

17 September 2021

Dear Members

Meeting of the Sentencing Council – 24 September 2021

As you know we had been exploring whether we might be able to meet in person for our next Council meeting. Unfortunately, our usual meeting rooms are currently in use as a 'Blitz Court' until early October. It is also not clear, despite the removal of legal restrictions, what social distancing measures might be deemed necessary or appropriate for meetings within the RCJ or elsewhere – including potential limits on total numbers.

As a result, the next Council meeting will again be held via Microsoft Teams, the link to join the meeting is included below. **The meeting is Friday 24 September 2021 from 9:30 to 15:45.** Members of the office will be logged in shortly before if people wanted to join early to confirm the link is working. You will see that the meeting is scheduled to be slightly longer than our previous virtual meetings, reflecting the fact that agenda was originally put together on the expectation we might meet in person. We have extended the lunch break and included an additional afternoon break to compensate.

We hope (subject obviously to whatever guidance is in place at the time) still to consider meeting in person in October; our usual rooms' use as a 'Blitz Court' will have ended by then and we have the rooms booked. To support that we will be giving consideration to RCJ and wider MoJ guidance on in person meetings and what risk assessments and / or mitigation measures may be necessary.

The agenda items for the Council meeting are:

- | | |
|---|-------------|
| ▪ Agenda | SC(21)SEP00 |
| ▪ Minutes of meeting held on 30 July | SC(21)JUL01 |
| ▪ Terrorism | SC(21)SEP02 |
| ▪ What next for the Sentencing Council? | SC(21)SEP03 |
| ▪ Environmental Offences | SC(21)SEP04 |
| ▪ Animal cruelty | SC(21)SEP05 |
| ▪ Motoring offences | SC(21)SEP06 |
| ▪ Perverting the Course of Justice | SC(21)SEP07 |
| ▪ Firearms importation | SC(21)SEP08 |

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

A handwritten signature in black ink, appearing to read 'Steve Wade', with a horizontal line underneath it.

Steve Wade

Head of the Office of the Sentencing Council

Sentencing Council

COUNCIL MEETING AGENDA

24 September 2021
Virtual Meeting by Microsoft Teams

- | | |
|---------------|--|
| 09:30 – 09:45 | Minutes of the last meeting (paper 1) |
| 09:45 -10:15 | Terrorism - presented by Vicky Hunt (paper 2) |
| 10.15- 10:45 | What next for the Sentencing Council? – presented by Emma Marshall (paper 3) |
| 10:45 – 11:00 | Break |
| 11:00 – 11:30 | Environmental Offences – presented by Ruth Pope (paper 4) |
| 11:30 – 12:15 | Animal cruelty – presented by Ollie Simpson (paper 5) |
| 12:15 – 12:45 | Lunch |
| 12:45 – 13:45 | Motoring offences – presented by Lisa Frost (paper 6) |
| 13:45 – 14:45 | Perverting the Course of Justice – presented by Mandy Banks (paper 7) |
| 14:45 - 15:00 | Break |
| 15:00 – 15:45 | Firearms Importation – presented by Ruth Pope (paper 8) |

Sentencing Council

COUNCIL MEETING AGENDA

Blank page

MEETING OF THE SENTENCING COUNCIL

30 JULY 2021

MINUTES

Members present:

Tim Holroyde (Chairman)
Rosina Cottage
Rebecca Crane
Rosa Dean
Michael Fanning
Diana Fawcett
Adrian Fulford
Jo King
Juliet May
Maura McGowan
Alpa Parmar
Beverley Thompson

Apologies:

Nick Ephgrave
Max Hill

Representatives:

Elena Morecroft for the Lord Chief Justice (Legal and Policy Advisor to the Head of Criminal Justice)
Hannah Von Dadelszen. Head Directorate of Legal Services, for the CPS

Observer:

Richard Mobbs of the CPS

Members of Office in attendance:

Steve Wade
Mandy Banks
Phil Hodgson
Vicky Hunt
Emma Marshall
Ruth Pope
Ollie Simpson

1. MINUTES OF LAST MEETING

- 1.1 The minutes from the meeting of 25 June 2021 were agreed.

2. MATTERS ARISING

- 2.1 The Chairman welcomed Nic Mackenzie and Gail Peachey who had recently joined the Analysis and Research team as principal research officers to lead on social research.

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

- 3.1 The Council considered proposed changes to the sentencing tables in the Membership of a proscribed organisation (Terrorism Act 2000, section 11), and the Support of a proscribed organisation (Terrorism Act 2000, section 12) guidelines which take into account the new statutory maximum sentences brought in by the Counter Terrorism and Sentencing Act 2021 which has increased the maximum from 10 to 14 years for both offences.

- 3.2 The Council also considered some additional guidance within the Preparation of terrorism acts (Terrorism Act 2006, section 5) guideline to assist judges sentencing cases that have police or security service involvement to the extent that harm is unlikely to ever be caused.

- 3.3 The Council discussed and agreed the changes.

4. DISCUSSION ON TOTALITY– PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

- 4.1 The Council considered a report on research that had been carried out with sentencers on the Totality guideline. It was agreed that the report should be prepared for publication in the autumn.

- 4.2 In the light of the findings of the research it was agreed that improvements could be made to the presentation and style of the guideline. The Council considered that a more comprehensive review of the content would be useful. The revision of the guideline would be added to the work plan.

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

- 5.1 The Council discussed the scope of a new project looking at public justice offences. In a previous discussion on future priorities the Council had agreed to add witness intimidation and perverting the course of justice to the work plan, and it was agreed during the meeting that witness intimidation would cover both the s.51(1) and (2) offence.

- 5.2 The Council discussed other offences to potentially be included within the scope of the project, and it was decided that for a number of reasons, including very low volumes of cases sentenced, both perjury and contempt would not be included.
- 5.3 The Council agreed that assisting an offender offences would be included within the project. The Council also briefly considered offences under s.44,45 and 46 of the Serious Crime Act 2007, and s.45 of the Serious Crime Act 2015, and asked that volumes of cases sentenced be brought back to the next Council meeting, before a decision was made on whether they should be included or not.

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

- 6.1 The Council considered whether to postpone work on immigration guidelines pending the introduction of new legislation, and to focus on animal cruelty offences where the maximum penalty has recently been increased. The Council agreed that it was sensible to wait until the prospective changes to the immigration penalties and offences had been made before work re-commenced on those guidelines.
- 6.2 The Council agreed to commence work on revising the Animal cruelty guideline given that the change to the maximum penalty applies to offences committed on or after 29 June 2021.

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

- 7.1 The Council was provided with a short update on progress with work arising from the ‘What next for the Sentencing Council?’ consultation and a timetable for this. A strategy document to accompany the response document is also being prepared.

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

- 8.1 Following further detailed consideration of responses to the consultation, the Council signed off the Modern slavery guidelines for publication on 12 August to come into effect on 1 October 2021.

9. DISCUSSION ON MINOR AMENDMENTS TO GUIDELINES – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

- 9.1 The Council agreed the amendments to be consulted on for the following: the Breach of a sexual harm prevention order guideline; compensation and confiscation across all relevant guidelines; the uplift for racially or religiously aggravated offences and the Domestic abuse overarching principles guideline. It was agreed to consult on these changes in the autumn.
- 9.2 The Council agreed that some interim guidance should be added to the Animal cruelty guideline pending a revision of the guideline. It was also agreed that the guideline for use in magistrates' court for the offence contrary to section 25(5) of the Identity Documents Act 2006 should be removed. This offence has been repealed and there was a danger that the outdated guideline could be misleading.
- 9.3 The Council considered that a review of the expanded explanation for the mitigating factor 'Involved through coercion, intimidation or exploitation' should await an evaluation of the expanded explanations to be undertaken in 2022.
- 9.4 The Council noted that the volumes for the offence contrary to section 44 of the Vehicle Excise and Registration Act 1994 had increased in recent years from a low point in 2016 and that further work should be done to consider how the Vehicle licence/registration fraud guideline should be revised.

