies. This is true of most age restricted sales and product safety prosecutions by Trading Standards Services. Although the only disposal available to the court is a financial penalty, there is no scale to follow in setting the size of that penalty. In consequence, the same inconsistencies revealed by the review into sentencing practice in health and safety cases pervade sentencing practice in this area too.
- 4.6 In the absence of a Guideline, there is little more than comment that might be put before a sentencing tribunal to assist in determining the relevant factors they might wish to have regard to. As such, the sentence is dependent to a certain degree not just on the extent of any assistance provided to the court by the prosecution, either by way of submission or evidence, but also on the willingness of the court to accept and reflect such matters in the sentence passed.

4.7 We would submit that the interests of justice are not served if sentencing practice is reliant on the assiduousness of the prosecutor and the willingness of lay magistrates to adopt analogous guidelines.

5. **Analogous Offences?**

5.1 We recognise that the recently published ‘General Guideline: Overarching Principles’ enjoins the court in the absence of an offence specific Guideline to have regard to guidelines for analogous offences, but it is our experience that courts are reluctant to have regard to the tables showing appropriate starting points and brackets for fines dependent on the size of the offending organisation.

5.2 In our opinion, this is not surprising. The common refrain from magistrates’ courts is that it would not be appropriate to have regard to the tables in other guidelines as the offences are not truly analogous.

5.3 Even if it is accepted that it is possible to extrapolate general principles from guidelines for roughly analogous offences, there is no table of fines to apply those principles to. This artificialises the process of drawing parallels.

5.4 After all, the sole purpose of determining levels of culpability and harm is to categorise the offence for the purpose of placing it within the table of fines at Step Two.

5.5 Undoubtedly, there are some culpability factors in the Definitive Guideline for the Sentencing of Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences (“the Health and Safety Guideline”) that might readily be thought capable of applying to an assessment of the culpability of a business that has sold a knife to a child, but unless the court is prepared to have regard to the tables as well, the mere recognition of such factors provides limited guidance for reaching the appropriate fine.

- 5.6 It is our opinion that it is by no means guaranteed that a sentencing tribunal will accept that other current guidelines are sufficiently analogous that they should be applied to the s.141A offence.
- 5.7 We acknowledge that the Health and Safety Guideline concerns a range of offences which share some characteristics with those restricting the sale of knives to young persons, namely (i) assessing the extent to which the reasonable precautions taken, and due diligence exercised, by the offender fell short of expected standards and (ii) there is a risk of harm from the s.141A offence that does not equate to direct evidence of harm.
- 5.8 However, there are several other (non-exhaustive) factors relevant to the s.141A offence, which do not apply to health and safety or food offences, such as:
- i) The underlying public policy for age restricted sales
 - ii) The age or putative vulnerability of the purchaser
 - iii) The serious, often fatal, harm that can be caused by the criminal use of a knife
 - iv) The risk to the purchasing youth of being prosecuted for mere possession of the knife
 - v) The extent of the due diligence systems in place which are unique to age restricted sales e.g. signage, refusals registers, being signatories to voluntary codes, training of staff, till prompts etc.
- 5.9 As to the (iii) above, with the exception of one notorious prosecution¹¹, we are aware only of prosecutions for the sale of knives to young persons which have been the result of test purchases rather than the purchase of a knife by a young person which has been used in an act of violence.
- 5.10 That notorious exception concerns a prosecution by the Trading Standards Service at Islington of a shop manager and the company which owned the

¹¹ Islington v City Supermarket (UK) Ltd (2015), Highbury Magistrates' Court - see <https://www.islington.media/news/shopkeeper-fined-for-selling-knife-to-stab-crime-teenager>

business. The defendants had sold two knives to a 17-year old who used them minutes later to stab another young person seven times in a near fatal attack. Having been convicted after a trial, the company was fined £750 and the manager £500.

5.11 The primary harm detected by underage knife test purchases is the risk of harm which arises from a retailer failing to have sufficient correctly implemented precautions in place to prevent knives being placed in the hands of young persons. It is one step removed from the risks which arise when a young person goes out with a knife in their pocket or bag, facing not only the risk of being in a potentially deadly confrontation but also of being subject to criminal proceedings for knife possession¹², as set out at point (iv) above.

5.12 In this regard, it is unfortunate that current sentencing practices routinely fail to acknowledge the harm, or risk of harm, identified by Trading Standards test purchases, despite young persons facing custodial sentences (in some cases with minimum terms) when caught in possession of knives without lawful excuse¹³. This lack of acknowledgment is in the face of sentencing guidelines for bladed articles and offensive weapons referring explicitly to quantifiable harm as including the risk of harm¹⁴.

6. Sentencing in Practice

6.1 We have carried out extensive research into how the s.141A offence is being sentenced across London, where the issue of knife crime remains a substantial unabated problem, which has revealed both inconsistency and a lack of understanding by magistrates as to the issues that might, or should, properly be taken into account when passing sentence.

¹² Referred to by District Judge Lucie when sentencing *LBBB v B&M Retail Ltd* at Barkingside Magistrates Court (see below)

¹³ Criminal Justice Act 1988 s.139 (1)

¹⁴ Sentencing Council *Bladed Articles and Offensive Weapons Possession Definitive Guideline*

<https://www.sentencingcouncil.org.uk/offences/crown-court/item/bladed-articles-and-offensive-weapons-possession/>

- 6.2 The genesis of this submission emanates from the sentences passed against two high street retailers (both very large organisations for the purposes of existing guidelines) that were convicted, upon their own pleas, of s.141A offences.
- 6.3 On 13/03/18, Decathlon UK Limited was fined £20,000 for a single offence, having entered a guilty plea at the first opportunity. Decathlon UK Limited is a substantial business with a turnover in excess of £250 million. Their parent company, Decathlon SA has an annual turnover of \$12 billion.
- 6.4 Six months later, on 22/09/18, B&M Retail Limited was fined £480,000 following guilty pleas to three offences. B&M has a turnover in excess of £2 billion. The fine was subsequently reduced on appeal to £330,000.
- 6.5 Since the sentencing of Decathlon and B&M, there have been a number of other prosecutions for s.141A offences which have resulted in the range of fines set out at Appendix A.
- 6.6 The most recent prosecutions in the last month (which are not included at Appendix A) have resulted in further inconsistency.
- 6.7 On 26/02/20, Shop Direct Home Shopping Limited (which trades as ‘Very’ and is said to be the largest exclusively online retailer in the UK) was convicted after trial at Croydon Magistrates’ Court of one offence contrary to s.141A, having sold a three-piece knife set to a 13-year-old test purchaser.
- 6.8 Shop Direct Home Shopping Limited had an average turnover during the relevant period of approximately £1.5 billion. The company acknowledged that it has specifically considered the risk of knives being purchased by children but decided that such an event was unlikely. It had no age verification measures in place to guard against the risk. The company was fined £20,000.

- 6.9 On 06/03/20, Today Tech LLP was convicted after trial at Lavender Hill Magistrates' Court of one offence contrary to s.141A, having sold a retractable craft knife to a 13-year-old test purchaser.
- 6.10 It was accepted between the parties that the LLP had failed to have any regard to its obligation not to sell knives to children, having failed even to identify knives as age-restricted products on its website. The LLP had a turnover during the relevant period of approximately £2 million but was not a profitable organisation. The LLP was fined £1000.
- 6.11 Both Shop Direct Home Shopping Limited and Today Tech LLP had been warned in advance of the test purchases that they would be taking place.
- 6.12 At the sentencing stage of each case, DJ Dean and DDJ Gladwell, respectively, invited assistance from the parties as to how they should approach sentence, both having expressed uncertainty about how they should do so.

7. Offensive Weapons Act 2019

- 7.1 Part 3 of the Offensive Weapons Act 2019 has created several new offences concerning the sale and delivery of knives to persons under the age of eighteen.
- 7.2 It is anticipated that Trading Standards Services (and presumably Police Services) will be engaged in testing compliance with the new legislation and active enforcement of the relevant provisions, which it should be assumed will lead to prosecutions, the sentencing of which has no Guideline.

8. Options

- 8.1. We would respectfully submit that the current Guideline for the sentencing of 'Bladed articles and offensive weapons' could be augmented to provide guidance on sentencing the s.141A offence.

- 8.2. If the Sentencing Council is of the view that it would consider issuing a Guideline for the s.141A offence, but only as part of a Guideline grouping similar offences, we would welcome the opportunity to make further submissions on which other offences might be grouped together.
- 8.3. The London Borough of Barking and Dagenham are well-placed, and willing, to conduct a wider study into sentencing decisions for prosecutions of all age-restricted products and product safety offences.
- 8.4. Similar factors of risk of harm, corporate culpability, and the availability to sentencing magistrates of unlimited fines apply to a wide range of offences enforced by Trading Standards Services.
- 8.5. In consequence, it is our experience that a similar level of disparity exists across the spectrum of Trading Standards work, for which the absence of any Guidelines is in part accountable.
- 8.6. This disparity is likely to persist unless the Sentencing Council takes steps to address it. Age restricted sales remain a focus for Trading Standards Services.
- 8.7. Between September 2018 and September 2019, Trading Standards Services in London attempted 1,051 test purchases of knives, leading to 119 sales. In addition, Croydon Trading Standards (leading a Home Office funded operation) made 100 online attempts to purchase knives from UK-based retailers, leading to 41 sales¹⁵.
- 8.8. The volume of offences prosecuted is greater than other offences for which there are guidelines.
- 8.9. The enactment of the Offensive Weapons Act 2019 will serve only to increase the already burgeoning number of prosecutions taken each year for, or related to,

¹⁵ <https://www.tradingstandards.uk/news-policy/news-room/2019/london-retailer-agreement-launched-to-crackdown-on-underage-knife-sales>

the s.141A offence. This fact, together with the overwhelming public interest in curbing knife crime involving young persons, is sufficient justification, in our respectful submission, for the Sentencing Council to prioritise the drafting of a Guideline.

For and on behalf of the London Borough of Barking and Dagenham

April 2020

This submission has the full support of the following organisations:

- *Association of Chief Trading Standards Officers*
- *National Trading Standards*
- *East of England Trading Standards Association*
- *Local Government Association*
- *London Councils (representing London's 32 borough councils and the City of London)*
- *London Trading Standards (representing 33 Local Authority Trading Standards services in the London region)*

Appendix A

Preamble

- a. In September 2019, Trading Standards Services in London were asked to provide details of recent sentencing decisions for prosecutions arising from the sales of knives to children. Results were obtained from nine Boroughs for sentences handed down by seven magistrates' courts and one Crown Court (on appeal).
- b. The results show a significant disparity of sentence. Of the thirty-four fines imposed, six are £500 or less, and ten are £1000 or less. The range of fines is from £0 to £120,000.
- c. In prosecutions taken by London Borough of Croydon during the Autumn of 2019 as part of a Home Office funded online test purchasing project, fines in the region of £8000 have been imposed apart from one case where a fine of £5000 was imposed upon conviction following a trial.
- d. Further disparities can be seen in that after a not guilty plea and trial, and having been convicted in 2016 for the same offence, Poundstretcher Ltd were fined £50,000, whereas on appeal B&M Retail Ltd had two £90,000 fines and one £120,000 fine imposed after guilty pleas and significant co-operation with the investigation.

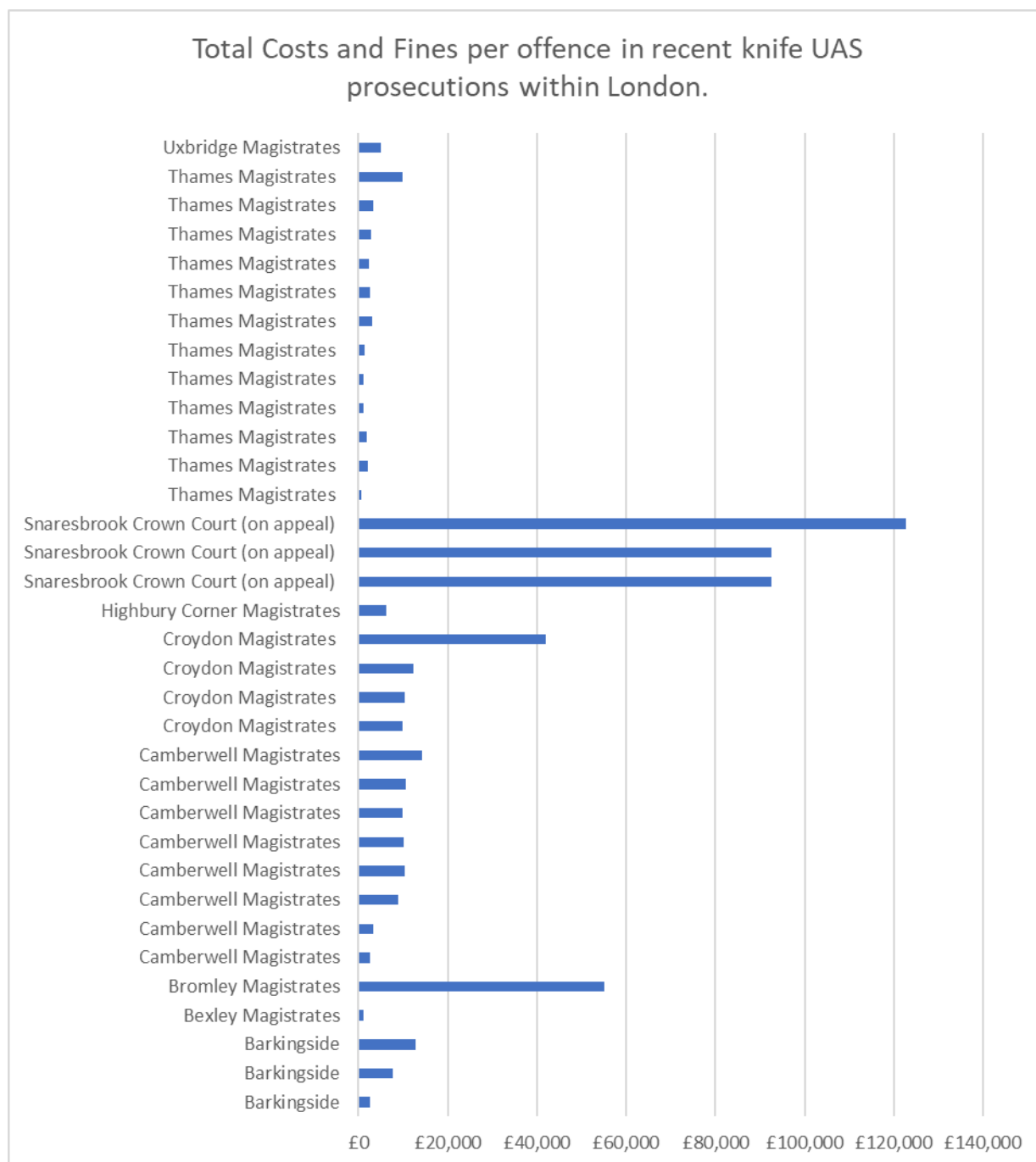


Table 1: Recent fines and costs totalled for underage sale of knife prosecutions at different Magistrates Courts within London.

Sale of knives etc to persons under eighteen - Organisations

Criminal Justice Act 1988, s141A

Effective from: TBC

Triable only summarily

Maximum: unlimited fine

Offence range:

Use this guideline when the offender is an organisation. If the offender is an individual please refer to the **Sale of knives etc to persons under eighteen – individuals** guideline.

Guideline users should be aware that the [Equal Treatment Bench Book](#) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

Step 1 – Determining the offence category

The court should determine the offender’s culpability and the harm caused with reference **only** to the factors below.

CULPABILITY
<p>High</p> <ul style="list-style-type: none"> • Offender fell far short of the appropriate standard for example, by: <ul style="list-style-type: none"> ○ failing to put in place standard measures to prevent underage sales <ul style="list-style-type: none"> ▪ For in store sales this would normally include: identifying restricted products, clear signage, age verification checks/ Challenge 21 or Challenge 25 policy, staff training, maintaining refusals log, till prompts ▪ For online sales this would normally include: identifying restricted products, use of a reliable online age verification tool and/or collect in-store policy with checks on collection. ○ Failing to act on concerns raised by employees or others; ○ failing to make appropriate changes following prior incident(s);
<p>Medium</p> <ul style="list-style-type: none"> • Offender fell short of the appropriate standard in a manner that falls between descriptions in ‘high’ and ‘low’ culpability categories • Systems were in place but these were not sufficiently adhered to or implemented
<p>Low</p> <ul style="list-style-type: none"> • Offender made significant efforts to prevent underage sales falling short of a defence

HARM
Factors indicating greater harm <ul style="list-style-type: none"> • Supply to younger child/children • Supply causes or contributes to antisocial behaviour • Two or more prohibited items supplied to a single purchaser
Factors indicating lesser harm <ul style="list-style-type: none"> • All other cases

Step 2 – Starting point and category range

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

Very large organisation

Where an offending organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence.

Large - Turnover or equivalent: £50 million and over

Harm	Culpability		
	A	B	C
Greater harm	Starting point £500,000	Starting point £250,000	Starting point £125,000
	Category range £750,000 – £450,000	Category range £150,000 – £450,000	Category range £75,000 – £200,000
Lesser harm	Starting point £250,000	Starting point £125,000	Starting point £50,000
	Category range £150,000 – £450,000	Category range £75,000 – £200,000	Category range 25,000 – £100,000

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

Harm	Culpability		
	A	B	C
Greater harm	Starting point £250,000	Starting point £125,000	Starting point £50,000
	Category range £150,000 – £450,000	Category range £75,000 – £200,000	Category range 25,000 – £100,000

	Starting point £150,000	Starting point £75,000	Starting point £30,000
Lesser harm			
	Category range £90,000 – £250,000	Category range 25,000 – £125,000	Category range £15,000 – £50,000

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

		Culpability	
Harm	A	B	C
	Starting point £150,000	Starting point £75,000	Starting point £30,000
Greater harm			
	Category range £90,000 – £250,000	Category range 25,000 – £125,000	Category range £15,000 – £50,000
	Starting point £50,000	Starting point £30,000	Starting point £10,000
Lesser harm			
	Category range £25,000 – £100,000	Category range £15,000 – £50,000	Category range £5,000 – £25,000

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

		Culpability	
Harm	A	B	C
	Starting point £50,000	Starting point £30,000	Starting point £10,000
Greater harm			
	Category range £25,000 – £100,000	Category range £15,000 – £50,000	Category range £5,000 – £25,000
	Starting point £25,000	Starting point £10,000	Starting point £5,000
Lesser harm			
	Category range £15,000 - £50,000	Category range £5,000 - £25,000	Category range £2,000 - £10,000

The court should then consider adjustment for any aggravating or mitigating factors. The following is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far.

Factors increasing seriousness**Statutory aggravating factors:**

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

Other aggravating factors:

- Offence was a consequence of cost-cutting
- Obstruction of justice
- Failure to respond to warnings or advice from Trading Standards
- Falsification of documentation or licences

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Evidence of steps taken voluntarily to prevent re-occurrence
- High level of co-operation with the investigation and acceptance of responsibility
- Good record of compliance with Trading Standards

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

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

Step 4 – Reduction for guilty pleas

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

Step 5 – Totality principle

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

Step 6 – Compensation and ancillary orders

In all cases, the court should consider whether to make [compensation](#) and/or other [ancillary orders](#).

- [Ancillary orders – Magistrates' Court](#)

Step 7 – Reasons

[Section 52 of the Sentencing Code](#) imposes a duty to give reasons for, and explain the effect of, the sentence.

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

22 October 2021
SC(21)OCT03 – Sexual Offences
Adrian Fulford
Ollie Simpson
07900 395719

1 ISSUE

1.1 The first meeting considering responses to the consultation on revisions to the sexual offence guidelines.

2 RECOMMENDATIONS

2.1 That:

- Council continue with the proposed approach to cases where no activity takes place, following the reasoning in *Privett* and *Reed*;
- the guidance is a little more explicit about the reduction to apply (up to one year when the offender desisted only through outside intervention);
- the section 14 guideline stays as brief guidance linking to the underlying offence guidelines, but that drop down text boxes be added to those guidelines relating to section 14;
- wider suggested changes to culpability, harm and aggravating factors be left out of scope of this revising exercise;
- wording be added to the guidance on sexual harm prevention orders (SHPOs) on foreign travel restrictions and on the effect on existing orders;
- the wording on remote offending/overseas victims be refined, and added also to the guideline for section 47 (paying for the sexual services of a child).

3 CONSIDERATION

3.1 The consultation on revisions to the sexual offences guidelines ran between 13 May and 13 August this year, to which we received 34 responses. We also conducted road testing during this period with 30 Crown Court judges, six district judges and six magistrates.

3.2 The consultation sought views on various proposed amendments to the sexual offences guidelines. The primary reason for the amendments was to provide clarity on the

approach to take in child sexual offence cases when contact offending has not occurred, either because the victim is not real or because activity has been incited but not caused. The consultation also sought views on a new guideline for sexual communication with a child (section 15A of the Sexual Offences Act 2003), small amendments to the guidance on historical sexual offending, and on other cross-cutting revisions, including drop-down text on sexual harm prevention orders (SHPOs), abuse of trust, severe psychological harm, age and/or lack of maturity, and physical disability or serious medical condition requiring urgent, intensive or long-term treatment.

3.3 This paper covers responses received on i) the section 14 and causing/inciting amendments where no sexual activity has taken place, ii) the proposed text on sexual harm prevention orders; and iii) wording on remote offending and overseas victims. We will aim to consider the rest, including the new section 15A guideline, in November's meeting.

Cases where no sexual activity takes place or there is no real victim

3.4 Most respondents agreed with our proposed approach, in following the reasoning set out in *Privett* and *Reed*: to assess seriousness on the basis of what the offender intended, but provide a small discount for the fact that no victim existed, or the sexual activity incited did not take place. However, a few responses questioned the basic premise of the revisions. I have reproduced extracts of these responses at **Annex A**.

3.5 The objections can be summarised as being that our approach places too much emphasis on harm *intended* over harm *caused*; that it would result in a disproportionate response by analogy with attempted offences such as murder or robbery; that it over-penalises the mere thought of doing something; and that it does not provide clarity for sentencers.

3.6 These objections avoid the fact that section 14 is a complete offence when arrangements have been made, whether the victim is real or not. For that and other reasons, the comparisons with attempted murder and assault are interesting but not persuasive. We are dealing with offenders who intend to commit serious contact offences indiscriminately, contrasting with most failed murder attempts. In any case, a premeditated murder attempt with no harm carries a starting point of 20 years' custody which is not insignificant.

3.7 The idea of applying too much weight to one strand of section 63 of the Sentencing Code (harm caused, intended to cause, might foreseeably have caused) over another seems a false choice. Harm can be assessed by reference to any or all of these, and it does seem to be the case that previous case law barely considered the latter two strands.

3.8 The Sentencing Academy suggested that this is such a fundamental part of the facts surrounding the case that it should be moved from step two to step one. We had considered various options for this, but considered them too convoluted. In essence, our proposal asks sentencers to make an adjustment at the start of step two to provide for a lower starting point, and notes in some instances that the reduction will result in a starting point outside the range, so the practical difference in approach may be limited.

3.9 On the other hand, one magistrate respondent didn't believe there should be a reduction at all (as was the case in some of the cases joined with *Privett*):

"I don't think there should be any reduction at all for there being no actual harm done, if the only reason for that was that the defendant was apprehended or the child did not exist. There should only be a reduction if the defendant voluntarily backed off from the abuse."

3.10 We should acknowledge the risk that real victims of this sort of offending could see the harm and suffering they have experienced as devalued or minimised by the proposed approach, but that is precisely the reason for applying a discount. For the reasons set out above, and in light of the general support for it, I do not propose to change the basic approach we consulted on.

Question 1: do you agree to continue with the proposed approach to situations where no sexual activity takes place?

3.11 A finding from road testing was that sentencers applied differing reductions to reflect the lack of a real victim. In the scenario of a "13 year old" decoy the reduction varied between six months and three years, being the main cause of a wide range of resulting sentences, between two years' and six years' imprisonment.

3.12 The Sentencing Academy noted this point:

The whole point of the guidelines is to structure that discretion and not to leave individual sentencers to decide on the level of reduction. The consultation document states that 'the Council's aim is to ensure that all sentences are proportionate' (p. 6); simply leaving an issue to the sentencer's discretion, without more, cannot fulfil the Council's aim. – Sentencing Academy

3.13 The Justice Select Committee agreed with the need for more clarity:

"We recommend that some additional text or examples be added to enhance clarity in relation to how a "downward adjustment" might be applied...

While we accept that the extent of the adjustment must be specific to the facts of the case, as a principle we do not think the downward adjustment should be too significant, if at all, in

certain cases where the harm was intended but did not take place because there was no real victim.... There should be greater clarity as to how, and the instances in which a downward adjustment should be applied, as well as further guidance to determine how great that adjustment should be.” – Justice Committee

3.14 The wording “a small reduction within the category range will usually be appropriate” should have led to reductions of a year or under in most decoy cases where the offender is apprehended at the scene. If this is unclear, we could be more explicit via the text marked in bold, as follows:

“The extent of this adjustment will be specific to the facts of the case. However, in cases where an offender is only prevented by the police or others from conducting the intended sexual activity at a late stage, or where a child victim does not exist and, but for this fact, the offender would have carried out the intended sexual activity, a reduction **of up to a year’s imprisonment** will usually be appropriate. Where, for instance, an offender voluntarily desisted at an early stage a larger reduction is likely to be appropriate, potentially going outside the category range.”

3.15 The facts surrounding earlier voluntary desistance could differ so greatly that I do not recommend providing a specific figure; the suggestion that sentences could potentially go outside the category range provides some guide.

Question 2: do you agree to amend the wording to be more explicit about the sort of reduction that should be applied?

3.16 Professor Alisdair Gillespie was concerned that sentencers could miss the guidance if we continued the approach of cross-referencing guidelines for the underlying offending:

“There is the danger that the sentencer concentrates on the guideline they are referred to, rather than the overarching points that are made in the s.14 guideline.... While the s.14 guideline should hyperlink to the relevant comparator guidelines, it would require the judge to remember to return to the initial guideline and not simply sentence on the basis of what is set out in, for example, the section 9 guideline. It is submitted that the culpability and harm factors will be common across most s.14 cases. Thus, it would be possible to create a guideline for s.14 instead of a ‘gateway guideline’.” – Professor Alisdair Gillespie

3.17 Virtually all section 14 cases at present involve section 9 (sexual activity with a child) as the offence being facilitated or arranged. To eliminate any confusion, we could draw up one substantive section 14 guideline essentially replicating the section 9/10 guideline, incorporating the additional text for cases where no sexual activity takes place, and with a banner directing users to other guidelines in the rare event that the underlying offence is not

section 9. The wording in the harm table could be amended slightly to be clear that it refers to the activity which was arranged or facilitated.

3.18 Note, however, that if the provisions in the Police, Crime, Sentencing and Courts Bill become law we would need further section 14 guidelines for cases where the intended offending comes under sections 5 to 8 of the 2003 Act (i.e. where the apparent victim is under 13 years old). We could add further section 14 guidelines which replicate these guidelines in the same manner, and could be accessed from a section 14 “landing page”.

3.19 This links with a suggestion from the Justices' Legal Advisers and Court Officers Service that the usual details about ancillary orders be included in the section 14 guideline. A substantive section 14 guideline would include that as standard; alternatively if sentencers are guided to an underlying guideline then they will see that information there.

3.20 In road testing, most sentencers made their adjustment as the guidelines proposed, at the beginning of step 2. A few made the adjustment at mitigation or guilty plea stage and some said it was unclear at which stage they should make the adjustment.

3.21 On balance, I believe we risk creating further complication by having a standalone guideline. There is no evidence of widespread confusion about the operation of the guideline, and most road testing participants did say that the guidance was clear and easy to use.

3.22 At the moment, the guidelines for the underlying offences do repeat the section 14 guidance in a blue box: Council members thought that this looked repetitious given the very similar text added to those guidelines for cases of attempted incitement where no activity had taken place. If there remains a concern about the guidance getting lost, or there is uncertainty about when to make an adjustment, we could add a drop down box at the start of the relevant guideline (for example section 9) which repeats the approach to take in section 14 cases. I will aim to demonstrate this at the meeting.

Question 3: do you want to retain the current format of the section 14 guideline as a brief textual guideline linking to the guidelines for the underlying offences?

Question 4: if so, do you want to add some drop-down text in the guidelines for the underlying offences (currently sections 9 to 12, but potentially also 5 to 8 in future) repeating the section 14 guidance?

Question 5: are you content to make equivalent changes to apply to arranging or facilitating offences under sections 5 to 8 without further consultation when those provisions in the Police, Crime, Sentencing and Courts Bill become law?

3.23 Professor Gillespie also questioned whether the section 14 guideline should cover the situation where section 14 is charged as an attempt:

“In Reed the Court of Appeal also stated, ‘no additional reduction should be made for the fact that the offending is an attempt’. It is respectfully submitted that the comments should also be included in the guideline as the CPS does, occasionally, continue to fail to adhere to its own charging standards and continue to charge attempted s.14. In such circumstances, it is important that there is no ‘double downward adjustment’ as the initial adjustment encapsulates the attempt point....

The current phrasing leaves open the question whether there will be a downward adjustment where there is a real child. The proposed guideline says:

‘No sexual activity need take place for a section 14 offence to be committed, including in instances where no child victim exists. In such cases the court should identify the category of harm on the basis of the sexual activity the offender intended, and then apply a downward adjustment...’

The use of the term ‘in such cases’ is unclear. Is it where no sexual activity takes place, where there is no real child, or both? In many instances where a real child is involved, the proper charge will be an attempt (most likely attempted s.9) but s.14 could still be applicable, not least because the steps taken to ‘arrange’ or ‘facilitate’ may not constitute ‘more than merely preparatory steps’ for the purposes of the Criminal Attempts Act 1981.

Arguably the guideline – including the downward adjustment – should apply irrespective of whether there is a real child or not because it is reflecting that no substantive (sexual) harm has taken place. However, it is respectfully recommended that the guideline should make clear that there should be no additional reduction to reflect the fact that it was an attempt.”

3.24 We intend “in such cases” to apply to all situations where no activity takes place. We could put the words “including in instances where no child victim exists” in parentheses to put the matter beyond doubt.

3.25 However, I am concerned about including the language about attempts into the section 14 guideline. In relation to the first scenario (incorrect charging), we should be reinforcing the idea that section 14 is charged substantively and is a substantive offence even where no child exists. In relation to the second, where someone has not gone beyond “merely preparatory steps” in the process of *making arrangements* it may well be that a significant reduction is the right approach and an “attempt discount” could be appropriate.

Question 6: do you agree not to amend the section 14 wording to include text about attempts (but consider putting “including in instances where no child victim exists” in brackets)?

3.26 We proposed making amendments to all “causing or inciting” offences in the Sexual Offences Act 2003.¹ HM Council of District Judges (Magistrates Courts) suggested that this would imply some unlikely scenarios:

“First, the section 17 offence provides for a person abusing a position of trust causing or inciting a child to engage in sexual activity. This offence requires proof that the defendant was in a position of trust in relation to the complainant. It is difficult to see any case where the words from the proposed amendment “or in attempts where a child victim does not exist” would ever apply to such an offence. It is far-fetched to imagine any sting operation creating a fake child to whom the defendant is actually in a position of trust.

Secondly, this observation applies equally, if not with greater force, to the section 26 offence of inciting a child family member to engage in sexual activity. For that offence, the prosecution must prove that the relationship between defendant and complainant is a family relationship within section 27 of the 2003 Act. We find it difficult to envisage a situation where that could be proved “in attempts where a child victim does not exist”. We do not expect this offence to be charged where there is a sting operation which involves only a fictitious child.

The fictitious child (or even a fictitious adult victim) situation is also very unlikely to apply to the section 31 offence of causing or inviting a person with a mental disorder impeding choice to engage in sexual activity. We note that any such offence involving a child complainant under section 31 is more likely to be charged as a child sexual offence with the additional aggravating feature of the mental disorder of such a child (specific targeting of a particularly vulnerable child). But how would the prosecution prove that the complainant had a mental disorder and the defendant knew, or reasonably could be expected, to know that he had a mental disorder?

Finally, we see no way in which the fictitious child (or fictitious adult victim) scenario might apply to the section 39 offence of a care worker causing or inciting sexual activity. How could the prosecution prove that the complainant has a mental disorder, that the defendant knows

¹ These are: section 8 (causing or inciting a child under 13 to engage in sexual activity); section 10 (causing or inciting a child to engage in sexual activity), section 17 (abuse of position of trust: causing or inciting a child to engage in sexual activity); section 26 (inciting a child family member to engage in sexual activity); section 31 (causing or inciting a person with a mental disorder impeding choice to engage in sexual activity); section 39 (care workers: causing or inciting sexual activity); sections 48 (causing or inciting sexual exploitation of a child); and section 52 (causing or inciting sexual exploitation for gain).

or could reasonably be expected to know that the complainant has a mental disorder and that the defendant is involved in the complainant's care?"

3.27 Offering a contrary view, one respondent thought that where this scenario applied to an "abuse of trust", relative or care home scenario the harm was inherently greater i) precisely because of the abuse of trust and ii) because it was more likely in those scenarios that there would be a real victim and contact offending would only be prevented by a third party. I would argue (i) is covered by sentencing levels in those guidelines and (ii) can be assessed by the judge on the facts before them.