10. DISCUSSION ON ARCHIVING GUIDELINES – PRESENTED BY PHIL HODGSON, OFFICE OF THE SENTENCING COUNCIL

- 10.1 The Council agreed that a digital archive of sentencing guidelines should be created that would include SGC guidelines and be available directly to the public via the Council's website. It was agreed that the Communication team would investigate options for creating and managing the archive and make recommendations to the Confidence and Communication sub-group.

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

24 September 2021
SC(21)SEP02 – Terrorism
Maura McGowan
Vicky Hunt
0207 0715786

1 ISSUE

1.1 This month the Council is invited to sign off the terrorism guidelines and resource assessment ready for a consultation launch on 20 October.

1.2 One additional issue is raised in this paper in relation to further legislation in the area of terrorism and how this may impact our guidelines in the future.

2 RECOMMENDATION

2.1 It is recommended that the Council sign off the guidelines and resource assessment. If there are any final minor comments on the consultation paper or the resource assessment that do not require discussion could these please be emailed by Friday 1 October.

3 CONSIDERATION

Guidelines

3.1 The Council saw and agreed the final changes to the guidelines at the last meeting, but it was agreed that formal sign off would wait until this month once the consultation paper had been written and the Resource Assessment completed.

3.2 There is just one proposal for a change to the guidelines before inviting Council members to sign them off.

3.3 The Preparation of Terrorist Acts guideline (and Explosive Substances guideline) were amended to include extra guidance on serious terrorism sentences. In addition, the sentence tables now include a number of asterisks to show when it might be necessary for a judge to make a sentence adjustment (i.e. where the serious terrorism sentence provisions may apply but the sentence table allows a sentence of less than 14 years).

3.4 The amended guideline can be seen at **Annex A**. Currently there is an asterisk in D1, B2, C2 and D2. No asterisk was put into any category 3 harm box as the criteria for a serious terrorism sentences includes the 'multiple deaths' condition, and harm category 3

cases will never involve the risk of death of two or more people. However, on closer analysis of the 'multiple deaths condition' criteria, the wording actually states:

the serious terrorism offence or the combination of the offence and one or more offences associated with it was very likely to result in or contribute to (whether directly or indirectly) the deaths of at least two people as a result of an act of terrorism

3.5 The inclusion of the phrase 'very likely' means that no harm category 2 case is likely to meet the criteria for a serious terrorism sentence either as harm category 2 includes only the following options:

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

3.6 For this reason I propose removing the asterisks from B2, C2 and D2, just leaving one asterisk in D1.

Question 1: Does the Council agree that the asterisk should be removed from categories B2, C2 and D2?

3.7 If Council is in agreement with that proposal the relevant paragraph of the consultation paper will require redrafting. I propose the following wording should replace the existing paragraph (at page 12 of 29):

When might a judge need to make an adjustment to the sentence?

If a serious terrorism sentence is to be imposed but the sentencing table would lead to a custodial term of below 14 years then at Step 3, once the seriousness has been determined, the judge will need to increase the sentence to the minimum unless exceptional circumstances apply.

There are not many sentences within the table that might require adjustment in this way. The serious terrorism sentence criteria includes the multiple deaths condition (i.e. that the offence was very likely to result in or contribute to (whether directly or indirectly) the deaths of at least two people as a result of an act of terrorism). This means that category 2 and 3 harm cases are unlikely to ever be eligible for a serious terrorism sentence, and so no adjustment would be necessary.

D1 includes a sentence of less than 14 years within the sentencing range. However, whilst cases falling into this category *may* meet the criteria for a serious terrorism sentence and if so might need adjusting at step 3, there are just as likely to be cases that do not meet the criteria. Many cases falling into this category will not meet the first main test (that the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further serious terrorism offences or other specified offences) and in those cases it is helpful for the sentencer to be given a suitable starting point and range that is based on the offence seriousness.

The only other adjustment that might be needed would be in those instances where a life sentence is imposed, but the 'serious terrorism case' criteria is met (i.e. this would have been a serious terrorism sentence but for the imposition of a life sentence). In these situations, the minimum term must be at least 14 years. C1 currently includes a life sentence minimum term of less than 14 years within its range. However it is hard to imagine a C1 scenario where the serious terrorism sentence criteria would not have been met, given that harm category 1 is 'multiple deaths risked and very likely to be caused', and the guideline assumes that in the majority of cases the dangerousness criteria would be met, and a life sentence imposed. The Council therefore propose amending the range so that the minimum term starts at 14 years (rather than 10 years as is currently the case).

3.8 All guidelines can be seen at **Annex A** (a digital version of the guidelines has also now been produced and will be available if Council members wish to see them at the September meeting).

Question 2: Is the Council content to sign off the terrorism guidelines ready for consultation on 20 October?

Consultation paper

3.9 The consultation paper was circulated to Council members on 10 September. If there are any significant queries on that paper, Council members are invited to raise them at the meeting for discussion. Any minor changes, such as spelling punctuation or stylistic changes can be emailed and will be actioned.

Question 3: Are there any issues or concerns from the consultation paper that the Council want to raise (save for those discussed below)?

Legislative Change

3.10 As Council will be aware the Police, Crime, Sentencing and Courts Bill is currently before Parliament.

3.11 The Bill includes a new provision which sets out the approach the court must take to determine the minimum term for offenders who are given a discretionary life sentence for certain offences which include Preparation of a Terrorist Act (Terrorism Act 2006, section 5) and Explosive Substance Act offences with a terrorist connection (Explosive Substances Act 1883, sections 2 and 3).

3.12 The new clause and the associated explanatory note are attached for your information at **Annex B**. The current Preparation of Terrorist Acts guideline can be seen [here](#).

3.13 If the new provision becomes law judges would be required to take the following approach when setting the minimum term; as a starting point impose a term that is two thirds of the notional determinate sentence. This starting point can then be adjusted as the court considers appropriate, taking into account, the seriousness of the offence(s).

3.14 This potentially raises some queries for the Preparation and Explosive Substance terrorism guidelines which include life sentences within the sentence table. It could be suggested that those life sentence minimum terms do not comply with the legislation as they were developed at a time when life sentence minimum terms would not have been calculated by reference to two thirds of the notional determinate sentence.

3.15 The existing legislation in section 323 of the Sentencing Code (set out below) does not spell out the approach that judges must take in the same way as the new legislation will.

323 Minimum term order: other life sentences

- (1) This section applies where a court—
 - (a) passes a life sentence in circumstances in which the sentence is not fixed by law, and
 - (b) makes a minimum term order.

- (2) The minimum term must be such as the court considers appropriate, taking into account—
 - (a) the seriousness of—
 - (i) the offence, or
 - (ii) the combination of the offence and one or more offences associated with it,
 - (b) the early release provisions as compared with section 244(1) of the Criminal Justice Act 2003 (duty to release prisoners), and

c) the effect that the following would have if the court had sentenced the offender to a term of imprisonment—

(i) section 240ZA of the Criminal Justice Act 2003 (crediting periods of remand in custody);

(ii) section 240A of that Act (crediting periods of remand on bail subject to certain restrictions);

including the effect of any declaration which the court would have made under section 325 or 327 (specifying periods of remand on bail subject to certain restrictions or in custody pending extradition).

3.16 At the time of producing the original guidelines in 2017, in cases where judges did calculate the term by reference to the notional determinate sentence, they would have done so by approximately halving it. However since legislative changes have been made to release provisions the situation has become more complicated and has been the subject of a number of Court of Appeal hearings, culminating in the most recent case of [McWilliams¹](#) which concluded that the life sentence minimum term for certain relevant offences should be calculated as two thirds rather than one-half of the notional determinate term.

3.17 To help the Council consider this issue I set out below the history of how the sentences in that table were reached.

How did the Council reach the sentences that are included in the sentence table?

3.18 In the original October 2017 consultation, the Council included both life sentences and also extended sentences within the sentencing table. In addition, the guidance above the table stated the following:

Offenders committing offences at the upper end of seriousness are likely to be found dangerous and so the table below includes options for life sentences and/ or extended sentences. The court must however have regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 to make the appropriate determination before imposing such sentences. (See step FIVE below). Where a dangerousness finding is not made a determinate sentence approximately twice the length of the minimum term should be imposed, and section 236A Criminal Justice Act 2003 should be considered. This guidance does not intend to restrict a court from imposing such sentences in any case where it is appropriate to do so.