3.28 We did consider before consultation that the wording could be added to all those guidelines for completeness' sake, even if they are never needed and imply some absurdities. If we do keep them, however, the North London Bench pointed out that for the offences involving over 16s we will need to amend the wording of the guidance slightly to refer to "a victim" rather than "a child victim".

Question 7: do you still want the guidance to apply to all the causing or inciting offences (with a reference to "victim" rather than "child victim" where appropriate)?

3.29 Although we were not seeking views on the various factors in the section 9/10 guideline, Professor Gillespie proposed two additions to higher culpability:

- taking steps to hide one's identity before contact offending takes place (for example asking the child to delete messages, or getting the child to save their number under a false name);
- activity with a child family member (noting that the offences relating to child family members in the 2003 Act are reserved in practice for child victims aged 16 and 17) – this, it is argued, would help the definition of "abuse of trust".

3.30 As a matter of principle I am not minded to open up the guidelines to wider amendment unless we have firm evidence that they are not working in practice. The points above are covered to some extent by the existing factors of grooming behaviour and abuse of trust, even if those could be subject to some interpretation. I believe, rather than making piecemeal changes which other stakeholders have not had the chance to consider, they should wait until a fuller refresh of the guidelines in due course.

Question 8: do you agree not to make these additions to the culpability factors?

Sexual Harm Prevention Orders

3.31 All respondents agreed to include text on Sexual Harm Prevention Orders (SHPOs) in the sexual offence guidelines. Professor Gillespie proposed including the "general

principle that the duration of the SHPO should not exceed the duration of the notification period”, citing the cases of in *R v McLellan [2017] EWCA Crim 1464* and *R v Stephenson [2019] EWCA Crim 2418*. However, my reading of *McLellan* is that there is precisely no general principle on this point:

“First, there is no requirement of principle that the duration of a SHPO should not exceed the duration of the applicable notification requirements... it all depends on the circumstances.” [paragraph 25]²

I believe we would be creating a broad-brush principle in what is intended to be short, factual guidance for the court and would not recommend making this addition. However, I make a brief suggestion in square brackets below if Council would like to do so.

3.32 The Justices’ Legal Advisers and Court Officers Services made two other suggestions for additions to the text:

“We propose that there be after “positive obligations”, a specific reference to prohibitions on foreign travel; unlike other prohibitions this has specific further requirements. We believe it would be helpful to highlight the different impact of making an order (section 349 Sentencing Code) on existing sexual harm prevention orders (which automatically cease) and sexual offences prevention orders and foreign travel orders (s114 Sexual Offences Act 2003) which cease unless the court orders otherwise.”

3.33 The Police, Crime, Sentencing and Courts Bill is changing the law on SHPOs to permit positive requirements. The relevant provisions and proposed amendments on SHPOs are set out at **Annex B**. This means we will need to amend our text anyway and the above suggestion on requirements of foreign travel prohibitions becomes redundant. On the assumption that the changes to the law are in force when the revised guidelines come into force, I propose that we amend the proposed text on SHPOs as follows (additional text in bold):

Sexual harm prevention orders (SHPOs)

Sentencing Code s345

To make an SHPO, the court must be satisfied that the offender presents a risk of sexual harm to the public (or particular members of the public) and that an order is necessary to protect against this risk. The only prohibitions **or requirements** which can be imposed by an

² Although the same paragraph of that judgment goes on to say: “All concerned should be alert to the fact...that the effect of a SHPO of longer duration than the statutory notification requirements has the effect of extending the operation of those notification requirements... Notification requirements have real, practical, consequences for those subject to them; inadvertent extension is to be avoided.” The conclusion is that an SHPO should not be used as a means of extending notification requirements.

SHPO are those which are necessary for the purpose of protecting the public from sexual harm from the offender. ~~The order may include only negative prohibitions; there is no power to impose positive obligations.~~

The order may have effect for a fixed period (not less than five years) or until further order, **with the exception of a foreign travel prohibition which must be a fixed period of no more than five years (renewable).** [In practice, the duration of an SHPO will usually be the same as the notification period.] Different time periods may be specified for individual restrictions and requirements.

Where an SHPO is made in respect of an offender who is already subject to an SHPO, the earlier SHPO ceases to have effect. If the offender is already subject to a Sexual Offences Prevention Order or Foreign Travel Order made in Scotland or Northern Ireland, that order ceases to have effect unless the court orders otherwise.

Chapter 2 of Part 11 of the Sentencing Code [LINK] sets out further matters relating to making SHPOs.

Question 9: do you agree to make these amendment to the proposed text on SHPOs, to reflect the new legislation and to provide some detail on duration and effect on existing orders?

3.34 Professor Gillespie pointed to various cases where the Crown Court has erroneously varied the terms of an SHPO where it has no powers to do so, resulting in appeals.³ These cases are all in the context of breaches of SHPOs which are not included in Schedules 3 or 5 to the 2003 Act, so there is no power to make new SHPOs upon conviction or vary the terms without a separate application being made by someone permitted to do so. We are already proposing changes which should resolve any confusion here via the Miscellaneous Amendments consultation.

Remote offending/victims overseas

3.35 All respondents welcomed our proposed inclusion of the following text: *“Sentencers should draw no distinction between activity caused or incited in person and activity caused or incited remotely, nor between the harm caused to a victim in this jurisdiction and that caused to a victim anywhere else in the world.”* Indeed, some respondents thought we should go further and make this an aggravating factor:

“If the activity relates to a place like the Philippines with GNP much lower than UK, (national health care generally vaccines and birth control only; food difficult to acquire for the

³ For example *R v McLoughlin* [2021] EWCA Crim 165 and *R v Rowlett* [2020] EWCA Crim 1748, to which I would add *R v Ashford and Others* [2020] EWCA Crim 673.

children), then something akin to 'breach of trust' should apply if the offender is resident in the UK.” – Member of the public

“I respectfully recommend that ‘defendant seeks to remotely exploit children outside of the jurisdiction’ is added as an aggravating factor. If this was thought to be too wide, it could be restricted to those situations where there is commercial sexual exploitation.” – Professor Alisdair Gillespie

3.36 I am not convinced that abuse of children overseas should be treated automatically more seriously than abuse which takes place within one jurisdiction, although the facts in specific cases might merit that (see below). This is another issue, like the extensive points raised by the charity International Justice Mission, that I propose should wait until a more comprehensive revision of the guidelines.

3.37 Two respondents thought the wording might be refined:

“In this context, we believe it is not just the harm caused. We would therefore propose a slight change to the wording, as follows (changed text underlined):

“Sentencers should draw no distinction between activity caused or incited in person and activity caused or incited remotely, nor whether a victim is located in this jurisdiction or is located anywhere else in the world.” – West London Magistrates Bench

“I agree with the principle, but would suggest a slight change in wording (which is designed to capture what is the stated intention in the consultation):

‘Sentencers should draw no distinction between activity caused or incited in person and activity caused or incited remotely, nor between the harm caused to a victim in this jurisdiction and that caused to a victim anywhere else in the world (save where the facts of a specific case mean that either distinction in some way affects harm or culpability).’” – Giles Fleming

3.38 I agree that the guidelines should not necessarily preclude a finding that remote offending or the location of the victim in some way affects the seriousness of a case and it could be argued that the current proposed wording, read literally, could have that effect. I do think we should keep an emphasis on the harm caused to victims and I think the most effective way of clarifying the wording would be:

“Sentencers should approach the assessment of seriousness in the same way regardless of whether activity was caused/incited in person or remotely, and regardless of whether harm was caused to a victim in this jurisdiction or to a victim anywhere else in the world.”

Question 10: do you agree to amend the wording of the text on remote offending/overseas victims?

3.39 We had proposed including this text in the guidelines for section 8 (causing or inciting a child under 13 to engage in sexual activity); section 10 (causing or inciting a child to engage in sexual activity); section 48 (causing or inciting sexual exploitation of a child); and section 52 (causing or inciting sexual exploitation for gain). Professor Gillespie suggested adding it also to the guidelines for section 15 (meeting a child following sexual grooming), section 15A (sexual communication with a child) and section 47 (paying for sexual services of a child). The CPS also thought it could apply to other offences, including section 17 (abuse of a position of trust: causing or inciting a child to engage in sexual activity).

3.40 The intention of this added wording was to address concerns about international child sexual exploitation. It may be that it is unlikely to bite on an “abuse of trust” offence, although there are increasing opportunities for teachers and others to offend remotely. Because of the 2003 Act’s territorial scope, in theory we could extend the principle about harm to victims in other jurisdictions to all contact offences (for example, if a child was raped by a UK national in the Philippines we could make the point that harm to the overseas victim is to be approached in the same way as that done to a victim in England and Wales).

3.41 There is a risk of scope creep here. I am persuaded to add it to section 47, but suggest we would be expanding the principle too far by adding it to other guidelines.

Question 11: do you agree to add the wording about remote offending/location to victim to the section 47 guideline? Are there any other guidelines to which it should be added?

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 risk being 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?

Aside from one response cautioning vaguely against “positive discrimination”, the only substantive response received was as follows:

“Yes - mostly positive discrimination. Female offenders receive more lenient sentences whereby they are often more harmful; both in terms of the impact on the victim through breaching expectations of women as being caring/nurturing, and also women often having more contact in trusting positions with children/victims. E.g. females giving personal care to disabled female and male service users, whereas male workers would not usually be expected to give personal care to female service users.

There is also a tendency for non-white offenders to receive different sentences; black offenders are often treated more harshly; Asian offenders often receive more lenient sentences. Perhaps for fear of being accused of racism. Cultural factors should be excluded from any consideration and sentences should be equal across the board.

There may also be a lack of clarity or uncertainty about sentencing offenders who identify as trans or have non-binary gender/sexual identity. Specific guidance should be taken from experienced professionals in terms of risk considerations and the impact required on sentencing...

People with a learning disability / mental health problem should have the conditions accounted for in mandated intervention; this includes services being mandated to provide sad intervention.” – Dr Nici Grace

4.2 It is difficult to assess whether these claims are true in relation to the offences the guidelines for which we are revising as the volumes for female offenders and for Black and Asian offenders are so low for each individual offence. To provide an indication of any disparities between sex and ethnicity, we can group offences under section 8, 10 and 14 together along with five years of data (2016-2020). However, care should be taken when interpreting these statistics as it is possible that this may mask differences between offences and/or years.

4.3 Between 2016-2020 and across these offences, the proportion of adult female offenders receiving immediate custody was higher than for males (74 per cent vs 65 per cent) and the ACSL for females was also higher at 5 years and 3 months, compared to 3 years and 7 months for males.

4.4 The custody rate for Black offenders was 77 per cent, compared to White (66 per cent), Asian (68 per cent), and Mixed ethnicity offenders (57 per cent), all offenders of Other ethnicity were sentenced to immediate custody. However, the ACSL, was similar across the highest volume ethnicities, between 3 years and 5 months and 3 years and 7 months.

4.5 Overall, offenders sentenced for this offence are predominantly White and male and I would be very cautious about suggesting that the harm caused by women is inherently greater. The comments on ethnicity above seem more general. I do not propose making any changes on the basis of this response.

5 IMPACT AND RISKS

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

Extracts of responses on the approach where no activity takes place/no child exists

“...to prescribe a small, and undefined, reduction at Step 2 is both unhelpful to sentencers and insufficient to recognise the absence of actual harm. It places almost all the emphasis on the harm intended. It is also inconsistent with sentencing in other contexts where the intended outcome was impossible. Consider solicitation to murder, another incitement offence. If the person incited to commit murder is an undercover police officer, the intended victim’s death cannot result from the incitement. The offender intends to kill through the intermediary, yet sentences for such incitement fall well short of the minimum term that would be imposed in the event that the intended victim had died.” – Sentencing Academy

... as a basic principle of ethics and fairness, most people would I suggest agree that harm caused is more important than harm intended (especially if the question is taken away from the particularly emotionally evocative context of sexual abuse). Ask for example which of the following should receive a higher sentence: a defendant who intends a battery, but by misfortune causes a death and is convicted of manslaughter; or a defendant who intended a death but, by good fortune, only caused battery-level injuries? The former is far more serious, because of the real consequences of the defendant's actions.

Second, the approach advocated by Privett, and by this consultation, devalues the harm caused to real children who have been abused. If a real victim of a s10 offence is caused to engage in penetrative activity by a much older defendant, the starting point will be 5 years. If a similar defendant attempts to cause a "decoy" child to engage in such activity, and does not desist from doing so early in the case, the approach of Privett would lead to only a modest reduction within the range (which is 4-10 years) - i.e. a sentence of perhaps 4 1/2 years. If they became aware of this, the real victim in the first case would justifiably feel that the pain and suffering they had endured, with the often life-changing impact that it may carry, counted for almost nothing. – Giles Fleming, Barrister

“It is ... in respect of harm, not coherent to use the concept of 'intention' to replace 'incitement, arrangement or encouragement'. Making arrangements to meet a child for sexual gratification is undoubtedly more than merely preparatory to making that arrangement, but the intention in the attempted offence (i.e. to do the impossible because the 'child' is in fact a police officer), is the intention to make the arrangements, not to commit the contact offence. Is it suggested that merely arranging by telephone to meet somebody

whom D mistakenly believes is rich whereas they are in fact a pauper with a view to robbing them, amounts to attempted robbery? It is not, in short, appropriate to use the terminology of s.63 (b)(ii) to such inchoate circumstances when it comes to assessing harm.

I would also point out, in any event, that there is no order of priority as between s.63 (b) (i), (ii) and (iii) [of the Sentencing Code]. Thus, whilst no doubt the CACD in Baker and Cook may arguably not have given sufficient weight to (ii) (harm 'intended'- although see above), the effect of Fulford LJ's judgment- that only a modest reduction should be given in some cases to reflect the impossibility of harm- is to give (ii) a completely unwarranted precedence over (i) (the ACTUAL harm caused) The two should be, at the very least, equally weighted."

HHJ Colin Burn

"The proposed amendments do not clearly or sufficiently set out the reduction or 'downward adjustment' in sentence where there is no actual child so no harm to anyone could possibly result from the defendant's actions. These are pure "thought crimes".

In the case of Vasile and others [2021] EWCA Crim 572 Fulford LJ (at para. 20) refers to s63 of the Sentencing Act 2020 and says its terms are critical. He then however chooses one of the tests ('any harm which the offence was intended to cause') and disregards the other two ('any harm which the offence caused' and 'any harm which the offence might foreseeably have caused'). In the case of a fictional child the answer to both those tests is "none". In those circumstances the reduction or downward adjustment where there is no actual child should be considerable, I would suggest two thirds from the starting point that would apply where actual activity has taken place.

The suggestion that it would be acceptable for a more severe sentence to be imposed where there was a fictional child as opposed to where sexual activity has taken place with an actual child strikes me as perverse." – HHJ Ian Graham

"There is a huge difference in harm but not culpability in inciting children to participate in sexual activity. It is the incitement which the Criminal Law Solicitors Association say is the Graver of the offences. There can be no harm on the basis that no victim existed.

Perhaps what is required is a separate section to deal with the issue of potential harm were there to be a genuine victim. There can be no harm if there is no victim but if the intended harm was to be substantial then this should be taken into account and there should be an adjustment in sentencing.

It is right that there always should be an adjustment for both aggravating and mitigating features and of course the list is not finite or comprehensive.

However, any sentence that is imposed. Should take into account that the child is not real.

The subjective issue of harm causes the Criminal Law Solicitors Association concerns, it is not an assessment which can properly be undertaken and should not be left to the Judge who sentences to ascribe an arbitrary harm to an offence which did not occur.” -- Criminal Law Solicitors Association

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Relevant Sentencing Code provisions on sexual harm prevention orders (with prospective amendments to be made by the Police, Crime, Sentencing and Courts Bill in red)

s343 Sexual harm prevention order

- ~~(1) In this Code “sexual harm prevention order” means an order under this Chapter made in respect of an offender which prohibits the offender from doing anything described in the order.~~
- (1) In this Code a “sexual harm prevention order” means an order made under this Chapter in respect of an offender.
- (1A) A sexual harm prevention order may—
- (a) prohibit the offender from doing anything described in the order;
 - (b) require the offender to do anything described in the order.
- (2) The only prohibitions **or requirements** that may be included in a sexual harm prevention order are those necessary for the purpose of—
- (a) protecting the public or any particular members of the public from sexual harm from the offender, or
 - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the offender outside the United Kingdom.
- (3) The prohibitions or requirements which are imposed on the offender by a sexual harm prevention order must, so far as practicable, be such as to avoid—
- (a) any conflict with the offender’s religious beliefs,
 - (b) any interference with the times, if any, at which the offender normally works or attends any educational establishment, and
 - (c) any conflict with any other court order or injunction to which the offender may be subject (but see section 349).”

s344 Meaning of “sexual harm”

- (1) In this Chapter, “sexual harm” from a person means physical or psychological harm caused—
- (a) by the person committing one or more offences listed in Schedule 3 to the Sexual Offences Act 2003 (sexual offences for the purposes of Part 2 of that Act), or

(b) (in the context of harm outside the United Kingdom) by the person doing, outside the United Kingdom, anything which would constitute an offence listed in that Schedule if done in any part of the United Kingdom.

(2) Where an offence listed in that Schedule is listed subject to a condition that relates—

- (a) to the way in which the offender is dealt with in respect of an offence so listed,
or
- (b) to the age of any person,

that condition is to be disregarded in determining for the purposes of subsection (1) whether the offence is listed in that Schedule.

s345 Sexual harm prevention order: availability on conviction

(1) Where a person is convicted of an offence listed in Schedule 3 or 5 to the Sexual Offences Act 2003 (sexual offences, and other offences, for the purposes of Part 2 of that Act), the court dealing with the offender in respect of the offence may make a sexual harm prevention order.

(2) Where an offence listed in Schedule 3 to that Act is listed subject to a condition that relates—

- (a) to the way in which the offender is dealt with in respect of an offence so listed,
or
- (b) to the age of any person,

that condition is to be disregarded in determining for the purposes of subsection (1) whether the offence is listed in that Schedule.

s346 Exercise of power to make sexual harm prevention order

Where a sexual harm prevention order is available to a court, the court may make such an order only if satisfied that it is necessary to do so for the purpose of—

- (a) protecting the public or any particular members of the public from sexual harm from the offender, or
- (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the offender outside the United Kingdom.

s347 Sexual harm prevention orders: matters to be specified

(1) A sexual harm prevention order must specify—

- (a) the prohibitions **and requirements** included in the order, and

- (b) for each prohibition **or requirement**, the period for which it is to have effect (the “~~prohibition period~~ **specified period**”).

See section 348 for further matters to be included in the case of a prohibition on travelling to any country outside the United Kingdom.

- (2) The ~~prohibition period~~ **specified period** must be—
- (a) a fixed period of not less than 5 years, or
 - (b) an indefinite period (so that the prohibition **or requirement** has effect until further order).

This is subject to section 348(1) (prohibition on foreign travel).

- (3) A sexual harm prevention order—
- (a) may specify fixed periods for some of its prohibitions **or requirements** and an indefinite period for others;
 - (b) may specify different periods for different prohibitions **or requirements**.

s347A Sexual harm prevention orders: requirements included in order etc.

- (1) A sexual harm prevention order that imposes a requirement to do something on an offender must specify a person who is to be responsible for supervising compliance with the requirement. The person may be an individual or an organisation.
- (2) Before including such a requirement in a sexual harm prevention order, the court must receive evidence about its suitability and enforceability from—
 - (a) the individual to be specified under subsection (1), if an individual is to be specified;
 - (b) an individual representing the organisation to be specified under subsection (1), if an organisation is to be specified.
- (3) Subsections (1) and (2) do not apply in relation to electronic monitoring requirements (see instead section 348A(5) and (6)).
- (4) It is the duty of a person specified under subsection (1)—
 - (a) to make any necessary arrangements in connection with the requirements for which the person has responsibility (“the relevant requirements”);
 - (b) to promote the offender’s compliance with the relevant requirements;
 - (c) if the person considers that—
 - (i) the offender has complied with all the relevant requirements, or
 - (ii) the offender has failed to comply with a relevant requirement,to inform the appropriate chief officer of police.
- (5) In subsection (4)(c) the “appropriate chief officer of police means—

- (a) the chief officer of police for the police area in which it appears to the person specified under subsection (1) that the offender lives, or
 - (b) if it appears to that person that the offender lives in more than one police area, whichever of the chief officers of police of those areas the person thinks it is most appropriate to inform.
- (6) An offender subject to a requirement imposed by a sexual harm prevention order must—
- (a) keep in touch with the person specified under subsection (1) in relation to that requirement, in accordance with any instructions given by that person from time to time, and
 - (b) notify that person of any change of the offender's home address.
- These obligations have effect as requirements of the order.
- (7) In this section "home address", in relation to an offender, means—
- (a) the address of the offender's sole or main residence in the United Kingdom, or
 - (b) where the offender has no such residence, the address or location of a place in the United Kingdom where the offender can regularly be found and, if there is more than one such place, such one of those places as the offender may select.

s348 Sexual harm prevention orders: prohibitions on foreign travel

- (1) A prohibition on foreign travel contained in a sexual harm prevention order must be for a fixed period of not more than 5 years.
- (2) Subsection (1) does not prevent a prohibition on foreign travel from being extended for a further period (of no more than 5 years each time) under section 350.
- (3) A "prohibition on foreign travel" means—
 - (a) a prohibition on travelling to any country outside the United Kingdom named or described in the order,
 - (b) a prohibition on travelling to any country outside the United Kingdom other than a country named or described in the order, or
 - (c) a prohibition on travelling to any country outside the United Kingdom.
- (4) A sexual harm prevention order that contains a prohibition within subsection (3)(c)—
 - (a) must require the offender to surrender all of the offender's passports at a police station, and
 - (b) must specify—
 - (i) the police station at which the passports are to be surrendered, and
 - (ii) the period within which they must be surrendered (if not surrendered on or before the date when the prohibition takes effect).

(5) Any passports surrendered must be returned as soon as reasonably practicable after the offender ceases to be subject to a sexual harm prevention order containing a prohibition within subsection (3)(c) (unless the offender is subject to an equivalent prohibition under another order).

(6) Subsection (5) does not apply in relation to—

- (a) a passport issued by or on behalf of the authorities of a country outside the United Kingdom if the passport has been returned to those authorities;
- (b) a passport issued by or on behalf of an international organisation if the passport has been returned to that organisation.

(7) In this section “passport” means—

- (a) a United Kingdom passport within the meaning of the Immigration Act 1971;
- (b) a passport issued by or on behalf of the authorities of a country outside the United Kingdom, or by or on behalf of an international organisation;
- (c) a document that can be used (in some or all circumstances) instead of a passport.

s349 Making of sexual harm prevention order: effect on other orders

(1) Where a court makes a sexual harm prevention order in relation to an offender who is already subject to—

- (a) a sexual harm prevention order, or
- (b) an order under section 103A of the Sexual Offences Act 2003 (sexual harm prevention orders under that Act),

the earlier order ceases to have effect.

(2) Where a court makes a sexual harm prevention order in relation to an offender who is already subject to—

- (a) a sexual offences prevention order under section 104 of the Sexual Offences Act 2003, or
- (b) a foreign travel order under section 114 of that Act,

the earlier order ceases to have effect (whichever part of the United Kingdom it was made in) unless the court orders otherwise.

s350 Sexual harm prevention orders: variations, renewals and discharges

(1) Where a sexual harm prevention order has been made in respect of an offender, a person within subsection (2) may apply to the appropriate court for an order varying, renewing or discharging the sexual harm prevention order.

(2) The persons are—

- (a) the offender;
- (b) the chief officer of police for the area in which the offender resides;

(c) a chief officer of police who believes that the offender is in, or is intending to come to, that officer's police area.

(3) An application under subsection (1) may be made—

- (a) where the appropriate court is the Crown Court, in accordance with rules of court;
- (b) in any other case, by complaint.

(4) Subsection (5) applies where an application under subsection (1) is made.

(5) After hearing—

- (a) the person making the application, and
- (b) if they wish to be heard, the other persons mentioned in subsection (2),

the court may make any order, varying, renewing or discharging the sexual harm prevention order, that it considers appropriate.

This is subject to subsections (6) and (7).

(6) An order may be renewed, or varied so as to impose additional prohibitions **or requirements** on the offender, only if it is necessary to do so for the purpose of—

- (a) protecting the public or any particular members of the public from sexual harm from the offender, or
- (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the offender outside the United Kingdom.

Any renewed or varied order may contain only such prohibitions **and requirements** as are necessary for this purpose.

(6A) Any additional prohibitions or requirements that are imposed on the offender must, so far as practicable, be such as to avoid—

- (a) any conflict with the offender's religious beliefs,**
- (b) any interference with the times, if any, at which the offender normally works or attends any educational establishment, and**
- (c) any conflict with any other court order or injunction to which the offender may be subject.**

(7) The court must not discharge an order before the end of the period of 5 years beginning with the day on which the order was made, without the consent of the offender and—

- (a) where the application is made by a chief officer of police, that chief officer, or
- (b) in any other case, the chief officer of police for the area in which the offender resides.

(8) Subsection (7) does not apply to an order containing a prohibition on foreign travel and no other prohibitions **or requirements**.

(9) In this section “the appropriate court” means—

- (a) where the Crown Court or the Court of Appeal made the sexual harm prevention order, the Crown Court;
- (b) where a magistrates’ court made the order and the offender is aged 18 or over—
 - (i) the court which made the order, if it is an adult magistrates’ court,
 - (ii) a magistrates’ court acting in the local justice area in which the offender resides, or
 - (iii) if the application is made by a chief officer of police, any magistrates’ court acting for a local justice area that includes any part of the chief officer’s police area;
- (c) where a youth court made the order and the offender is aged under 18—
 - (i) that court,
 - (ii) a youth court acting in the local justice area in which the offender resides, or
 - (iii) if the application is made by a chief officer of police, any youth court acting for a local justice area that includes any part of the chief officer’s police area.

In this subsection “adult magistrates’ court” means a magistrates’ court that is not a youth court.

(10) For circumstances in which a sexual harm prevention order ceases to have effect when a court in the United Kingdom makes another order, see the following provisions of the Sexual Offences Act 2003—

- (a) section 103C(6) (sexual harm prevention order under that Act);
- (b) section 136ZB(2) (certain orders made by a court in Northern Ireland or Scotland).

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Sentencing Council meeting:
Paper number:

22 October 2021
SC(21)OCT04 - Motoring offences
causing death or injury

Lead Council member:
Lead official:

Rebecca Crane
Lisa Frost
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1 ISSUE

1.1 This meeting will include further consideration of step one and two factors for the offences of Dangerous driving; Causing serious injury by dangerous driving and; Causing death by dangerous driving. Step one and two factors for some careless driving offences will also be considered, and the Council will be asked to confirm the approach to be taken to assessing culpability for careless driving under the influence of drink or drugs.

2 RECOMMENDATION

2.1 The Council is asked to:

- Consider and agree proposed culpability, aggravating and mitigating factors for dangerous driving offences;
- 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 At the last meeting the Council considered step one and two factors for revised and new guidelines for dangerous driving offences. It was agreed that further work would be undertaken to develop factors based on discussions. The Council is asked to consider revised factors.

3.2 The Council will also be asked to consider factors for careless driving offences. The similarity between dangerous and careless driving offences will be illustrated, and it is proposed that factors are similar for the offences to provide for appropriate seriousness categorisations and alternative charges and pleas.

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.

Dangerous driving offences

3.4 At the last meeting the Council agreed that the dangerous driving guidelines should include specific factors to assess culpability rather than including the existing SGC guideline approach of referencing the risk created by the offence and examples. It was agreed that further work should be undertaken on the initial factors proposed, taking into account points raised at the meeting.

3.5 An additional factor not proposed at the last meeting has been included at medium culpability for consideration. This is included in a number of other guidelines and is intended to capture offences falling between high and low culpability. This is thought necessary as both high and low culpability include broader factors whereas medium culpability factors are more specific. While it may be thought that the 'balancing' wording would provide for offences involving multiple features in different categories, the factor would enable appropriate seriousness categorisations where factors do not easily provide for a balancing exercise to be undertaken.

3.6 Revised factors are as follows. **Annex A** includes a sample of descriptions of driving from cases analysed and includes a summary of points noted by the Judge when identifying the offence categorisation. This may assist in providing context to proposed factors. One factor which the Council did not wish to include at lesser culpability was 'genuine mistake'. It was suggested this would be more appropriate as an aggravating factor, if included at all. However, this was relevant in some cases analysed, an example being where an elderly offender drove in the wrong direction on a dual carriageway for 7 miles, which was not due to a momentary lapse of concentration.

Culpability

The court should determine culpability by reference only to the factors below, which comprise the principal factual elements of the offence. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting before making an overall assessment and determining the appropriate offence category. A combination of factors in any category may justify an increased starting point.

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
- Racing or competitive driving against another vehicle
- Lack of attention to driving for a substantial period of time
- Greatly excessive speed

Medium

- Brief but obviously seriously 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
- Cases falling between high and low culpability because:
 - Factors in both high and lesser categories are present which balance each other out; and/or
 - The offender's culpability falls between the factors as described in high and lesser culpability

Lesser

- Standard of driving was just over threshold for dangerous driving
- Momentary lapse of concentration
- Genuine mistake
- Speed not excessive

Question 1: Does the Council agree with the proposed culpability factors, and with their placement?

3.7 Proposed revised aggravating factors based on the discussion at the last meeting 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
- Disregarding warnings of others
- Driving for commercial purposes
- Driving LGV, HGV, PSV
- Other driving offences committed at the same time as the dangerous driving
- Blame wrongly placed on others
- Failed to stop and/or provide assistance at the scene
- Offence committed in the course of police pursuit
- Passengers, including children
- Vehicle poorly maintained
- More than one person killed as a result of the offence (death by dangerous only)
- Serious injury to one or more victims, in addition to the death(s) (death by dangerous only)
- Offence committed on licence or while subject to court order(s)

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

3.8 Proposed revised mitigating factors are as follows. These include 'efforts made to seek assistance for victims' which some members thought should not be included when discussed previously. This is provided for in existing guidance and was also taken into account as mitigation in a number of cases analysed. It also acts as a counter factor to the factor 'failed to provide assistance', which reflects one of the recommendations of Professor Bottoms that guidelines should try to have balance between aggravating and mitigating factors where possible.

- No previous convictions or no relevant/recent convictions
- Impeccable driving record
- Alcohol or drugs consumed unwittingly

- 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 where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

Question 3: Does the Council agree with the proposed mitigating factors?

Careless Driving

3.9 Guidelines which will be developed for careless driving offences include causing death by careless driving; careless driving causing serious injury and; causing death by careless driving while under the influence of drink or drugs. It is thought the MCSG careless driving model should also be updated based on revised factors.

3.10 The offence of careless driving is very similar to dangerous driving, with the distinction being that the standard of driving falls below that of a competent and careful driver rather than the 'far below' required for dangerous driving. The Road Traffic Act 1988 includes the following statutory definitions:

Section 3. Careless, and inconsiderate, driving

If a person drives 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, he is guilty of an offence.

Section 3ZA. Meaning of careless, or inconsiderate, driving

(2) A person is to be regarded as driving without due care and attention if (and only if) the way he drives falls below what would be expected of a competent and careful driver.

(3) In determining for the purposes of subsection (2) above what would be expected of a careful and competent driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.

(4) A person is to be regarded as driving without reasonable consideration for other persons only if those persons are inconvenienced by his driving.

Careless driving causing death or serious injury

3.11 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

3.12 Transcript analysis has confirmed that careless driving can often be hard to distinguish from dangerous driving, as illustrated in the sample of offences provided at **Annex A**. Examples of careless and inconsiderate driving are included in the existing SGC guideline and are as follows:

(i) Careless Driving

- overtaking on the inside or driving inappropriately close to another vehicle
- inadvertent mistakes such as driving through a red light or emerging from a side road into the path of another vehicle
- short distractions such as tuning a car radio

(ii) Inconsiderate Driving

- flashing of lights to force other drivers in front to give way
- misuse of any lane to avoid queuing or gain some other advantage over other drivers
- driving that inconveniences other road users or causes unnecessary hazards such as unnecessarily remaining in an overtaking lane, unnecessarily slow driving or braking without good cause, driving with un-dipped headlights which dazzle oncoming drivers or driving through a puddle causing pedestrians to be splashed

Depending on the circumstances, it is possible that some of the examples listed above could be classified as dangerous driving (see the revised CPS guidance). However, experience shows that these types of behaviour predominantly result in prosecution for careless driving.

A typical piece of careless driving may be that it is a momentary negligent error of judgement or a single negligent manoeuvre, so long as neither falls so far below the standard of the competent and careful driver as to amount to dangerous driving.

3.13 Given the similarity between offences many of the dangerous driving factors are also relevant to careless driving offences. However, some of the examples of careless driving above are quite hard to succinctly articulate as factors and to provide an appropriate threshold for, and an exhaustive list of factors would be undesirable.