¹ [2021] EWCA Crim 745

3.19 The consultation paper included the following reasoning:

It is important to note that whilst the table includes life imprisonment and extended terms of imprisonment, these are sentences that are only available when sentencing offenders who are found to be 'dangerous offenders'. The Court must, therefore have regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003, to decide whether it would be appropriate to impose a life sentence (section 224A) or an extended sentence (section 226A). Where the criteria are not met the court should instead of a life sentence, impose a determinate sentence approximately twice the length of the minimum term that is stated in the sentence table. The court must also have regard to section 236A Criminal Justice Act (special custodial sentence for certain offenders of particular concern).

The starting points and ranges have been based on statistical data from the Court Proceedings Database, analysis of first instance transcripts and Court of Appeal sentencing remarks, reference to the ranges within the Lord Chief Justice's guidance as set out in Kahar, and from the collective judgement of the members of the Council.

Between 2006 and 2016 there were 90 adult offenders sentenced for the section 5 offence. 81 out of the 90 received an immediate custodial sentence. The average custodial sentence length was 8 years 5 months (mean) or 6 years (median), after any reduction for guilty plea.

3.20 Post consultation, some changes were made and the inclusion of extended sentences in the sentencing table was dropped leaving just life sentences and determinate sentences. In addition, the guidance wording above the sentence table changed so that in the final guideline sentencers are not specifically told how to go about sentencing an offender who is not found to be dangerous, or where a life sentence is not justified (i.e. they are not told to double the minimum term to get to a determinate sentence). That is left to the judge themselves to work out.

3.21 In the consultation response document published in March 2018, the Council said the following:

Whilst the Council agreed to remove EDS from the table, references to life sentences have remained. The reason is that the Council feels that in some of the category ranges, where an offender has played a significant role and life (or multiple lives) have been endangered, a dangerousness finding is likely to be made, justifying a life sentence, and it is more appropriate to include such a sentence in the table rather than extremely lengthy

determinate sentences. However, the guidance above the table makes clear that the court must make a dangerousness finding before such sentences become available.

3.22 Throughout the process of developing the guideline, and in the Council's public explanation of that process, it has been clear that the Council has never started with a lengthy determinate sentence and then halved it in order to propose an appropriate life sentence minimum term. Indeed, the Council explicitly chose not to do that as such lengthy determinate sentences did not reflect the reality of sentencing in this area and so it would have been difficult for the Council to come up with a determinate sentence figure in this manner.

3.23 The Council instead looked at sentencing practice and specific cases and decided that life sentences had to appear on the face of the guideline. The length of the minimum term was based on case law and sentencing practice, and in some areas the term chosen reflected an increase from existing sentencing practice, where it was felt appropriate to do so given the changing nature of terrorist offending by 2017.

3.24 Had the Council decided on an appropriate determinate sentence first (the notional determinate sentence) and then halved it to come up with the life sentence minimum term then there may be an argument to suggest that the sentence levels should now be revised to increase them to reflect a sentence that is two thirds of the notional determinative sentence. However as this was not the approach taken and in fact the Council set sentences that reflected the seriousness of the offence, the Council may feel that the sentences ought to remain as they are.

Question 4: Does the Council consider that the sentences included within the Preparation and Explosive Substance guidelines should remain and are compliant with the legislation should it be passed?

3.25 Unfortunately, due to the timing of this legislation, we will have already published our consultation on changes to the guidelines, before the PCSC Bill becomes an Act. If the Council does feel that the sentences ought to be revised then this would involve further work and a further period of consultation.

3.26 To pre-empt any calls on the Council to make changes to the guidelines we could include some wording within the current consultation explaining how the Council reached the existing sentences and why the Council considers that those sentences should remain.

3.27 I have already included such wording in the draft circulated at page 24 of 29 entitled 'Life Sentences in Terrorism Cases'.

Question 5: Does the Council want to include a section in the consultation paper to cover this?

Question 6: If so, is the Council in agreement with the wording proposed at page 24 of the consultation?

4 IMPACT AND RISKS

The Analysis and Research team have now completed the Resource Assessment, and this is attached at **Annex C**.

Question 7: Is the Council content to sign off the Resource Assessment?

Meeting date: 24 September 2021
Paper number: SC(21)SEP03 – ‘What Next for the Sentencing Council’ strategy paper
Lead official: Emma Marshall

ISSUE

1.1 The strategy document to be published alongside the consultation response document for the *What Next for the Sentencing Council* (‘Vision’) consultation.

RECOMMENDATION

2.1 That you agree the content and format of the strategy document. We will then continue to work on the full consultation response document and circulate this for comments.

CONSIDERATION

3.1 The Council agreed at the June meeting that in addition to a consultation response document, we would prepare a strategy document that would be published alongside this. The strategy document will provide a high level, easily accessible, summary of the key priorities and actions for the Council for next the five years. It was agreed that this would be focused on a small number of high-level strategic objectives with more specific actions sitting underneath.

3.2 We have now drafted the strategy document attached at Annex A. This has already been discussed with Vision working group and with Elaine Lorimer as the Council’s independent member of the Governance Group. On the basis of those of those discussions, the original draft has been revised and considered again by the Vision working group and the Governance Group.

3.3 We plan to have this formatted and laid out by Design102 and so in order to meet our planned publication date of 4th November, we need to have finalised this document by mid-October.

Question 1: Does the Council have any comments on either the structure or content of the proposed strategy document?

Question 2: Is the Council content to agree to publish this document on 4th November?

RISKS AND IMPACT

4.1 It is important that the strategy document is fully aligned with the consultation response document so that we can provide a full and justified explanation for all the decisions that have been made. If not, this may attract criticism that the Council has not fully taken account of the views put forward and is not being responsive to recommendations. This could undermine confidence in the Council and the decisions it takes.

4.2 It is also important that the strategy document is seen to be actioning those areas of work that are flagged in the consultation document as higher priority. We have already placed these on the Office's planning spreadsheet and are currently working on how best to resource these.

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

24 September 2021
SC(21)SEP04 – Environmental Offences
Ruth Pope

1 ISSUE

1.1 On 2 August we received a letter from the Herts Fly Tipping Group (attached at Annex A) 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. The letter has received significant press coverage and a Hertfordshire MP, Sir Oliver Heald also forwarded the letter to the Council.

1.2 A holding response was sent (see Annex B) saying that the matter would be brought to the attention of the Council at its next meeting.

1.3 This paper sets out the issues raised and some possible approaches to address them.

2 RECOMMENDATION

2.1 That the Council agrees to investigate ways in which the environmental guideline could be revised to ensure that it operates effectively in fly-tipping cases.

3 CONSIDERATION

Background

3.1 The Environmental offences guidelines came into force on 1 July 2014. There are two guidelines: one for [individuals](#) and one for [organisations](#). The guidelines apply to offences covered by section 33, Environmental Protection Act 1990 (EPA 1990); and Regulations 12 and 38(1), (2) and (3) of the Environmental Permitting (England and Wales) Regulations 2010 (EPR 2010). The statutory maximum sentence for an individual is five years' custody and the guideline offence range is a discharge to three years' custody.

3.2 In November 2016 the Council published an [assessment](#) of the guidelines. This noted that the guidelines were expected to:

- Increase levels of fines received by organisations and some individuals who commit more serious offences;
- Maintain fine levels for individuals and organisations committing less serious offences.

3.3 The assessment found that as expected higher fines had resulted for some organisations, but the anticipated increase for individuals was not detected. The assessment noted that this could be due to the type of offence coming before the court as the data used to compare sentencing before and after the guideline came into force did not indicate the seriousness of the offence.

3.4 The assessment also found that a small sample of data collected by the Environment Agency since the guideline came into force showed that the majority of cases were sentenced within the appropriate category range, as set out in the guideline; which implied that the guideline was generally being applied in the manner intended.