3.14 Subject to decisions made in respect of dangerous driving factors, it is proposed that careless driving factors for offences causing death and serious injury are the same, save for some minor differences. The medium factor providing for cases between high and lesser culpability is likely to capture many examples which do not fall just short of dangerous driving, but are clearly over the threshold for careless or inconsiderate driving offences:

<p>High</p> <ul style="list-style-type: none"> • Standard of driving was just below threshold for dangerous driving • Prolonged, persistent and deliberate course of careless or inconsiderate driving • Consumption of substantial amounts of alcohol or drugs leading to gross impairment • Lack of attention to driving for a substantial period of time • Greatly excessive speed
<p>Medium</p> <ul style="list-style-type: none"> • Brief but obviously dangerous 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 • Cases falling between high and low culpability because: <ul style="list-style-type: none"> - Factors in both high and lesser categories are present which balance each other out; and/or - The offender's culpability falls between the factors as described in high and lesser culpability
<p>Lesser</p> <ul style="list-style-type: none"> • Standard of driving was just over threshold for careless driving • Momentary lapse of concentration • Genuine mistake

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

Aggravating and mitigating factors

3.15 Aggravating and mitigating factors for careless driving causing death or injury could also be the same as for dangerous driving offences, save for some minor differences.

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
- Disregarding warnings of others
- 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 and/or provide assistance at the scene
- 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 5: Does the Council agree with the proposed aggravating factors for careless driving offences causing death or serious injury?

3.16 Proposed mitigating factors are as follows:

- No previous convictions or no relevant/recent convictions
- Impeccable driving record
- Alcohol or drugs consumed unwittingly
- 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 where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

Question 6: Does the Council agree with the proposed mitigating factors for careless driving offences causing death or serious injury?

Harm factors

3.17 Harm factors for dangerous driving were agreed at the last meeting, and the factors and approach agreed will be relevant to the careless driving guidelines. It was agreed that only one category should be included for offences involving death. For the new offence of careless driving causing serious injury it is anticipated that the legislative definition of serious injury for dangerous driving offences will be mirrored, so the same harm factors would be used for this offence. Should the definition differ once the legislation is finalised, this will be brought to the Council for further consideration.

Causing death by careless driving under the influence

3.18 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.

3.19 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.

3.20 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 7: 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 Any risks identified have been highlighted in this paper. 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.

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Dangerous driving – summary, categorisation and reasons	
DD1	<p>Drove across country roads tailgated another driver for some miles, until reaching a crossroads. Other car turned right at those crossroads and he then followed, almost immediately overtook then went onto the wrong side of the road, at what was obviously a very considerable speed. Over the course of the following straight section of road overtook three further vehicles, and attempted to overtake the third of those vehicles while driving in excess of 120 miles an hour on single carriageway road with a solid white line, and at the summit of this road the brow of a hill. Victim who was driving perfectly well appeared over the brow of the hill, and D then tried to pull in but driving far too fast to achieve such a manoeuvre. He attempted to overtake, there was insufficient room to do so, and an inevitable collision occurred with victim.</p> <p>Level 1 - Deliberate decision to ignore or a flagrant disregard for the rules of the road, and an apparent disregard for the great danger being caused to others.</p>
DD2	<p>D and victim were drinking in pub for four and a half hours and were asked to leave as had had enough to drink. Victim let D drive his vehicle, a transit van, and was passenger. D drove 3 miles before crashing into a parked car. Spun off road and through a garden fence and collided with another car.</p> <p>Level 1 - consumption of substantial amounts of alcohol leading to gross impairment.</p>
DD3	<p>Collision occurred during course of a chase between D and co-d. Victim driving VW polo at 30 mph, co-d (chasing vehicle driven by D) driving at 70 mph, more than twice speed limit for road and caused other drivers to take evasive action or fear for safety. Both drivers lost control and D's vehicle ploughed into victims' vehicle causing it to spin 180 degrees.</p> <p>Level 1 - with multiple features of high culpability, a prolonged, persistent, deliberate course of very bad driving, at greatly excessive speeds, overtaking other vehicles at excessive speeds, with complete disregard for the rules of the road and the safety of other road users.</p>
DD4	<p>Driving in erratic and dangerous manner before incident; sped away from garage forecourt and performed highly dangerous overtaking manoeuvre collided with another vehicle and rammed it out of way. Narrowly missed another car and pedestrian before hitting victim who was crossing road. Did not stop and continued driving in same dangerous and wanton manner for quite some time. 'extremely prolonged, persistent, wilful, appalling driving'. Efforts</p>

	<p>made to dispose of vehicle, returned original plates and made no comment interviews. No remorse.</p> <p>Very top of Level 1 – prolonged, persistent, appalling driving.</p>
DD5	<p>Under influence of large quantity of drugs and alcohol and excessive speed in residential area and failing to stop for police - Level 1.</p>
DD6	<p>D had been on a 5-6 day 'drink and drug bender' Under influence of drugs (cocaine, cannabis and diazepam) overtook learner driver on a slip road and crashed into motorcyclist. 70mph in a 40mph limit.</p> <p>Level 1. Had been falling asleep while driving; consumption of illegal drugs which seriously impaired ability to drive; drove at greatly excessive speed; drove when knowingly deprived of adequate sleep (told the probation officer he had not slept for days.)</p>
DD7	<p>D chasing another car. Took a roundabout wrong way and drove through a red light in middle of rush hour traffic, going as fast as possibly could with no regard for other road users.</p> <p>Level 1 - prolonged, persistent deliberate course of bad driving over several miles in bad weather at highly dangerous speeds in car chase– acutely aware of risk and no regard for other road users.</p>
DD8	<p>D was driving along motorway at high speed, constantly changing lanes. Crashed into a vehicle ahead, throwing it up in the air (despite it being a straight stretch of road). D's car came to a stop, but rather than attempting to provide assistance he fled the scene. D eventually handed himself in, but didn't accept any culpability for the crash and cast aspersions on the other person's driving. Judge said standard of driving level 2, but aggravating factors escalate to level 1.</p>
DD9	<p>Failed to give way at junction of a busy A road, went into side of a vehicle</p> <p>Level 2 - driving created a substantial risk of danger. Speed greatly excessive on approach to junction.</p>
DD10	<p>Lost control on straight stretch of road collided with a car being driven in a proper manner in the opposite direction. Conditions were bad, heavy rain and standing water on roads. Aggressive driving; pushing other motorists by driving too close and speed far too fast for conditions.</p> <p>Level 2: Danger created was substantial - overtaking when unsafe; driving too close and dangerously fast without regard to the weather and driving conditions despite knowing the road was dangerous.</p>

DD11	D driving van and not paying attention as was looking at colleague in other van in adjacent lane. Drove into back of a motorcyclist. Level 3 - Momentary lapse of concentration.
DD12	Others saw motorbike and he just didn't register it. Admitted lack of concentration. Level 3 - Lack of concentration
DD13	Drove wrong way up dual carriageway for 7 miles. Level 3 - Not momentary lapse of concentration but genuine mistake.
Careless driving - summary, categorisation and reasons	
CD1	Standard fell not far short of dangerous. Racing resulting in a head on collision while disqualified from driving. Lied about who driver was, was driving at national speed limit. No licence (had never passed test). - Level 1
CD2	V was on his scooter, his L-plates displayed, driving carefully and responsibly along the street. D had left a garage, performed a U-turn and then accelerated vehicle ferociously. As he did so he did not have the car properly under control. Level 1 - falls very close to borderline between dangerous and careless driving.
CD3	D was driving a van, according to CCTV D's driving was erratic and he swerved into V (a cyclist). D drove away from the scene, was eventually identified by the police, but continued to try and place the blame elsewhere. Level 1 - Careless or inconsiderate driving falling not far short of dangerous driving.
CD4	Pleaded as alternative to death by dangerous. Driving too fast in built up area - estimated 53mph in 30 mph zone. Overtook car in front and hit pedestrian crossing road. Level 1 - Careless and inconsiderate driving falling not far short of dangerous.
CD5	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

CD6	<p>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.</p> <p>Level 2 - Highlights that victim was vulnerable road user, D should have taken care around crossing, was working as a professional, carrying passenger, potential hazards clearly marked.</p>
CD7	<p>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.</p> <p>Level 2 - Flagrantly ignoring warning signs, disobeying a traffic sign and attempting manoeuvre.</p>
CD8	<p>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.</p> <p>Level 2 - Middle category - not a momentary lapse but avoidably distracted.</p>
CD9	<p>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.</p> <p>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 SP is that of category 2.</p>
CD10	<p>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</p>

	<p>done. Not under influence of alcohol or drugs. Issues with vision (incipient cataracts) but no issues raised that he shouldn't have been driving.</p> <p>Bottom of level 2/top of level 3 - not momentary lapse of concentration.</p>
CD11	<p>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.</p> <p>Level 3 – momentary lapse of concentration.</p>

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Sentencing Council meeting:
Paper number:

22 October 2021
**SC(21)OCT05 - Perverting the Course of
Justice and Witness intimidation**

Lead Council member:
Lead official:

Juliet May
Mandy Banks
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1 ISSUE

1.1 This is the third meeting to discuss the guidelines and will focus on matters regarding an assisting an offender guideline. The Council are also asked to note the changes made to the perverting the course of justice (PTCJ) and witness intimidation guidelines following the last meeting. The next meeting will look at sentence levels in detail so the Council are not asked to consider these at the meeting.

2 RECOMMENDATION

2.1 At today's meeting the Council are asked:

- To consider the problems regarding an assisting an offender guideline
- To note the changes made to the PTCJ and witness intimidation guidelines following the last meeting

3 CONSIDERATION

Assisting an Offender

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

3.2 The offence can only be committed where a relevant offence (that is an offence carrying a term of five years or more) has previously been committed by the person assisted, and proof of that person's guilt is an essential element in proof of this offence – although this does not necessarily mean that the other person has to have been convicted of the principal offence. Where there are issues around proving that the principal offence was committed an

alternative would be to charge perverting the course of justice. The maximum sentence depends upon the offence committed by the other person:

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

3.3 The different statutory maxima means this is a complicated guideline to develop. The aim was to try to create one guideline, with one set of harm/culpability factors, but with four sentencing tables, one for each of the different statutory maxima, we have other guidelines with more than one sentence table. However we have been faced with a number of challenges in trying to do so. Firstly, the volumes involved are very small, 79 offenders sentenced in 2019, and 42 sentenced in 2020. This means the available data for the current sentencing of these offences, which we use to create the sentence ranges is very small.

3.4 There is a further problem in that the Court Proceedings Database (CPD), which provides the sentencing data, does not differentiate the data in the four different groupings that we need (set out in 3.2 above), instead the data is broken down into three groupings, murder, indictable offence (except murder) and triable either way offences. This means that the offence of assisting an offender where the offence committed was murder maps from the legislation to the CPD, however, the three other sections from the legislation are covered by only two sections in the CPD. We are unable to identify which is which from the data, i.e. we don't know the statutory maximum sentence of the underlying offence so don't know what the maximum sentence for the assisting offence should be. This presents a problem when we need to understand sentencing outcomes and sentence lengths to be able to have a sentencing table for each different statutory maximum under the legislation.

3.5 In order to try and find a potential solution to this we ordered all the sentencing transcripts for one year's worth of sentenced cases and created a mini data set. This involved ascertaining from reading the sentencing remarks, firstly what offence the offender assisted had committed, then noting what the corresponding statutory maximum was for the offender being sentenced, then what their sentence was. This is quite a time consuming process and as the transcripts from 2020 were ordered, this only produced 42 cases, so the data set has considerable limitations. In addition, it is not always possible to identify the offence from the transcripts due to the limited detail in some of them, so this resulted in a very small dataset of offences in which we could identify the corresponding offence and statutory maximum. An option would be to order the 79 transcripts from 2019 in order to

build a bigger data set in order to develop the sentence ranges with more confidence, but this comes at a financial and time cost, and would still produce a small set of data. Also, as noted above it is not always possible to identify the offence the offender assisted had committed, to see which statutory maximum applied.

3.6 In discussion with Juliet about ways of dealing with these difficulties she has suggested that we could possibly come to an accurate estimate of the correct sentences by a combination of pro-rata comparison with the murder data and the Council's combined experience. This is something we could of course try to do, although using the murder data has limitations as such a small number are sentenced each year, 16 in 2020.

3.7 Due to the low volumes and the inability to correctly identify the offences in question it is problematic to produce sentencing ranges for the guideline based on the data available to us, with a potential outcome being that the guideline may have an impact on the sentencing severity of this offence. Most offenders sentenced for assisting an offender (where the offence is not murder) receive a custodial sentence (77% immediate custody/suspended sentence in 2020) so the potential to impact prison resources is slightly higher despite the low volumes. The ACSL is considerably lower than the statutory maximum for these offences, around 1 year in 2020, compared to the statutory maximum sentence of 7,5 or 3 based on the offence in question, this may make it difficult to produce sentence ranges that incorporate the statutory maximum sentence.

3.8 From an A&R perspective, it may also be difficult to produce a resource assessment based on the limited data available, and it may be difficult to identify in future if the guideline has had an impact on sentencing for each section of the legislation, making evaluation of the guideline difficult.

3.9 This raises concerns about developing a guideline for this offence. There are concerns about the reliability/limitations of the available sentencing data with which to use to develop the ranges, so the ranges might not reflect current sentencing practice. Generally when we develop guidelines the intention is not to change sentencing practice, but to promote consistency of approach and consolidate sentencing practice. The risk here is that the guideline might possibly alter current sentencing practice as we can't exactly be sure what current sentencing practice is.

3.10 Previously we have created guidelines where there has been no sentencing data, but this has been for new offences or offences where there have been no cases sentenced. In those cases we have looked to see what Parliament intended in creating the offences, and created sentence ranges accordingly. This situation is different, it is an established offence so the risk is that the ranges we would create based on incomplete data might be different to

current sentencing practice. On the other hand, a way forward would to construct the three sentence tables would be to estimate current sentencing practice using a combination of pro-rata comparison with the murder data and Council's combined experience, as per Juliet's suggestion, along with the limited available data we do have from using transcript analysis to inform the CPD data regarding legislation.

3.11 There are risks in creating a guideline for this offence, due to the problems with data. It may be worth noting that there have been no calls for a guideline for this offence, and courts could use the PTCJ guideline as an analogous offence instead, if the Council chose not to do it. It is likely in any event that an assisting an offender guideline would be very similar to the PTCJ guideline. Some work has started to develop a draft guideline, this is attached at **Annex A**, and Council will see that the draft culpability and harm factors are very similar to those in the PTCJ guideline attached at **Annex B**. The sentence table is blank at this stage pending a decision on the development of the guideline. The factors in the draft guideline at **Annex A** reflect what the CACD said in A-G's Ref (No. 16 of 2009) (Yates) [2009] EWCA Crim 2439, [2010] 2 Cr App R (S) 11 (64) that when assessing sentence for an offence of assisting an offender the issues were likely to be:

1. The nature and extent of the criminality of the offender for whom assistance was provided.
2. The nature and extent of the assistance provided.
3. The extent to which the efforts to assist the offender damaged the interests of justice

The available data we have for this offence is at **Annex D**.

Question 1: What is the Council's view about the risks involved in developing a guideline for this offence? Does the Council think the risks in creating sentence ranges due to the limitations of the data are ones that can be satisfactorily overcome? Or are they such that the risks could outweigh the benefits of developing a guideline?

3.12 Turning now to the changes made to the PTCJ guideline attached at **Annex B**. The changes made following the last meeting can be seen in track changes, mainly changes to the wording of some of the factors, with some deletions, including the factors in medium culpability which the Council agreed did not work for this offence.

3.13 The changes made to the witness intimidation guideline following the last meeting can be seen at **Annex C**. These again can be seen in track changes and are mainly small changes to wording with some additions and deletions. At the last meeting the Council discussed the extent to which the factors within both guidelines should be similar and asked

that where possible the factors should match. This has been considered and the Council will see that a number of the factors are the same within both guidelines, namely:

- Conduct over a sustained period of time
- Sophisticated and planned nature of offence
- Unplanned and limited in scope and duration
- Unsophisticated nature of conduct
- Serious impact on administration of justice
- Some impact on administration of justice

3.14 There are some factors however that it is proposed are distinct to each offence and so will be different between the guidelines. Witness Intimidation offences are more targeted and personal and cause direct harm to victims, through violence, threats and intimidation, causing real fear and anxiety. This is reflected in the offence specific factors such as:

- Threats of violence to witnesses and/or their families
- Deliberately seeking out witnesses
- Contact made at or in vicinity of victim's home

3.15 PTCJ however covers a much wider range of offending and are offences against the justice system as a whole, compared to offences against individual victims directly in witness intimidation offences. There can be victims, when innocent people are falsely accused by offenders, sometimes for minor driving offences, but sometimes for far more serious offences. This is why for this offence there are different harm factors of:

- Serious consequences for an innocent person(s) as a result of the offence (for example time spent in custody/arrest)
- Serious distress caused to innocent party (for example loss of reputation)
- Suspicion cast upon an innocent person as a result of the offence
- Some distress caused to the innocent party

If the Council wanted more synchronicity between offences the factors of '*serious distress caused to innocent party (for example loss of reputation)*' and '*some distress caused to the innocent party*' could be altered to '*serious distress caused to victim*' and '*some distress caused to victim*'. However as the range of offending is so wide for these offences it is suggested that the factors remain bespoke to this offence- as it will help identify the specific

harm caused by these offences and to whom, rather than just a generic '*distress caused to victim*'.