3.5 Since 2016 we have received a number of representations about the application of the guideline for individuals to fly-tipping cases. There have been meetings at an official level with the Department for Environmental and Rural Affairs (Defra). The overall theme of these representations has been that the fines imposed on individuals are deemed to be too low to reflect both the costs avoided by the offender and the costs of clearing up; as well as being inadequate as a deterrent.

3.6 In responding to these points the Council has drawn attention to the fact that step 5 of the guideline does require sentencers to take account of cost avoided and that the law requires courts to take into account the financial circumstances of the offender in setting the amount of a financial penalty. The Council has, at times, been invited to comment on the appropriateness of sentences in specific cases and has declined to do so.

3.7 In summary, to date we have taken the view that the matters raised are either already covered by the guideline or relate to legislation.

Volumes and sentence outcomes

3.8 The number of adult offenders sentenced for offences under s 33 EPA 1990 (which would include fly-tipping):

Court	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Magistrates	671	662	560	545	538	637	598	671	752	641	311
Crown	56	41	22	27	30	25	26	32	26	53	10
Total	727	703	582	572	568	662	624	703	778	694	321

3.9 Not all of these offences will be fly-tipping, but what the figures show is (with the exception of 2020) volumes of prosecutions have been fairly stable for many years. 2020 figures may reflect the impact of the pandemic on court processes and prioritisation and the subsequent recovery, so should be treated with caution.

3.10 Sentence outcomes for adult offenders sentenced for offences under s 33 EPA 1990:

Outcome	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Discharge	113	147	141	111	95	86	76	49	65	47	26
Fine	510	468	377	380	411	484	463	503	572	497	233
Fines as a proportion	70%	67%	65%	66%	72%	73%	74%	72%	74%	72%	73%
CO	68	54	43	43	40	48	46	55	62	57	28
SSO	17	9	10	15	8	22	15	37	20	53	6
Immd custody	11	17	4	12	5	11	7	26	10	18	4
Other	8	8	7	11	9	11	17	33	49	22	24
Total	727	703	582	572	568	662	624	703	778	694	321

3.11 Fines appear to have been imposed in around three-quarters of cases since the guideline came into force. Prior to that the proportion of fines was slightly lower and the proportion of discharges higher (although due to a data processing issue, offenders sentenced to a fine of over £10,000 in magistrates' courts during the period 2010 to 2015 may have been excluded from the data and therefore volumes shown for this period may be lower than the actual number sentenced; however, it is likely that the number of missing records is low).

3.12 Median fine amounts received by adult offenders sentenced for offences under s 33 EPA 1990:

	2015	2016	2017	2018	2019	2020
Median fine amount	£250	£300	£320	£300	£320	£320

3.13 The median is the value which lies in the middle of a set of numbers when those numbers are placed in ascending or descending order. The median is often a more suitable measure than the mean as it is not as influenced by extreme values. Due to data processing issues it has not been possible to include fines data prior to 2015.

Issues raised – Fines versus Fixed Penalty Notices

3.14 The suggestion at Annex A is that where a fixed penalty notice (FPN) has been offered and a defendant opts to go to court and is convicted, the fine should exceed the maximum FPN available (currently £400). Current [guidance to magistrates on fixed penalty notices](#) contained in the explanatory materials to the MCSG states:

- the fact that the offender did not take advantage of the penalty (whether that was by requesting a hearing or failing to pay within the specified timeframe) does not increase the seriousness of the offence and must not be regarded as an aggravating factor. The appropriate sentence must be determined in accordance with the sentencing principles set out in this guidance (including the amount of any fine, which

must take an offender's financial circumstances into account), disregarding the availability of the penalty

3.15 The argument at Annex A is that this undermines the purposes of FPNs which are said to include reducing costs for prosecutors and alleviating pressure on courts.

3.16 The explanatory materials were the subject of consultation from November 2014 to January 2015. The Council may feel that the guidance is legally correct and it would be arbitrary to impose higher fines for offences where an FPN has been offered. In practice, of course, although the fine imposed may in some cases be lower than the FPN, when costs and the surcharge are added, the overall amount is still likely to be as high or higher for most of those who go to court.

Issues raised – stronger means testing and maximum payment periods

3.17 It is argued at Annex A that means declarations are not adequately tested by courts and that consequently fines are often being set on the basis of inaccurate information. They quote with approval what the guideline says about obtaining reliable information – but suggest that more needs to be done to reinforce the need for courts to undertake robust checks. While there may be some truth in the suggestion that magistrates do not test the means information presented, we have no evidence of this and the Council is limited in what it can do to influence the matter. If the prosecutors have evidence that offenders are misleading the court, the onus would be on them to raise it.

3.18 It is further argued at Annex A that the problem is exacerbated by the failure of courts to collect the financial penalties imposed. There is some [guidance](#) in the explanatory materials about payment of fines. This guidance was subject to consultation in 2014/5 and reflects a realistic approach to payment. The way in which fines are enforced after the sentence hearing are outside the Council's remit.

Issues raised – greater use of community sentences and suspended sentence orders

3.19 The suggestion at Annex A is that if an offender cannot pay the fine, the court should consider imposing a community order. There are obvious problems with this suggestion, but there may be scope for reconsidering the emphasis that the guideline puts on fines over community penalties (see para 3.26 below).

3.20 Annex A also proposes the greater use of suspended sentence orders stating that these provide an effective deterrent. The guideline does provide for some custodial sentences including at category 3 for deliberate cases. Of course, courts must always consider the Imposition guideline and be satisfied that the custody threshold has been crossed and that custody is unavoidable before imposing any custodial sentence.

The development and aims of the guideline

3.21 The consultation on the guideline in 2013 stated:

The Sentencing Council received a number of requests to produce a guideline for fly-tipping and other environmental offences from a range of parties with an interest in this area, including members of the National Fly-tipping Prevention Group and the Environment Agency. The requests arose from particular concerns that the levels of fines currently being given in the courts for environmental offences are not high enough and so neither reflect the seriousness of the offences committed nor have a sufficient deterrent effect on offenders. Concerns were also raised about the inconsistency in fine levels for similar offences, committed by similar offenders, across the country.

3.22 The Council took the view that fines were often the most appropriate penalty for this offence. The consultation stated:

The starting points and ranges include conditional discharges, fines, community orders and custody. The inclusion of community orders has been intentionally limited as an alternative to a fine. The Council is of the view that given these offences are mainly committed for economic gain, where the custodial threshold is not passed a fine will normally be the most appropriate disposal. This is the case even where the community order threshold has been passed.

3.23 The response to consultation stated:

Question 20 sought views on the Council's stipulation in the guideline that, when sentencing individuals, "even where the community order threshold has been passed, a fine will normally be the most appropriate disposal". There were 87 responses to this question.

The majority of respondents to this question, 82 per cent, agreed with the Council's view that, as the offences covered by the guideline are mainly committed for economic gain, a fine would usually be a more appropriate disposal than a community order; however, a minority of respondents strongly disagreed. Some respondents – for example, the Probation Chiefs' Association, Enfield Council and a handful of magistrates' responses – commented that environmental crimes were antisocial and therefore a fitting response may be to impose community order requirements, such as unpaid work, on an offender.

The Council acknowledges that in many cases a community order may be an appropriate disposal. However, the Council considers that it remains the case that a fine will more often be the correct response to a crime that is carried out for economic benefit. The Council considers that the framing of the guidance in the guideline provides flexibility to impose a community order (or a combination of a fine and community order) where appropriate and that the emphasis is correctly placed, and therefore does not propose to make any changes to this section of the guideline.

3.24 The sentence table for an offence where culpability is assessed as deliberate is:

Offence category	Starting Point	Range
Category 1	18 months' custody	1 – 3 years' custody
Category 2	1 year's custody	26 weeks' – 18 months' custody

Category 3	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Category 4	Band E fine	Band D fine or low level community order– Band E fine

Next steps

3.25 While much of what is suggested at Annex A is not legally possible even if it were desirable, it seems clear that the Environmental guideline for individuals does not always operate as intended for fly-tipping cases. This is despite the fact that the guideline contains much that could be useful in ensuring that offences of fly-tipping are dealt with in a way that meets the purposes of sentencing including punishment and deterrence. For example, step 1 requires sentencers to consider compensation and step 9 covers various ancillary orders that may be appropriate including forfeiture of vehicle. The sentence table above clearly envisages that community orders *may* be imposed for category 3 and 4 cases but the figures at 3.10 above show that the guideline is steering magistrates towards imposing fines (which was the original intention).