3.16 As noted at the last meeting although there is some crossover between these offences, they are distinct offences from one another, with considerably different statutory maxima. For PTCJ this is life imprisonment compared to five years for witness intimidation. Therefore although there can be some similar factors, it is suggested that there is a necessity for some factors to be tailored to each individual offence.

Question 2: Does the Council agree that there should be individual factors tailored to each offence within the two guidelines?

Question 3: Is the Council content with the rest of the changes made to the PTCJ guideline following the last meeting?

Question 4: Is the Council content with the rest of the proposed changes made to the witness intimidation guideline following the last meeting?

4 EQUALITIES

4.1 If the decision is to go ahead with an assisting an offender guideline, the available statistics showing sentencing outcomes by demographic group, (sex, age group and ethnicity of offenders) will be provided next month.

5 IMPACT AND RISKS

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

Assisting an Offender

s.4(1) of the Criminal Law Act

Triable only on indictment (unless the principal offence is an either way offence, in which case the offence of assisting a principal offender is also triable either way.)

Criminal Law Act 1967, s. 4(3)(a)

Maximum: 10 years (Principal offence is murder)

Criminal Law Act 1967, s.4(3)(b)

Maximum: 7 years (Principal offence is subject to a sentence of 14 years)

Criminal Law Act 1967, s.4(3)(c)

Maximum: 5 years (Principal offence is subject to a sentence of 10 years)

Criminal Law Act 1967, s.4(3)(d)

Maximum: 3 years (All other cases)

Offence range: x – xx years' custody

STEP ONE

Determining the offence category

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

The level of **culpability** is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

CULPABILITY	
Demonstrated by one or more of the following:	
A- High Culpability	<ul style="list-style-type: none">• Conduct over a sustained period of time• Sophisticated and planned nature of conduct• Offence committed by the offender assisted very serious
B- Medium culpability	<ul style="list-style-type: none">• Other cases that fall between categories A and C because:<ul style="list-style-type: none">○ Factors are present in A and C which balance each other out and/or○ The offender's culpability falls between the factors described in A and C
C- Lower culpability	<ul style="list-style-type: none">• Unplanned and limited in scope and duration• Unsophisticated nature of conduct• Offence committed by the offender assisted not serious• Involved through coercion, intimidation or exploitation• Offender's responsibility substantially reduced by mental disorder or learning disability

HARM	
The level of harm is assessed by weighing up all the factors in the case.	
Category 1	<ul style="list-style-type: none">• Serious impact on the administration of justice• Serious effect on victims as a result of the offence (for example delay in identifying/bringing offender/s to justice)
Category 2	<ul style="list-style-type: none">• Some impact on the administration of justice• Some effect on victims as a result of the offence
Category 3	<ul style="list-style-type: none">• Limited effects of the offence

STEP TWO

Starting point and category range

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

Harm	Culpability		
	A	B	C
Category 1	Starting Point Category Range	Starting Point Category Range	Starting Point Category Range
Category 2	Starting Point Category Range	Starting Point Category Range	Starting Point Category Range
Category 3	Starting Point Category Range	Starting Point Category Range	Starting Point Category Range

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

Factors increasing seriousness

Statutory aggravating factors:

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

Other aggravating factors:

- Offence committed in a domestic context
- Commission of offence whilst under the influence of alcohol or drugs
- Offender involves others in the conduct
- Any steps taken to prevent the victim reporting the incident or obtaining assistance and/or from assisting or supporting the prosecution
- Evidence concealed/destroyed-double counting
- Offence committed on licence or post sentence supervision or while subject to court order(s)

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Mental disorder, learning disability (where not taken into account at step one)
- Age and/or lack of maturity
- Sole or primary carer for dependent relatives

STEP THREE

Consider any factors which indicate a reduction for assistance to the prosecution

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

STEP FOUR

Reduction for guilty pleas

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

STEP FIVE

Totality principle

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

STEP SIX

Compensation and ancillary orders

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

STEP SEVEN

Reasons

[Section 52 of the Sentencing Code](#) imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP EIGHT

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003 and [section 52 of the Sentencing Code](#)

Perverting the Course of Justice

Common law

Triable only on indictment

Maximum: Life imprisonment

Offence range: x – xx years' custody

STEP ONE

Determining the offence category

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

The level of **culpability** is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

CULPABILITY	
Demonstrated by one or more of the following:	
A- High Culpability	<ul style="list-style-type: none">• Conduct over a sustained period of time• Extremely <u>Sophisticated</u> <u>and planned</u> nature of conduct• Underlying offence <u>extremely</u> <u>very</u> serious• Offence committed in the context of other serious criminal activity
B- Medium culpability	<ul style="list-style-type: none">• Conduct of more than a brief duration• Conduct was somewhat sophisticated• Underlying offence reasonably serious• Other cases that fall between categories A and C because:<ul style="list-style-type: none">○ Factors are present in A and C which balance each other out and/or○ The offender's culpability falls between the factors described in A and C
C- Lower culpability	<ul style="list-style-type: none">• <u>Unplanned and limited in scope and duration</u> Conduct was of a brief duration• Unsophisticated nature of <u>conduct</u>• Underlying offence was not serious• Involved through coercion, intimidation or exploitation• Offender's responsibility substantially reduced by mental disorder or learning disability

HARM	
The level of harm is assessed by weighing up all the factors in the case.	
Category 1	<ul style="list-style-type: none">• Serious consequences for an innocent person(s) as a result of the offence (for example time spent in custody/arrest)• Serious <u>distress</u> caused to innocent party (for example loss of reputation)• <u>Serious impact on administration of justice</u>• <u>High level of financial costs (police/prosecution/court) incurred as a result of the offence</u>• <u>Conduct succeeded in perverting the course of justice</u>

	<ul style="list-style-type: none"> • <u>Substantially delayed the course of justice</u>
Category 2	<ul style="list-style-type: none"> • <u>Suspicion cast upon an innocent person as a result of the offence</u> • <u>Some distress caused to innocent party</u> • Some costs incurred as a result of the offence • <u>Some impact on administration of justice</u> • <u>Conduct partially successful in perverting the course of justice</u> • <u>Some impact on delaying the course of justice</u>
Category 3	<ul style="list-style-type: none"> • Conduct did not succeed in perverting the course of justice • Limited effects of the offence on victim/costs incurred

STEP TWO

Starting point and category range

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

Harm	Culpability		
	A	B	C
Category 1	Starting Point 4 years' custody Category Range 2 - 6 years' custody	Starting Point 2 years' custody Category Range 1 -4 years' custody	Starting Point 1 years' custody Category Range 6 months - 2 years' custody
Category 2	Starting Point 2 years' custody Category Range 1 -4 years' custody	Starting Point 1 years' custody Category Range 6 months - 2 years' custody	Starting Point 6 months' custody Category Range High level community order - 1 years' custody
Category 3	Starting Point 1 years' custody Category Range 6 months -2 years' custody	Starting Point 6 months' custody Category Range High level community order - 1 years' custody	Starting Point High level community order Category Range Low level community order - 6 months custody

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

Factors increasing seriousness

Statutory aggravating factors:

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

Other aggravating factors:

- [Offender involves others in the conduct](#)
- [Vulnerable victim](#)
- Offence committed in a domestic context

- Commission of offence whilst under the influence of alcohol or drugs
- ~~Leading role in group~~
- Evidence concealed/destroyed
- Offence committed on licence or post sentence supervision or while subject to court order(s)

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- The offender was in a lesser or subordinate role if acting with others/performed limited role under direction
- Physical disability or serious medical conditions requiring urgent, intensive or long-term treatment
- Mental disorder, learning disability (where not taken into account at step one)
- Age and/or lack of maturity
- Sole or primary carer for dependent relatives

STEP THREE

Consider any factors which indicate a reduction for assistance to the prosecution

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

STEP FOUR

Reduction for guilty pleas

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

STEP FIVE

Totality principle

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

STEP SIX

Compensation and ancillary orders

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

STEP SEVEN

Reasons

[Section 52 of the Sentencing Code](#) imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP EIGHT

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003 and [section 52 of the Sentencing Code](#)

Witness Intimidation

Criminal Justice and Public Order Act 1994, s.51(1) and s.51(2)

Triable either way

Maximum when tried summarily: 6 months or level 5 fine

Maximum when tried on indictment: 5 years

Offence range: x – xx years' custody

STEP ONE

Determining the offence category

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

The level of **culpability** is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability the court should balance these characteristics to reach a fair assessment of the offender’s culpability.**

CULPABILITY	
Demonstrated by one or more of the following:	
A- High Culpability	<ul style="list-style-type: none"> • Threats of violence to witnesses and/or their families • Deliberately seeking out witnesses • Breach of bail conditions • Conduct over a sustained period of time • Sophisticated and planned nature of conduct • Offender involves others in the conduct • Offence committed in the context of other serious criminal activity
B- Medium culpability	<ul style="list-style-type: none"> • Non-violent conduct amounting to a threat (for example staring at, approaching or following witnesses) • Attempts to alter or stop evidence • Other cases that fall between categories A and C because: <ul style="list-style-type: none"> ○ Factors are present in A and C which balance each other out and/or ○ The offender’s culpability falls between the factors described in A and C
C- Lower culpability	<ul style="list-style-type: none"> • Unplanned and Offence limited in scope and duration • Unsophisticated nature of conduct • Involved through coercion, intimidation or exploitation • Offender’s responsibility substantially reduced by mental disorder or learning disability
HARM	
The level of harm is assessed by weighing up all the factors in the case.	
Category 1	<ul style="list-style-type: none"> • Serious Considerable detrimental impact on administration of justice • Serious Considerable distress caused to victim • Contact made at or in vicinity of victim’s home
Category 2	<ul style="list-style-type: none"> • Some detrimental impact on administration of justice • Some distress caused to the victim

Category 3	<ul style="list-style-type: none">Limited effects of the offence
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STEP TWO

Starting point and category range

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

Harm	Culpability		
	A	B	C
Category 1	Starting Point 2 years' custody Category Range 1 -4 years' custody	Starting Point 1 years' custody Category Range 6 months-2 years' custody	Starting Point 6 months' custody Category Range High level community order - 1 years' custody
Category 2	Starting Point 1 years' custody Category Range 6 months -2 years' custody	Starting Point 6 months' custody Category Range High level community order - 1 years' custody	Starting Point High level community order Category Range Medium level community order - 6 months' custody
Category 3	Starting Point 6 months' custody Category Range High level community order - 1 years' custody	Starting Point High level community order Category Range Medium level community order – 6 months' custody	Starting Point Medium level community order Category Range Low level community order – High level community order

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

Factors increasing seriousness

Statutory aggravating factors:

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

Other aggravating factors:

- [Offender involves others in the conduct](#)
- [Use of social media](#)

- Vulnerable victim

- Offence committed in a domestic context
- Commission of offence whilst under the influence of alcohol or drugs

- ~~Leading role in group~~

- Evidence concealed/destroyed
- Offence committed on licence or post sentence supervision or while subject to court order(s)

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse
- ~~Admissions to police in interview~~
- ~~Ready co-operation with the authorities~~
- Good character and/or exemplary conduct
- The offender was in a lesser or subordinate role if acting with others/performed limited role under direction
- Physical disability or serious medical conditions requiring urgent, intensive or long-term treatment
- Mental disorder, learning disability (where not taken into account at step one)
- Age and/or lack of maturity
- Sole or primary carer for dependent relatives

STEP THREE

Consider any factors which indicate a reduction for assistance to the prosecution

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

STEP FOUR

Reduction for guilty pleas

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

STEP FIVE

Totality principle

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

STEP SIX

Compensation and ancillary orders

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

STEP SEVEN

Reasons

[Section 52 of the Sentencing Code](#) imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP EIGHT

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003 and [section 52 of the Sentencing Code](#)

Number and proportion of adult offenders sentenced for **assisting an offender where the offence was indictable (except murder)**, 2010-2020

	Number of adult offenders sentenced										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Discharge	4	3	0	1	0	1	1	0	1	0	0
Fine	0	0	1	1	1	0	0	1	0	1	1
Community sentence	12	7	6	10	4	3	3	1	5	7	1
Suspended sentence	20	12	14	22	22	18	18	15	7	17	10
Immediate custody	15	16	13	23	13	16	25	15	15	15	5
Otherwise dealt with	0	0	0	0	0	0	0	1	3	1	1
Total	51	38	34	57	40	38	47	33	31	41	18

	Proportion of adult offenders sentenced										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Discharge	8%	8%	0%	2%	0%	3%	2%	0%	3%	0%	0%
Fine	0%	0%	3%	2%	3%	0%	0%	3%	0%	2%	6%
Community sentence	24%	18%	18%	18%	10%	8%	6%	3%	16%	17%	6%
Suspended sentence	39%	32%	41%	39%	55%	47%	38%	45%	23%	41%	56%
Immediate custody	29%	42%	38%	40%	33%	42%	53%	45%	48%	37%	28%
Otherwise dealt with	0%	0%	0%	0%	0%	0%	0%	3%	10%	2%	6%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Number and proportion of adult offenders sentenced for **assisting an offender where the offence was triable either way**, 2010-2020

	Number of adult offenders sentenced										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Discharge	0	0	2	1	0	2	0	3	5	1	0
Fine	0	1	0	0	2	2	0	0	0	0	1
Community sentence	3	5	5	4	1	5	1	0	1	1	2
Suspended sentence	2	3	3	2	9	3	4	7	4	7	5
Immediate custody	0	6	4	7	3	4	2	7	0	3	0
Otherwise dealt with	0	0	0	0	0	1	0	0	0	0	0
Total	5	15	14	14	15	17	7	17	10	12	8

	Proportion of adult offenders sentenced										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Discharge	0%	0%	14%	7%	0%	12%	0%	18%	50%	8%	0%
Fine	0%	7%	0%	0%	13%	12%	0%	0%	0%	0%	13%
Community sentence	60%	33%	36%	29%	7%	29%	14%	0%	10%	8%	25%
Suspended sentence	40%	20%	21%	14%	60%	18%	57%	41%	40%	58%	63%
Immediate custody	0%	40%	29%	50%	20%	24%	29%	41%	0%	25%	0%
Otherwise dealt with	0%	0%	0%	0%	0%	6%	0%	0%	0%	0%	0%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Average custodial sentence lengths (ACSL) received by adult offenders sentenced for assisting an offender under section 4 of the Criminal Law Act 1967 offences, 2010-2020

		ACSL (years)										
		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Assisting an offender – murder	Mean	2.8	2.3	3.0	3.8	2.3	3.2	2.8	2.2	2.8	3.1	3.0
	Median	2.8	2.8	3.5	2.8	1.8	2.5	2.0	2.0	2.5	2.5	2.7
Assisting an offender - indictable offence (except murder)	Mean	1.8	1.1	1.0	1.8	1.1	1.6	1.5	2.2	1.9	1.7	1.1
	Median	1.5	0.8	0.8	1.5	0.8	1.4	1.3	2.0	2.0	2.0	1.0
Assisting an offender - triable either way offences only	Mean	-	1.3	*	0.5	*	*	*	2.2	-	*	-
	Median	-	0.9	*	0.5	*	*	*	1.3	-	*	-
Total	Mean	2.1	1.5	1.4	2.3	1.5	2.3	2.0	2.2	2.3	2.3	2.5
	Median	2.0	1.0	0.8	1.5	1.1	1.8	1.5	2.0	2.3	2.0	2.4

Source: Court Proceedings Database, Ministry of Justice

Notes:

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

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

22 October 2021
SC(21)OCT06 – Firearms importation
Maura McGowan
Ruth Pope

1 ISSUE

1.1 This is the second meeting to discuss the responses to the consultation on a single guideline for importation of firearms which ran from 17 June to 8 September 2021.

1.2 The aim is to consider the issues raised by the responses relating to sentence levels, step 2 factors and remaining steps and to sign off the definitive guideline for publication on 24 November to come into effect on 1 January 2022.

2 RECOMMENDATION

2.1 That the Council:

- reviews and approves the changes made to step 1 factors at the September meeting;
- considers the responses to the draft guideline at **Annex A** relating to sentence levels and aggravating and mitigating factors and agrees any changes to be made;
- signs off the firearms importation guideline for publication;
- agrees the resource assessment at **Annex B** for publication.

3 CONSIDERATION

Changes agreed at the October meeting

3.1 The draft guideline at Annex A incorporates the changes agreed to harm and culpability factors at the September meeting (these are indicated by yellow highlighting).