3.26 If the Council agreed that the guideline should be revised, one fairly straightforward change would be to remove the reference to Band D, E and F fines from the face of the guideline and replace them with community orders. This would not mean that a fine could not be imposed; the Imposition guideline states:

Sentencers must consider all available disposals at the time of sentence; even where the threshold for a community sentence has been passed, a fine or discharge may be an appropriate penalty. In particular, a Band D fine may be an appropriate alternative to a community order.

3.27 Clearly, further work would need to be done to establish whether this would be appropriate. The guideline is not just used for sentencing fly-tipping and any changes would have to work for other environmental offences.

3.28 The guideline was devised after careful consideration and contains many elements which in theory address the issues raised. Work could be done with sentencers and other guideline users to look at the content and format of the guideline to assess what other changes could usefully be made.

3.29 In the short term we will need to respond more fully to the letter at Annex A explaining how the Council intends to take matters forward. In the event that the Council decides to review the guideline the local authorities who are signatories to the letter may be able to provide us with useful data.

3.30 Looking at resources in the team and space on Council agendas, it would be early 2022 before the Council would be able to consider any substantive proposals.

Question 1: Does the Council wish to review the operation of the environmental guideline for individuals?

Question 2: If so, what should be the scope of the review – should it be limited to its application to fly-tipping cases (save for checking for unintended consequences for other offences)?

Question 3: In the short term how should we respond to the letter at Annex A?

4 EQUALITIES

4.1 We have not yet looked at the demographic spread of offenders for this offence or whether there are any apparent disparities.

4.2 One potential equalities issue that the discussion above raises is whether the guideline applies fairly across offenders of varying financial status. It will be important to ensure that the guideline does not allow offenders of means to buy their way out of a more serious penalty.

Question 4: Are there any particular equalities issues that should be investigated in any review of the guideline?

5 IMPACT AND RISKS

5.1 There is clearly a risk of the Council appearing unresponsive if nothing is done to address the concerns raised. However, the Council has many competing demands and limited resources and time spent on this could delay other projects.

Blank page

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

24 September 2021
SC(21)SEP05 – Animal Cruelty
Rosa Dean
Ollie Simpson
07900 395719

1 ISSUE

1.1 The scope of and approach to revisions to the animal cruelty sentencing guideline, following the increase in the maximum penalty from six months' to five years' imprisonment.

2 RECOMMENDATIONS

2.1 That:

- the guideline should cover the offences of mutilation, tail docking and poisoning, alongside the offences of causing unnecessary suffering and animal fighting for which there is already a guideline;
- the existing animal cruelty guideline be retained unchanged (with a six month maximum) for the offence of breach of a duty of a person responsible for animal to ensure welfare; and
- the new guideline should largely be unamended in terms of harm, culpability, aggravating and mitigating factors, but sentence levels should increase mainly for the most serious offences, distinguished principally by culpability.

3 CONSIDERATION

3.1 The Animal Welfare (Sentencing) Act 2021 received Royal Assent on 29 April and came into force on 29 June. The Act has increased the maximum penalty for the following Animal Welfare Act 2006 offences from six months (summary only) to five years' imprisonment:

3.2 section 4 (causing unnecessary suffering);

3.3 section 5 (mutilation);

3.4 section 6 (tail docking);

3.5 section 7 (poisoning); and

3.6 section 8 (fighting).

3.7 The existing magistrates' courts sentencing guidelines for animal cruelty (which can be found [here](#)) were revised in 2017 following concern that the guidelines in force since 2008 were not nuanced enough, particularly for those cases falling between the lowest and highest levels of seriousness. Responses to the consultation disagreeing with the sentence levels proposed were mainly concerned with the maximum penalty available, which has now been amended.

3.8 The current animal cruelty guideline has three levels of culpability. The highest covers the following behaviour: deliberate or gratuitous attempt to cause suffering; prolonged or deliberate ill treatment or neglect; ill treatment in a commercial context; and a leading role in illegal activity. The lowest category of culpability includes two factors: well intentioned but incompetent care; and mental disorder or learning disability, where linked to the commission of the offence. The middle category is cases falling in between the two.

3.9 There are two categories of harm. Greater harm is characterised by death or serious injury/harm to animal, or a high level of suffering caused. Lesser harm is all other cases.

3.10 Under the sentencing table, custody is only an option for high culpability offenders, and is the only option in the range for high culpability, high harm cases. The range for medium culpability cases is largely community orders, and the range for low culpability cases consists mainly of fines.

3.11 The bulk of sentences imposed for animal cruelty offences are for section 4 offences (unnecessary suffering) and, to a lesser extent section 9 offences (failing to ensure needs of animal are met) as the following table shows:

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

Animal Welfare Act 2006, s9	Failing to ensure needs of animal are met as required by good practice	156	136	48
------------------------------------	--	-----	-----	----

3.12 Although volumes are low, Defra’s hope and expectation is that the revised guidelines will cover all the offences where the maximum penalty has been raised from six months to five years (i.e. sections 4 to 8). Although there may be aspects of offending activity which are specific to (for example) tail docking or poisoning, I believe the existing step one and step two factors are broad enough to cover examples of this offending. One distinction with these offences is that they are more likely to be deliberate acts than the broader section 4 offence. However, I see no harm in allowing these guidelines to cover offences under sections 5 to 7 for assistance on the rare occasions they are sentenced.

Question 1: do you agree that the revised guideline should cover offences under sections 4 to 8?

3.13 There has been no change to the maximum penalty for section 9 offences which remains at six months. I therefore propose that this remain the subject of its own guideline – i.e. the current animal cruelty guideline with only those amendments (if any) emerging from this project which read across from the guideline for those offences with a five year maximum. As a starting point I am not proposing to change sentencing levels.

Question 2: do you agree that the existing animal cruelty guideline should be retained, largely unamended, for section 9 offences?

3.14 My proposition for an overall approach to the amendments is that we limit ourselves to the changes required to support the increase in maximum penalty, particularly given the content of the guideline was last consulted on and revised relatively recently.

3.15 The sentencing statistics are set out in the tables at **Annex A**, with a particular focus on sentences imposed under sections 4, 8 and 9. In a typical year before the increase in penalty, a third of section 4 offenders would receive a custodial sentence (roughly 10% immediate, and 25% suspended). Over a third (and sometimes as many as four in ten) would receive a community order and just over a fifth would receive a fine. Of those that received immediate custody in 2020, it appears that over three quarters received sentences, pre-guilty plea, of over four months. This suggests that sentencing practice tends towards the upper end of the table.

3.16 In opening the second reading debate of the Animal Welfare (Sentencing) Bill, the Member who introduced the Bill, Chris Loder MP, set out its intention:

“It is a simple, yet vital measure that will ensure perpetrators who harm an animal by, for example, causing unnecessary suffering, mutilation or poisoning, face the full force of the law. That includes cases of systematic cruelty, such as the deliberate, calculating and callous behaviour of ruthless gangs who use dog fighting to fuel organised crime. The Bill will mean that the courts will have sentences at their disposal commensurate with the most serious cases, so that the punishment fits the crime. This will send a clear signal.”

3.17 The Government’s expectation is not that significant numbers of offenders will now receive lengthy custodial sentences, or indeed that more will receive custody who did not before. The Explanatory Notes say this:

“The increase in maximum penalties will not result in an increase in the number of offenders being sent to prison, but only in the potential length of time that might be served by the most serious offenders. The Government considers that this may lead to some marginal extra costs to the criminal justice system, but this is unlikely to be more than £500,000 per annum.”