Sentence levels

3.2 There are two sentence tables for this offence (table 1 for offences subject to the statutory maximum of a life sentence and table 2 for offences subject to the statutory maximum of seven years). The Justices' Clerks' Society(JCS) commented on Table 2:

There does seem to be quite a gap between Category 3D and the 3C and 2D guidelines. we note that for the other offences in Table 2 the ranges start at the starting point of the next offence down and finish at the starting point of the next offence up in seriousness. The range for the 3D offence finishes at High level community order which is the bottom of the range for 3C and 2D offences. The bottom end of that range with a Band A fine also seems very low as with credit for a guilty plea this could be as low as £40. Bearing in mind that even the lowest category of offence does involve the intentional evasion of the prohibition of importation of these weapons we believe that the starting point and range on this the lowest

category should be increased, with a starting point of either medium or high level community order and a range from Band C fine to 6 months custody. This keeps the matter within the powers of the magistrates' courts but keeps open the option of custody at the top end of that range.

From our experience magistrates are more likely to find factors which lead them to reduce a sentence from the starting point rather than factors which will increase that sentence and in some cases they will sentence outside the lower end of the guideline if they believe there are good reasons. We therefore believe that setting the starting point and the bottom end of the range at such a low level will bring about lower sentences for offences at the bottom end of the guidelines.

3.3 The levels in table 2 (reproduced below) were set with regard to current sentencing practice and the sentence levels in the existing [Possession of a prohibited weapon](#) guideline.

Harm	Culpability		
	A / B	C	D
Category 1	Starting point 5 years' custody Category range 4 – 7 years' custody	Starting point 3 years' custody Category range 2 – 5 years' custody	Starting point 2 years' custody Category range 1 – 3 years' custody
Category 2	Starting point 3 years' custody Category range 2 – 5 years' custody	Starting point 2 years' custody Category range 1 – 3 years' custody	Starting point 1 year's custody Category range High level community order – 2 years' custody
Category 3	Starting point 2 years' custody Category range 1 – 3 years' custody	Starting point 1 year's custody Category range High level community order – 2 years' custody	Starting point Low level community order Category range Band A fine – High level community order

3.4 The JCS correctly point out that D3 is out of step with the rest of the table but their suggestion runs the risk of more custodial sentences being passed. The sentences at D3 of the draft guideline are already higher than the lowest sentences passed in 2019 and 2020:

Year	Discharge	Fine	Community order	Suspended sentence	Immediate custody	Range
2019	2	8	2	7	6	Discharge – 12 years' custody
2020	4	10	3	10	8	Discharge – 14 years' custody

3.5 Because of the element of intention or knowledge required for these offences, discharges were not included in the sentence table as it is difficult to envisage a situation

where it would be 'inexpedient to inflict punishment' (section 80 Sentencing Code) and the Council took the view that in an exceptional case a court could go outside the guideline.

3.6 In the Possession of a prohibited weapon guideline, (which is an offence of strict liability) a discharge is included. The lowest four boxes are reproduced below:

<p>Starting point 1 years' custody Category range High level community order – 2 years' custody</p>	<p>Starting point Medium level community order Category range Band C fine – High level community order</p>
<p>Starting point Medium level community order Category range Band C fine – High level community order</p>	<p>Starting point Band C fine Category range Discharge – Low level community order</p>

3.7 If the Council did want to change the sentence levels in D3 to mark the seriousness of this offence and to bring the range closer to D2 and C3, a suggestion would be to use the sentence levels at D2 / C3 in the Possession of a prohibited weapon guideline highlighted above. This would still represent an increase on current sentencing practice for some cases but as there is no custodial sentence in the range it would avoid significant sentence inflation.

3.8 The Sentencing Academy pointed out some inconsistencies in the location of the starting points within the ranges in the sentence tables. While it is desirable for sentence tables to follow a logical pattern, this is not the most important consideration. The starting points and ranges in table 1 are based on those in the transfer and manufacture guideline and any attempt to place starting points consistently at the mid-point would introduce unintended differences with that guideline.

3.9 There were no other suggestions for changes to sentence levels in response to the consultation.

Question 1: Should the sentence levels at D3 in table 2 be changed?

Question 2: Should any other changes be made to the sentence levels?

Aggravating and mitigating factors

3.10 The JCS suggested some additional 'other' culpability factors relating to the intended use of the firearm (such as "Offender intends firearm/ammunition to be used for a criminal purpose, or is reckless as to whether it would be so used"). The Council of District Judges suggested a low harm factor relating to legitimate personal use of the firearm – "For personal use for otherwise legitimate purposes (considering reasonableness of account in all the circumstances)". A magistrate said that harm should consider if "there is evidence that the commercial operation has supplied arms known to have been used to harm others".

3.11 These suggestions have not been adopted at step 1, but may be relevant to the factors at step 2. On a similar theme, a magistrate suggested an aggravating factor relating to the use of firearms supplied by the offender.

3.12 The aggravating factor A6 is relevant to this issue: 'Offender intends firearm/ammunition to be used or is reckless as to whether it would be used (where not taken into account at step 1)'. Bearing in mind that there is no reference at step 1 to the intended use of the firearm (although references to links to other serious criminal activity may allude to this), there may be a case for removing the words '(where not taken into account at step 1)' from this aggravating factor.

3.13 A magistrate took issue with the mitigating factor M5: 'Genuine belief that firearm/ammunition will not be used for criminal purpose' saying:

The idea that someone genuinely did not believe the object(s) would not be used for criminal purposes is flawed, even if I do not expect it to be used unlawfully I am enabling that to potentially happen by importing the objects. this cannot be a reason to reduce my culpability. This does not reduce their offending at best it does not aggravate it and so is neutral. this should be removed from the reducing seriousness list.

3.14 This is at odds with the suggestion from the Council of District Judges of a factor relating to the legitimate use of a firearm.

3.15 Two respondents (the CPS and JCS) pointed out that the mitigating factor M6: 'No knowledge or suspicion that importation was unlawful' amounts to a defence and therefore the mitigating factor should be removed. The CPS suggested 'No knowledge or suspicion that importation was of firearms' as an alternative citing a case where a courier imported weapons without knowing what they were (because he made no effort to find out what he was carrying) and this provided some (limited) mitigation. Allowing for the fact that step 2 factors are non-exhaustive and cases such as that cited by the CPS will be rare, it is proposed that the mitigating factor should be removed and not replaced.

3.16 The NCA commented on several of the aggravating factors and suggested adding some more:

"Intent to evade/conceal" We suggest this factor covers both at import in person and by post. This can be assessed by a subject making an un-true declaration to a customs officer or postal customs declaration at import. Concealment; Where the firearm is placed in packaging intending to evade x-ray control, ghosting, substitution, cover loads, misdeclaration, fraudulent accounting.

Border Force have reported highly sophisticated concealment seizures which include adaptation of vehicles and petrol tanks and recent loads where firearms have been deconstructed and declared as car parts.

Most illicit commodities detected at the Border have been subject to concealment methods intended to evade Customs Control.

“Has attempted to convert, contrary to section 4”

“Has purchased the firearm from an unauthorised seller/non legitimate means”
Although the use of the Dark web is not unlawful, consideration into malignant intent should be taken when purchasing from such platform.

3.17 The first suggestion by the NCA relating to attempts to evade/conceal is covered at step 1 in the ‘other’ culpability factors:

- Significant planning, including but not limited to significant steps to evade detection (*high*)
- Some degree of planning, including but not limited to some steps to evade detection (*medium*)

3.18 The second suggestion ‘Has attempted to convert, contrary to section 4’ would amount to a separate offence. The Possession of a prohibited weapon guideline has the following aggravating factor:

- Firearm modified to make it more dangerous

3.19 This factor could be included in the importation guideline but it could result in double counting as this may already have been taken into account at step 1, particularly with the addition of the wording ‘or adapted’ in the description of the type of weapon. It is not clear why importation of a weapon that has been adapted to make it dangerous is more serious than the importation of one that is inherently very dangerous without adaptation. If the implication is that the offender has been involved in the process of modifying the weapon – that would be a separate offence. However the Council of HM Circuit Judges made a similar point stating: ‘We would suggest that the importation of weapons that have been modified to be more dangerous should be an aggravating factor’.

3.20 The third suggestion from the NCA: ‘Has purchased the firearm from an unauthorised seller/non legitimate means’, would apply in most cases and is arguably already covered by the culpability factors relating to planning.

3.21 The Council of HM Circuit Judges suggested that A3: ‘Firearm under s5(1)(a) (automatic weapon)’ runs the risk of double counting because it would be categorised as a Type 1 weapon. There is merit in this point; this aggravating factor appears in the transfer and manufacture guideline (where the type of weapon is not part of the culpability assessment) but not in the Possession of a prohibited weapon guideline (where the type of weapon is part of the culpability assessment).

3.22 The CLSA queried the relevance of M12: 'Sole or primary carer for dependent relatives' in the context of this offence. This is a factor that is included in almost all guidelines and it could be relevant, particularly for offenders on the cusp of custody.

3.23 The CPS queried M4: 'Very small scale importation and very low risk of harm to others' stating that this would already have been taken into account in the assessment of harm at step 1. This factor was included to distinguish the small scale importation where there is a real risk of a dangerous weapon going into circulation (even if not intended), from the situation where there is little or no risk of that happening. The NCA commented:

We do understand that this may have been included in cases where a subject has purchased one stun gun however we ask the Council that consideration should not be taken into mitigating factors with any firearm categorised as a section 5 OLP [original lethal purpose] or converted/unlawful blank firearm.

3.24 It is difficult to envisage a case where this factor would be applied by a court in relation to a lethal weapon prohibited under section 5 (though perhaps it could apply in the case of a collector who held weapons securely and in a non-functioning condition) – which should deal with the NCA's concerns.

3.25 The NCA commented on M3: 'Firearm incomplete or incapable of being discharged (including stun gun that is not charged and not held with a functioning charger)', stating:

Unsuccessful conversion of a blank firing firearm should not be included. The attempted conversion, whether capable or not to live fire indicates an intent to convert into a OLP and becomes an offence under section 4.

3.26 The reason for including this mitigating factor is because the identification of the type of weapon at step 1 disregards the fact that the weapon may not be complete or in working order. The extent to which this would mitigate the sentence would depend on the facts of an individual case but, all other things being equal, a non-functioning weapon is less immediately dangerous than a functioning one.

Question 3: Should the wording '(where not taken into account at step 1)' be removed from A6?

Question 4: Should the mitigating factor M6 'No knowledge or suspicion that importation was unlawful' be removed?

Question 5: Should the aggravating factor A3: 'Firearm under s5(1)(a) (automatic weapon)' be removed?

Question 6: Should any other changes be made to aggravating or mitigating factors?

General points

3.27 The NCA made some general points about converted or reactivated weapons and about the method of importation:

The NCA has actively lead intelligence gathering and tasking's on projects which identifies the illicit sale and importation of Firearms into the UK. The Firearms Strategic Action Plan 418 ("Law enforcement Interventions against OCGs involved in converting firearms and ammunition in the UK") works alongside LE agencies during a number of recent law enforcement investigations nationally where lawful blank firing handguns have been recovered in a converted state and/or used in violent offences. NABIS reporting from ROCU's and Forces in regards to these Firearms has identified these as a threat and is a priority for the Agency.

Legislation has recently changed in regards to Antique Firearms and ammunition with the transition period to register or surrender ceasing imminently. Antique Firearms which have been reactivated or attempted to have been converted back to OLP have been assessed by the NAC and is a priority for the Agency.

We recommend that sentencing should reflect the impact these converted weapons have on not only Law Enforcement partners but to the communities we serve and should be categorised as such.

Sentencing should remain constant whether the import is by person at a border or by post. For example a section (50) or (170) CEMA 1979 offence for the same category firearm prohibited at import by post should hold the same prevalence as if the subject had attempted to evade the controls at the border.

In order to mitigate and reduce the importation of illicit firearms into the Agency welcomes the review of charging of offences by the CPS as highlighted in the guidelines

3.28 The guideline has been designed to ensure that sentencing reflects the danger represented by lethal weapons whether in their original condition or converted. This will depend to some extent on how offences are charged (the CPS is in the process of updating its legal guidance and aims to publish this by the end of October). The guideline is also designed to work across a range of methods of importation.

Question 7: Should any other changes be made to cover the general point made by the NCA?

Steps 3 to 8

3.29 The consultation asked whether there were any other matters that should be addressed at steps 3 to 8. There were no suggestions.

4 EQUALITY AND DIVERSITY

4.1 The volumes for these offences are too low to draw any conclusions about whether there are any issues of disparity in sentencing based on membership of one or more demographic group.

4.2 Only one respondent has raised substantive issues relating to equality: T2A have made suggestions relating to the sentencing of young adults and how this is presented in our published statistics. In light of this response and further analysis by the A&R team, we have made the decision to alter our published statistics on age groups to allow for more detailed

breakdown of the younger age groups. This change will be applied to the data tables accompanying the Firearms Importation offences guideline and all future published data tables and has been approved by the Analysis and Research subgroup.

5 IMPACT AND RISKS

5.1 The resource assessment is at Annex B which anticipates that any impact on prison and probation resources from the guideline would be small.

Question 8: Is the Council content to sign off the resource assessment for publication?

Question 9: Is the Council content to sign off the guideline for publication in November, to come into force on 1 January 2022?

Firearms – Importation

Improper importation of goods

Customs and Excise Management Act 1979 (section 50(3), (4) and (5A)(a))

Fraudulent evasion of prohibition / restriction

Customs and Excise Management Act 1979 (section 170(1)(b), (2), (3) and (4A)(a))

Triable either way

Maximum: 7 years unless committed in Great Britain in connection with a prohibition or restriction on the importation or exportation of any weapon or ammunition that is of a kind mentioned in section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af) or (c) or (1A)(a) of the Firearms Act 1968 in which case the maximum is life imprisonment

Offence range: Fine – 28 years' custody

Guideline users should be aware that the [Equal Treatment Bench Book](#) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

Step 1 – Determining the offence category

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

Culpability – Type of weapon

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

Courts should take care to ensure the categorisation is appropriate for the specific weapon. Where the weapon or ammunition does not fall squarely in one category, the court may need to adjust the starting point in step 2.

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

Type 1

Weapon that is designed **or adapted** to be capable of killing two or more people at the same time or in rapid succession

- This would **normally** include a weapon prohibited under the following sections of the Firearms Act 1968:
 - section 5(1)(a)
 - section 5(1)(ab)
 - section 5(1)(aba)
 - section 5(1)(ac)
 - section 5(1)(ad)
 - section 5(1)(ae)
 - section 5(1A)(c)

Type 2

All other weapons falling between Type 1 and Type 3

- This would **normally** include a weapon requiring certification or prohibited under the following sections of the Firearms Act 1968:
 - section 1
 - section 5(1)(af)
 - section 5(1A)(a) (including disguised stun guns when charged under that section)

Ammunition (where not at Type 3)

- This would **normally** include ammunition requiring certification or prohibited under the following sections of the Firearms Act 1968:
 - section 1
 - section 5(1)(c)
 - section 5(1A)(b) and (d)-(g)

Type 3

Weapon that is not designed **or adapted** to be lethal

- This would **normally** include a weapon under section 5(1)(b)

Very small quantity of ammunition

Culpability – other culpability factors

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

High culpability:

- Leading role where offending is part of a group activity
- Significant planning, including but not limited to significant steps to evade detection
- Abuse of position of trust or responsibility, for example registered firearms dealer, customs official
- Expectation of substantial financial or other advantage
- Involves others through coercion, intimidation or exploitation

Medium culpability:

- Significant role where offending is part of a group activity
- Some degree of planning, including but not limited to some steps to evade detection
- Expectation of significant financial or other advantage
- Other cases falling between higher and lower culpability because:
 - Factors are present in higher and lower which balance each other out and/or
 - The offender's culpability falls between the factors as described in higher and lower

Lower culpability:

- Lesser role where offending is part of a group activity, including but not limited to performing a limited function under direction
- Involved through coercion, intimidation or exploitation
- Little or no planning
- Expectation of limited, if any, financial or other advantage

Other culpability factors	Type of weapon		
	1	2	3
High	Culpability category A	Culpability category B	Culpability category C
Medium	Culpability category B	Culpability category C	Culpability category C
Lower	Culpability category C	Culpability category C	Culpability category D

Harm

Harm is assessed by reference to the **scale** and **nature of the importation** regardless of the offender's role and regardless of whether the importation was intercepted.

Category 1

- Large-scale commercial enterprise – indicators may include:
 - Large number of firearms/ ammunition involved
 - Operation over significant time period
 - Close connection to **other serious criminal activity**

Category 2

- Medium-scale enterprise and/or some degree of sophistication, including cases falling between category 1 and category 3 because:
 - Factors in both 1 and 3 are present which balance each other out; and/or
 - The harm falls between the factors as described in 1 and 3

Category 3

- Smaller-scale **and** unsophisticated enterprise – indicators may include:
 - Limited number of firearms/ ammunition involved
 - Minimal/no connection to **other serious criminal activity**

Step 2 – Starting point and category range

Having determined the category at step 1, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

Table 1 should be used if the offence is subject to a maximum life sentence
Table 2 should be used if the offence is subject to a maximum 7 year sentence

TABLE 1: Offences subject to the statutory maximum of a life sentence (offence relates to weapon or ammunition that is of a kind mentioned in Section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af), (c), section 5(1A)(a) Firearms Act 1968)

Harm	Culpability			
	A	B	C	D
Cat 1	Starting point 20 years' custody Category range 16 – 28 years' custody	Starting point 14 years' custody Category range 10 – 17 years' custody	Starting point 10 years' custody Category range 8 – 12 years' custody	Starting point 6 years' custody Category range 4 – 8 years' custody
Cat 2	Starting point 14 years' custody Category range 10 – 17 years' custody	Starting point 10 years' custody Category range 8 – 12 years' custody	Starting point 6 years' custody Category range 4 – 8 years' custody	Starting point 3 years' custody Category range 2 – 5 years' custody
Cat 3	Starting point 10 years' custody Category range 8 – 12 years' custody	Starting point 5 years' custody Category range 3 – 8 years' custody	Starting point 3 years' custody Category range 2 – 5 years' custody	Starting point 2 years' custody Category range 1 – 3 years' custody

TABLE 2: Offences subject to the statutory maximum sentence of 7 years

Harm	Culpability		
	A / B	C	D
Category 1	Starting point 5 years' custody Category range 4 – 7 years' custody	Starting point 3 years' custody Category range 2 – 5 years' custody	Starting point 2 years' custody Category range 1 – 3 years' custody
Category 2	Starting point 3 years' custody Category range 2 – 5 years' custody	Starting point 2 years' custody Category range 1 – 3 years' custody	Starting point 1 year's custody Category range High level community order – 2 years' custody
Category 3	Starting point 2 years' custody Category range 1 – 3 years' custody	Starting point 1 year's custody Category range High level community order – 2 years' custody	Starting point Low level community order Category range Band A fine – High level community order

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

Factors increasing seriousness

Statutory aggravating factors:

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

Other aggravating factors:

- A3. Firearm under section 5(1)(a) (automatic weapon)
- A4. Compatible ammunition and/or silencer(s) imported with firearm (See step 6 on totality when sentencing for more than one offence)
- A5. Others put at risk of harm by method of importation
- A6. Offender intends firearm/ammunition to be used or is reckless as to whether it would be used (where not taken into account at step 1)
- A7. Use of business as a cover
- A8. Attempts to dispose of the firearm or other evidence
- A9. Commission of offence whilst under the influence of alcohol or drugs
- A10. Offender prohibited from possessing weapon or ammunition because of previous conviction (See step six on totality when sentencing for more than one offence)
- A11. Failure to comply with current court orders
- A12. Offence committed on licence or post sentence supervision

Factors reducing seriousness or reflecting personal mitigation

- M1. No previous convictions **or** no relevant/recent convictions
- M2. Good character and/or exemplary conduct
- M3. Firearm incomplete or incapable of being discharged (including stun gun that is not charged and not held with a functioning charger)
- M4. Very small scale importation **and** very low risk of harm to others
- M5. Genuine belief that firearm/ammunition will not be used for criminal purpose
- M6. No knowledge or suspicion that importation was unlawful
- M7. Offender co-operated with investigation and/or made early admissions
- M8. Remorse
- M9. Serious medical condition requiring urgent, intensive or long-term treatment
- M10. Age and/or lack of maturity
- M11. Mental disorder or learning disability
- M12. Sole or primary carer for dependent relatives

Step 3 – Consider any factors which indicate a reduction for assistance to the prosecution

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

Step 4 – Reduction for guilty pleas

The court should take account of any reduction for a guilty plea in accordance with [section 73 of the Sentencing Code](#) and the [Reduction in sentence for a guilty plea guideline](#).

Step 5 – Totality principle

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

Step 6 – Ancillary orders

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

- [Ancillary orders – Magistrates' Court](#)
- [Ancillary orders – Crown Court Compendium](#)

Forfeiture of firearms

Where the offender is convicted of an offence contrary to section 170 of the Customs and Excise Management Act 1979 the court may consider making an order for forfeiture under section 170(6).

For any offence, the court may consider making an order for deprivation under [section 153 of the Sentencing Code](#) of any property used in the commission of the offence.

Serious Crime Prevention Order

Where the offender is convicted of an offence contrary to section 170 Customs and Excise Management Act 1979, the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

Step 7 – Reasons

[Section 52 of the Sentencing Code](#) imposes a duty to give reasons for, and explain the effect of, the sentence.

Step 8 – Consideration for time spent on bail (tagged curfew)

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

Final Resource Assessment

Firearms Importation Offences

Introduction

This document fulfils the Sentencing Council's statutory duty to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services.¹

Rationale and objectives for new guideline

In December 2020, the Sentencing Council published the definitive Firearms offences guidelines, relating to firearms offences covered by the Firearms Act 1968. These included a guideline for the offences of transferring and manufacturing of firearms or ammunition.

No current guideline exists for offences relating to importing firearms or ammunition or for fraudulent evasion of prohibition under the Customs and Excise Management Act 1979 (detailed below). The Sentencing Council has produced a new sentencing guideline to cover both offences, for use in all courts in England and Wales.

The Council's aim in developing the guideline is to provide sentencers with a structured approach to sentencing these offences that will ensure that sentences are proportionate to the offence committed and in relation to other offences. It should also promote a consistent approach to sentencing.

Scope

As stipulated by section 127 of the Coroners and Justice Act 2009, this assessment considers the resource impact of the guideline on the prison service, probation service and youth justice services. Any resource impacts which may fall elsewhere are therefore not included in this assessment.

This resource assessment covers the following offences under the Customs and Excise Management Act 1979 (CEMA), which will be covered by a single guideline:

- Import prohibited weapons or ammunition with intent to evade a prohibition or restriction (section 50(3),(4), (5A)(a)).

¹ Coroners and Justice Act 2009 section 127: www.legislation.gov.uk/ukpga/2009/25/section/127

- Fraudulent evasion of prohibition or restriction on prohibited weapon or ammunition (section 170(1)(b) and (3), 170(2),(3), and (4A)(a).

This guideline applies to sentencing adults only; it will not directly apply to the sentencing of children and young people.

Current sentencing practice

To ensure that the objectives of the guideline are realised, and to understand better the potential resource impacts of the guideline, the Council has carried out analytical and research work

The intention is that the guideline will encourage consistency of sentencing and, in the majority of cases, will not change overall sentencing practice. In order to develop a guideline that maintains current practice, knowledge of recent sentencing was required.

Sources of evidence have included the analysis of transcripts of judges' sentencing remarks and sentencing data from the MoJ Court Proceedings Database.² A survey was also conducted with sentencers to gain feedback on the guideline and to understand if it would function as anticipated.

Detailed sentencing statistics for the offences covered by the guideline have been published on the Sentencing Council website at the following link:

<http://www.sentencingcouncil.org.uk/publications/?type=publications&s=&cat=statistical-bulletin&topic=&year>.

Import prohibited weapons or ammunition with intent to evade a prohibition or restriction (section 50(3),(4), (5A)(a))³

Between 2016 and 2020,^{4,5} around 80 offenders were sentenced for this offence. The most common outcome was a fine (36 per cent), followed by a suspended sentence order (29 per cent). A further 13 per cent were given a community order, 12 per cent were sentenced to immediate custody and 10 per cent were given a discharge.

² The Court Proceedings Database (CPD), maintained by the Ministry of Justice (MoJ), is the data source for these statistics. The data presented in this resource assessment only include cases where the specified offence was the principal offence committed. When a defendant has been found guilty of two or more offences this is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe. Although the offender will receive a sentence for each of the offences that they are convicted of, it is only the sentence for the principal offence that is presented here. The average custodial sentence lengths presented in this resource assessment are mean average custodial sentence length values for offenders sentenced to determinate custodial sentences, after any reduction for guilty plea. Further information about this sentencing data can be found in the accompanying statistical bulletin and tables published here: <http://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>

³ Within the CPD data, it is not possible to identify the weapon present, therefore, care should be taken when interpreting these statistics as they may include cases in which the weapon present was not a firearm and as such may influence the volumes of offenders sentenced or the sentence given.

⁴ Due to the small number of offenders sentenced for these offences, 5 years of data have been presented.

⁵ 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.

For those that were sentenced to immediate custody between 2016 and 2020, the average (mean) custodial sentence length (ACSL) was 2 years 3 months.⁶

Fraudulent evasion of prohibition or restriction on prohibited weapon or ammunition (section 170(1)(b) and (3), 170(2),(3), and (4A)(a)³

Between 2016 and 2020,⁴ around 50 offenders were sentenced for this offence. Just under half (47 per cent) were sentenced to immediate custody and 39 per cent were given a suspended sentence order. A further eight per cent received a fine and six per cent were given a community order.

For those sentenced to immediate custody between 2016 and 2020, the ACSL was 8 years 3 months.⁶

Key assumptions

To estimate the resource effect of a guideline, an assessment is required of how it will affect aggregate sentencing behaviour. This assessment is based on the objectives of the guideline and draws upon analytical and research work undertaken during guideline development. However, some assumptions must be made, in part because it is not possible precisely to foresee how sentencers' behaviour may be affected across the full range of sentencing scenarios. Any estimates of the impact of the guideline is therefore subject to a large degree of uncertainty.

Historical data on changes in sentencing practice following the publication of guidelines can help inform these assumptions, but since each guideline is different, there is no strong evidence base on which to ground assumptions about behavioural change. The assumptions thus have to be based on careful analysis of how current sentencing practice corresponds to the guideline ranges presented in the proposed guideline, and an assessment of the effects of changes to the structure and wording of the guideline where a previous guideline existed.

The resource impact of the guideline is measured in terms of the change in sentencing practice that is expected to occur as a result of it. Any future changes in sentencing practice which are unrelated to the publication of the guideline are therefore not included in the estimates.

In developing sentence levels for the guideline, data on current sentence levels have been considered. Existing guidance and transcripts of judges' sentencing remarks have also been reviewed and a survey with sentencers was undertaken to understand if the guideline would be applied as intended.

While data exists on the number of offenders and the sentences imposed, assumptions have been made about how current cases would be categorised across

⁶ The statutory maximum sentence for this offence is 7 years' custody unless the offence relates to a weapon or ammunition that is of a kind mentioned in Section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af), (c), section 5(1A)(a) of the Firearms Act 1968, in which case the statutory maximum sentence is life imprisonment (more information about the weapons that fall into this category can be found here: <https://www.legislation.gov.uk/ukpga/1968/27/section/5>). It is not possible to distinguish the actual weapon used within our data and therefore we are unable to identify if any sentence has been incorrectly recorded as above the statutory maximum.

the levels of culpability and harm proposed in the new guideline, due to a lack of data available regarding the seriousness of current cases. As a consequence, it is difficult to ascertain how sentence levels may change under the new guideline and it remains difficult to estimate with any precision the impact the guideline may have on prison and probation resources.

Resource impacts

This section should be read in conjunction with the guidelines available at: <https://www.sentencingcouncil.org.uk/>.

The guideline covers both offences of importation under section 50(3),(4),(5A)(a) and offences of fraudulent evasion under section 170(1)(b) and (3), 170(2),(3), and (4A)(a) of CEMA and has been produced with current sentencing practices in mind. Due to the similar nature of these offences and because they are covered by the same guideline, the resource impact has been assessed and presented for both section 50 and section 170 offences collectively.

It is expected that the guideline will improve consistency of sentencing for these offences, but it is not anticipated that it will lead to any notable changes in sentencing.

There is currently no guideline for these offences which are low in volume and the limited data available suggests that current sentencing practice varies. The guideline has four levels of culpability (this is assessed by considering culpability factors similar to those in the transfer and manufacture guideline in conjunction with the type of weapon or ammunition) and three levels of harm. There are two sentencing tables, with different sentencing ranges depending on the maximum sentence for the type of weapon or ammunition. For offences subject to the statutory maximum of life, the sentencing range is from 1 to 28 years' custody. For offences subject to the statutory maximum sentence of 7 years, the range is a Band A fine⁷ to 7 years' custody.

The offences under section 50 and section 170 of the CEMA 1979 relate to more than firearms and ammunition and it is not possible to identify the type of weapon to which the offending relates within the limited data we have available; it is therefore possible that some of the sentences presented are for weapons other than firearms. However, analysis of transcripts of Crown Court judges' sentencing remarks⁸ conducted during the development of the guideline, suggests that of those cases seen in the Crown Court, all related to firearms or ammunition (it is not possible to verify this for cases sentenced in the magistrates' court as no transcripts are available). Between 2016 and 2020, most offenders (86 per cent) sentenced for fraudulent evasion of prohibition or restriction on prohibited weapon or ammunition (section 170) were sentenced at the Crown Court, suggesting that it is likely that this is representative of the types of cases seen.

⁷ The starting point for a Band A fine is 50 per cent of the offender's relevant weekly income.

⁸ Twenty-six transcripts of Crown Court sentencing remarks from 2018 and 2019 were analysed to assess the impact this guideline may have on prison and probation services. Of these, 10 related to section 50 offences and 16 related to section 170 offences.

However, for offenders sentenced for importing prohibited weapons or ammunition with intent to evade a prohibition or restriction (section 50), most were sentenced at magistrates' courts (72 per cent between 2016 and 2020), for which there are no sentencing transcripts available. As such, it is difficult to establish whether this offence generally involves firearms and ammunition or other types of weapons. It is therefore possible that the guideline may have a greater or lesser impact than expected because it is unclear how many offenders are sentenced for these offences specifically relating to firearms. However, it is anticipated that the guideline will enable more consistent sentencing of these offences.

Analysis of transcripts of Crown Court judges' sentencing remarks was conducted to assess how sentences might change under the new guideline. The analysis suggests that for the most serious offences (generally those sentenced to immediate custody), sentences under the new guideline will remain broadly similar to current sentencing practice. For less serious offences (typically involving non-lethal weapons) the analysis suggested that some offenders previously sentenced to suspended sentence orders may receive community orders under the guideline, but it is anticipated that this change would have minimal impact on prison and probation services.

Research with sentencers was conducted⁹ to support the development of the guideline and mitigate the risk of the guideline having an unintended effect. As a result of this work, some minor amendments were made to the draft guideline to ensure that the definitive guideline is interpreted as expected. Therefore, it is not anticipated that these changes will alter the expected impact on resources, rather that they will ensure a consistent interpretation of the guidelines and thereby a consistent approach to sentencing.

Due to a lack of available data, the small number of offenders sentenced for this offence and the current varied sentencing practice, it is not possible to say whether the guideline for these offences will have an impact on prison and probation resources overall but it is anticipated that any impact would be small and sentencing will become more consistent following the introduction of the guideline.

Risks

In attempting to estimate the likely resource impacts of this guideline, there are two main risks to consider:

Risk 1: The Council's assessment of current sentencing practice is inaccurate

An important input into developing sentencing guidelines is an assessment of current sentencing practice. The Council uses this assessment as a basis to consider whether current sentencing levels are appropriate or whether any changes should be made. Inaccuracies in the Council's assessment could cause unintended changes in sentencing practice when the new guideline comes into effect.

⁹ The research involved a survey conducted with 16 sentencers during September 2021; the results were analysed to assess whether the guidelines were being interpreted as anticipated. Questions focused on how useable sentencers found the guideline and ensuring the correct categorisation of certain factors was applied.

This risk is mitigated by information that is gathered by the Council as part of the guideline development and consultation phase. This includes research with sentencers, providing them with scenarios, to test whether the guideline is being interpreted as intended. However, there are limitations on the number of scenarios which can be explored, so the risk cannot be fully eliminated. Transcripts of judges' sentencing remarks have provided a more detailed picture of current sentencing practice for these offences, which has formed a large part of the evidence base on which the resource impacts have been estimated. However it should be noted that these are rough estimates which should be interpreted as indicative of the direction and approximate magnitude of any change only.

Risk 2: Sentencers do not interpret the new guideline as intended

If sentencers do not interpret the guideline as intended, this could cause a change in the average severity of sentencing, with associated resource effects.

The Council takes a number of precautions in issuing a new guideline to try to ensure that sentencers interpret it as intended. Sentencing ranges are agreed on by considering sentencing data in conjunction with Council members' experience of sentencing. Transcripts of Crown Court sentencing remarks have also been studied to ensure that the guideline is developed with current sentencing practice in mind. Research carried out with sentencers during the consultation period has helped to identify possible issues with the interpretation and application of the guideline, and amendments have subsequently been made to the definitive guideline.