3.18 This was confirmed by the Minister, Victoria Prentis, in closing for the Government at second reading. For the purposes of assessing the impact on the justice system, Defra assumed that the average custodial sentence length for these offences would increase from 3.6 months to 5.6 months, and that 25 offenders per year would be dealt with in the Crown Court (which is presumably a proxy for the department’s estimate of the numbers that could not be dealt with sufficiently before the law was amended; the RSPCA have suggested informally that they would expect the number to be higher than this but no more than 100).

3.19 The RSPCA have shared with us a sample of cases which were sentenced at or near the previous maximum of six months, including some where the sentencer expressed a wish to go higher if this was possible. These, alongside examples from the passage of the Bill, are included at **Annex B**. Again, these case studies can be said to represent the view of the RSPCA, the Government and MPs and Peers of the sorts of cases which should now be receiving somewhere between six months and five years.

3.20 The increase from a maximum of six months to five years is clearly significant, and there are various possibilities in how we approach a revision to the guideline. However, the content of the existing guideline was revised in 2017 following consultation and (subject to a few points of detail, including some raised in Parliament related to filming animal cruelty) there is no suggestion that it is difficult to use or causing problems in practice.

3.21 My proposal therefore is not to re-open substantially the various step one and step two factors, but to focus on considering what sorts of behaviour merit higher sentences in

line with the new maximum penalty (whilst noting that may require some consequential amendments to the harm and culpability factors).

3.22 At one extreme, we could simply inflate starting points and ranges across the sentencing table. However, based on the statements in Parliament and discussions with Defra and the RSPCA, the consensus view appears to be that sentences above the previous six month limit should be for those offences involving particularly sadistic behaviour, and/or the involvement of organised criminality.

3.23 We can consider the detail at November's meeting, but it would be helpful to have an early steer on the general appetite to provide for sentences above the six months point. It may be instructive to compare the guidelines for child cruelty offences which have a maximum penalty of 10 years (or 14 years for causing or allowing a child to die). The actual bodily harm guideline may also be a useful comparator, especially considering this offence also has a maximum of five years' custody. The step one factors and sentencing tables for these offences are at **Annex C**.

3.24 Given the sorts of sentencing levels in these comparator guidelines, I provisionally propose a modest uplift to most of the sentencing categories in the animal cruelty guideline (and indeed there may be a case for leaving low culpability levels as they are), whilst providing for the most serious offences (however defined) to occupy the space between six months and five years. Reading across to the child cruelty and ABH guidelines, it may be that the starting point for this highest category is relatively low compared to the maximum, with headroom built in for the worst cases (for example those involving a campaign of particularly sadistic cruelty).

3.25 It is obviously open for discussion, but if we did choose to retain the two harm category structure, with death/serious injury/high levels of suffering indicating raised harm, it appears to me that it would fall to culpability to distinguish the worst sorts of offenders – for example, their role in the offending, whether there was a commercial aspect to the cruelty, and the extent to which the behaviour was gratuitous and/or sadistic. This reflects the sorts of behaviour singled out in Parliament and in discussions with Defra and the RSPCA as being deserving of custodial sentences above six months. That may mean we look at whether two culpability levels are sufficient, or whether we need to add a third.

Question 3: do you agree that we should largely limit the scope of consultation to looking at sentencing levels and other changes necessary to reflect the new maximum?

4 EQUALITIES

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

4.2 Given the lack of data, we have no evidence or suggestion that there are disproportionate outcomes in terms of age, race or sex. We will seek views on this point during consultation, but it is something that we can consider if Council members believe there may be particular avenues to explore.

Question 4: are there any equalities issues in relation to animal cruelty offences that the Council would like us to consider as part of the project?

5 IMPACT AND RISKS

5.1 We will prepare a draft resource assessment for consideration at November's meeting alongside a draft revised guideline. Given what proportion of these offenders receive custodial sentences now, opening up the prospect of up to five years in prison could result in the need for many more prison places, although there is a high likelihood these sentences could remain suspended. There is the potential for a significant proportion of offenders who currently receive community orders to be subject to custodial sentences depending on how we amend the sentencing levels. There will be an increase in Crown Court workload as a result of the change of maximum penalty, which will be affected by how we set sentencing levels in the guideline.

5.2 The topic is obviously emotive. A consultation risks opening up other issues surrounding animals, such as pet theft, rules around import and export, and animal sentence in general. Despite the comments made in Parliament, there may be unrealistic expectations about the sorts of sentences that will be imposed in practice for these sorts of offences. Questions may also be raised about sentencing levels in these cases compared to offences relating to, for example, inanimate property and drug offences.

5.3 Most prosecutions in England and Wales are made by the RSPCA and their input will be important in revising the guideline. However, I do not propose giving them a formal role as experts advising the Council, given the need to strike a balance between fair and

proportionate sentences for these offences, and sentence levels for other offences such as child cruelty and assault. However, their views and those of other animal charities will be sought as part of the consultation.

Question 5: do you agree not to involve the RSPCA formally for expertise, but to seek their input as having first hand experience of prosecuting animal cruelty cases?

Blank page

Sentencing Council meeting:
Paper number:

24 September 2021
SC(21)SEP06 – Motoring offences
causing death or injury

Lead Council member:
Lead official:

Rebecca Crane
Lisa Frost
0207 071 5784

1 ISSUE

1.1 This meeting will consider step one and two factors for the offences of Dangerous driving; Causing serious injury by dangerous driving and; Causing death by dangerous driving.

2 RECOMMENDATION

2.1 The Council is asked to:

- Consider and agree proposed culpability and harm factors and their placement and;
- Consider and agree aggravating and mitigating factors.

3 CONSIDERATION

3.1 Dangerous driving is provided for by s.2 Road Traffic Act 1988 and provides that a person is to be regarded as driving dangerously if the standard of driving falls *far below* what would be expected of a competent and careful driver and it would be obvious to a competent and careful driver that driving in that way would be dangerous. The same driving standard definition is relevant to Causing serious injury by dangerous driving (s1A, Road Traffic Act 1988) and Causing death by dangerous driving (s1 Road Traffic Act 1988). Driving when it would be obvious to a careful or competent driver that the current state or load of a vehicle would be dangerous also constitutes an offence. The statutory definition of dangerous driving is as follows:

Section 2A. Meaning of dangerous driving.

(1) For the purposes of [sections 1, 1A and 2] above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)—

(a) the way he drives falls far below what would be expected of a competent and careful driver, and

(b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

(2) A person is also to be regarded as driving dangerously for the purposes of sections 1 [1A] and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.

(3) In subsections (1) and (2) above “*dangerous*” refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful 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) In determining for the purposes of subsection (2) above the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried.

3.2 The respective statutory maximum sentences for these offences are as follows:

<u>Offence</u>	<u>Maximum sentence</u>
Dangerous driving	2 years
Causing serious injury by dangerous driving	5 years
Causing death by dangerous driving	Currently 14 years (PCSC Bill proposes increase to life)

Existing guidelines

3.3 A summary of existing guidance for dangerous driving offences is as follows:

- Dangerous driving offences causing death: SGC Causing Death by Driving guideline (published in 2008.) **Annex A**
- Dangerous driving: Existing guidance in the MCSG but none for the Crown Court.
- Dangerous driving causing serious injury: No existing guidance

3.4 While no guidance currently exists for dangerous driving causing serious injury, the Court of Appeal¹ has confirmed that in the absence of a specific sentencing guideline for this offence reference should be made to the sentencing guideline, Causing Death by Driving, in assessing the offence seriousness. Transcripts confirm that this approach is also followed for dangerous driving offences in the Crown Court.

3.5 The SGC death by dangerous guideline states that the factor that primarily determines the starting point of the sentence is the culpability of the offender, and that the central feature should be an evaluation of the quality of the driving involved and the degree of danger foreseeably created. The guidelines draw a distinction between those factors of an

¹ *Dewdney [2014] EWCA Crim 1722, [2015] 1 Cr App R (S) 5 (36); Shaw [2018] EWCA Crim 2932 and; Burton [2019] EWCA Crim 2396*

offence that are intrinsic to the quality of driving (referred to as “determinants of seriousness”) and other aggravating factors.

The guideline grades the seriousness of offences as those which involve a flagrant disregard for other road users; those that create a substantial risk and; offences involving a significant risk. There is a complexity to the SGC guideline in that it provides for the level to be determined according to the standard of driving as described, and then additional consideration given to the presence of any determinates of seriousness which provide for sentence adjustment, in addition to any aggravating factors.

The determinates of seriousness are as follows:

- **Awareness of risk**
 - (a) a prolonged, persistent and deliberate course of very bad driving
- **Effect of alcohol or drugs**
 - (b) consumption of alcohol above the legal limit
 - (c) consumption of alcohol at or below the legal limit where this impaired the offender’s ability to drive
 - (d) failure to supply a specimen for analysis
 - (e) consumption of illegal drugs, where this impaired the offender’s ability to drive
 - (f) consumption of legal drugs or medication where this impaired the offender’s ability to drive (including legal medication known to cause drowsiness) where the driver knew, or should have known, about the likelihood of impairment
- **Inappropriate speed of vehicle**
 - (g) greatly excessive speed; racing; competitive driving against another vehicle
 - (h) driving above the speed limit
 - (i) driving at a speed that is inappropriate for the prevailing road or weather conditions
 - (j) driving a PSV, HGV or other goods vehicle at a speed that is inappropriate either because of the nature of the vehicle or its load, especially when carrying passengers
- **Seriously culpable behaviour of offender**
 - (k) aggressive driving (such as driving much too close to the vehicle in front, persistent inappropriate attempts to overtake, or cutting in after overtaking)
 - (l) driving while using a hand-held mobile phone
 - (m) driving whilst the driver’s attention is avoidably distracted, for example by reading or adjusting the controls of electronic equipment such as a radio, hands-free mobile phone or satellite navigation equipment
 - (n) driving when knowingly suffering from a medical or physical condition that significantly impairs the offender’s driving skills, including failure to take prescribed medication
 - (o) driving when knowingly deprived of adequate sleep or rest, especially where commercial concerns had a bearing on the commission of the offence
 - (p) driving a poorly maintained or dangerously loaded vehicle, especially where commercial concerns had a bearing on the commission of the offence
- **Victim**
 - (q) failing to have proper regard to vulnerable road users

3.6 Levels of seriousness include examples of driving at each level. The guideline states that the presence of aggravating factors or combinations of determinants of seriousness will increase the sentence starting point, and a high number of these may justify a sentence starting point in the next level:

Levels of seriousness

The 3 levels are distinguished by factors related predominantly to the standard of driving; the general description of the degree of risk is complemented by examples of the type of bad driving arising. The presence of aggravating factors or combinations of a small number of determinants of seriousness will increase the starting point within the range. Where there is a larger group of determinants of seriousness and/or aggravating factors, this may justify moving the starting point to the next level.

Level 1 - The most serious offences encompassing driving that involved a 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. Such offences are likely to be characterised by:

- A prolonged, persistent and deliberate course of very bad driving **AND/OR**
- Consumption of substantial amounts of alcohol or drugs leading to gross impairment **AND/OR**
- A group of determinants of seriousness which in isolation or smaller number would place the offence in level 2

Level 1 is that for which the increase in maximum penalty was aimed primarily. Where an offence involves both of the determinants of seriousness identified, particularly if accompanied by aggravating factors such as multiple deaths or injuries, or a very bad driving record, this may move an offence towards the top of the sentencing range.

Level 2 - This is driving that created a *substantial* risk of danger and is likely to be characterised by:

- Greatly excessive speed, racing or competitive driving against another driver **OR**
- Gross avoidable distraction such as reading or composing text messages over a period of time **OR**
- Driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs, failing to take prescribed medication or as a result of a known medical condition **OR**
- A group of determinants of seriousness which in isolation or smaller number would place the offence in level 3

Level 3 - This is driving that created a *significant* risk of danger and is likely to be characterised by:

- Driving above the speed limit/at a speed that is inappropriate for the prevailing conditions **OR**
- Driving when knowingly deprived of adequate sleep or rest or knowing that the vehicle has a dangerous defect or is poorly maintained or is dangerously loaded **OR**
- A brief but obvious danger arising from a seriously dangerous manoeuvre **OR**
- Driving whilst avoidably distracted **OR**
- Failing to have proper regard to vulnerable road users

The starting point and range overlap with Level 2 is to allow the breadth of discretion necessary to accommodate circumstances where there are significant aggravating factors.

3.7 Starting points and ranges for each level are as follows:

Nature of offence	Starting point	Sentencing range
<p>Level 1</p> <p>The most serious offences encompassing driving that involved a 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>	<p>8 years custody</p>	<p>7 - 14 years custody</p>
<p>Level 2</p> <p>Driving that created a <i>substantial</i> risk of danger</p>	<p>5 years custody</p>	<p>4 - 7 years custody</p>
<p>Level 3</p> <p>Driving that created a <i>significant</i> risk of danger</p> <p><i>[Where the driving is markedly less culpable than for this level, reference should be made to the starting point and range for the most serious level of causing death by careless driving]</i></p>	<p>3 years custody</p>	<p>2 - 5 years custody</p>

This has been slightly adapted in the current website version of the guideline, although the factors remain the same: [Causing death by dangerous driving – Sentencing \(sentencingcouncil.org.uk\)](http://sentencingcouncil.org.uk)

3.8 The MCSG Dangerous driving guideline includes a different model and factors. It combines the culpability and harm assessment and includes 3 potential categories more likely to be relevant to cases seen in the magistrates' court, with factors indicating higher or lower culpability and greater harm providing for an uplift within the specified range: [Dangerous driving – Sentencing \(sentencingcouncil.org.uk\)](http://sentencingcouncil.org.uk)

Proposed factors

3.9 The Council has agreed it will develop guidelines for three dangerous driving offences: offences involving death; offences involving serious injury and; dangerous driving. As all offences involve the same standard of driving, it is proposed that the culpability assessment for each guideline includes the same factors. Harm assessments will obviously differ.

3.10 Proposed culpability factors have been developed and placed with reference to transcripts and existing factors which sentencers are familiar with. The factors reflect the level of risk with reference to specific features of dangerous driving and incorporate existing determinates of seriousness where these are relevant to culpability. In some cases it is proposed that categorisations differ to their placement in existing guidance, with many existing level 3 examples proposed as medium culpability factors. It is not intended that this inflate sentences as the impact of their position will be considered in developing sentences, but it is thought - and transcript analysis indicates - some existing death by dangerous level 3 examples involve features which distinguish them from lesser culpability factors. The table includes italicised detail of corresponding factors (with some rephrasing) in existing guidance for reference. The Council is asked to consider factors, and if they agree with their categorisation.

3.11 Proposed culpability factors are as follows:

CULPABILITY FACTORS	
High	<ul style="list-style-type: none">• Consumption of substantial amounts of alcohol or drugs leading to gross impairment (<i>existing level 1 example SGC; high culpability factor DD MCSG</i>)• Prolonged, persistent and deliberate course of bad driving (<i>existing level 1 seriousness factor in SGC death by dangerous and DD MCSG</i>)• Greatly excessive speed (<i>listed as determinate of seriousness in SGC gl and excessive speed - without qualification as excessive - in level 1 and 2 DD MCSG when combined with other factors</i>)• Racing or competitive driving against another vehicle (<i>listed as determinate of seriousness in SGC gl and high culpability factor in DD MCSG</i>)• Aggressive driving (such as driving much too close to the vehicle in front, persistent inappropriate attempts to overtake, or cutting in after overtaking) (<i>existing DD MCSG high culpability factor and determinate of seriousness factor in SGC</i>)• Lack of attention to driving for a substantial period of time (<i>gross avoidable distraction such as reading or composing text messages over a period of time level 2 of SGC; Carrying out other tasks while driving high culpability factor MCSG</i>)
Medium	<ul style="list-style-type: none">• Brief but obviously seriously dangerous manoeuvre (<i>level 3 of SGC gl</i>)

	<ul style="list-style-type: none"> • Driving knowing that the vehicle has a dangerous defect or is poorly maintained or is dangerously loaded (<i>level 3 of SGC gl; high culpability factor in MCSG DD</i>) • Avoidable distraction (such as using a mobile telephone, smoking or operating non-essential vehicle accessories such as radio or satellite navigation) (<i>gross avoidable distraction such as reading or composing text messages over a period of time level 2 of SGC; avoidable distractions level 3 of SGC; Carrying out other tasks while driving high culpability factor MCSG</i>) • Driving when knowingly suffering from a medical condition which significantly impaired the offender's driving skills (<i>MCSG DD</i>) • Driving at a speed that is inappropriate for the prevailing road or weather conditions (although is not greatly excessive) (<i>level 3 SGC</i>) • Driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs (<i>level 2 SGC</i>) • Disregarding advice relating to driving when taking medication or as a result of a known medical condition (<i>failing to take prescribed medication or as a result of a known medical condition level 2 SGC</i>) • Driving when knowingly deprived of adequate sleep or rest (<i>level 3 of existing SGC but tiredness high culpability factor in MCSG DD</i>)
Lesser	<ul style="list-style-type: none"> • Momentary lapse of concentration • Genuine mistake (<i>lower culpability MCSG DD</i>) • Genuine emergency (<i>lower culpability MCSG DD</i>) • Offence due to inexperience rather than irresponsibility where qualified to drive (<i>factor without qualification element in lower culpability MCSG DD, but would not want this to apply to an unqualified driver who should not have been driving</i>) • Speed not excessive (<i>lower culpability MCSG DD</i>)

3.12 As already noted, a number of the factors are replicated across categories and distinguished by thresholds. Another option is to replicate the approach in the SGC guideline of the level of offence being assessed with reference to the risk created, with factors provided as examples in each category.

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

3.13 A factor included in the existing guidelines but not proposed is 'Failing to have proper regard for vulnerable road users' This factor is listed as a determinate of seriousness in the SGC guideline and given as an example of a level 3 offence. It is thought that this would be very broad in application as a culpability factor and apply to a high proportion of offences. Failing to have regard to vulnerable road users could be considered to be inherent in the offence as any victim, or potential victim, of a dangerous driver could be considered vulnerable to the risk the offender presents. It is therefore not proposed it be included as a culpability factor.

3.14 Level 2 examples provide for 'a group of determinants of seriousness which in isolation or smaller number would place the offence in level 3'. It is not proposed this be included as does not work with the model the Council uses for guidelines. However, given the potential for factors in different categories to be relevant, it is proposed the culpability assessment includes the following explanatory wording:

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.

As well as this providing for cases involving multiple factors transcript analysis identified a number of cases where factors in different categories were present, so guidance to weigh factors would likely be useful to sentencers.

Question 2: Does the Council agree with the proposed wording to accompany the culpability assessment?

Aggravating factors

3.15 The existing MCSG and SGC guidelines include the following factors:

- Previous convictions for motoring offences, particularly offences that involve bad driving or the consumption of excessive alcohol or drugs before driving
- More than one person killed as a result of the offence
- Serious injury to one or more victims, in addition to the death(s)
- Disregard of warnings
- Other offences committed at the same time, such as driving other than in accordance with the terms of a valid licence; driving while disqualified; driving without insurance; taking a vehicle without consent; driving a stolen vehicle
- The offender's irresponsible behaviour such as failing to stop, falsely claiming that one of the victims was responsible for the collision, or trying to throw the victim off the car by swerving in order to escape (*limit examples to the first two which are more common?*)
- Driving off in an attempt to avoid detection or apprehension (*proposed rephrase to 'offence committed while attempting to avoid detection or apprehension' which would capture police pursuits*)

3.16 It may be considered that factors relating to multiple victims would not be required as each death or injury would result in a separate charge. However, for offences involving death concurrent sentences are imposed so it may be appropriate to provide for multiple victims to aggravate the offence and guidance included at step two as to how the sentence should be adjusted. This can be considered further in developing sentences.

3.17 It is proposed that the other factors (subject to minor revision) be retained and some additional aggravating factors be considered. As well as standard aggravating factors 'Failure to comply with current court orders' and 'Offence committed on licence or post sentence supervision', it is proposed that the following factors should aggravate the offence:

- Driving for commercial purposes
- Driving LGV, HGV, PSV
- Failure to provide, or steps taken to avoid providing, a breath, urine or blood specimen for analysis

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

Mitigating factors

3.18 Mitigating factors included in the existing guidelines are as follows:

- Alcohol or drugs consumed unwittingly
- Offender was seriously injured in the collision
- The victim was a close friend or relative
- Actions of the victim or a third party contributed significantly to the likelihood of a collision occurring and/or death resulting (*latter part of factor in death by dangerous only*)

The Council is asked to consider if these should be retained, particularly whether injuries sustained by the offender should mitigate the offence. If the offender suffered a permanent disability that could be captured by the standard mitigating factor relating to long term medical conditions. Other existing lesser culpability factors are 'the offender's lack of driving experience contributed to the commission of the offence' and 'the driving was in response to a proven and genuine emergency falling short of a defence.' Variations of these factors have been proposed as lesser culpability factors, so if these are agreed it not proposed they are retained as mitigating factors.

3.19 The following mitigating factors are also proposed, most of which are standard mitigating factors:

- No previous convictions or no relevant/recent convictions
- Impeccable driving record

- 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 4: Does the Council agree with the proposed mitigating factors?

Harm factors

3.20 Harm factors across the three dangerous driving guidelines will vary depending on the consequences of the offence. For dangerous driving no or only moderate injury may be caused, while the other offences involve serious injury or death.

Death by dangerous driving

3.21 For offences involving death it is proposed that, as for other guidelines involving death such as manslaughter, only one category of harm is included. Multiple victims would likely be charged as separate offences and consideration will be given when developing sentences to how such circumstances should be reflected at step two. It is proposed the wording included in the Manslaughter guidelines is adopted, which is as follows:

Harm

For all cases the harm caused will inevitably be of the utmost seriousness. The loss of life is taken into account in the sentencing levels at step two.

Question 5: Does the Council agree with the proposed approach to reflecting harm in the death by dangerous driving guideline?

Dangerous driving causing serious injury

3.22 The legislation (relevant to England and Wales) defines serious injury as physical harm amounting to grievous bodily harm:

Section 1A RTA 1988

(1) A person who causes serious injury to another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.

(2) In this section “*serious injury*” means—

(a) in England and Wales, physical harm which amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861, and

(b) in Scotland, severe physical injury.

3.23 Transcripts confirmed that injuries in these offences are often life changing, with many victims left with permanent disabilities. Some examples of injuries detailed in transcripts are as follows:

- traumatic brain injury, a subarachnoid haemorrhage and extensive bruising to head; multiple fractures to cervical spine; a fracture to left clavicle and rib fracture and complex fractures to left leg which required surgery. In different hospitals for 10 weeks. The pain and suffering endured was very considerable indeed, and victim was terrified that the injury and the surgery to her spine would have left her paralysed. Life changing injuries and lasting impact on day to day activities.
- fractures to right leg and eight days in hospital and a 9 inch pin fitted. V left fearful of walking dog and difficulty sleeping and suffered panic attacks and flashbacks, walking remains painful.
- excruciating pain and injuries which resulted in a below the knee amputation of leg, as well as significant injury and loss of use of his right arm, leaving him unable to work.
- severely fractured leg and due to complications needed amputating; devastated his life.
- fractured sternum, four toe fractures and injury to left knee. Ongoing serious injuries and ended in early retirement, but at lower end of serious injury scale.
- left a quadriplegic, quality of life devastated; he feels isolated, lonely and is facing a bleak isolated future.
- broken left arm, a dislocated and shattered right hip, a fractured pelvis, two broken ribs on the left side of his body, soft tissue injuries, a large bruise on his right forearm, a dislocated large toe and cuts to his left and right shins and left forearm.
- multiple skull fractures, a bleed to his brain, a perforated eardrum, lacerations to his bottom and above his knee, multiple fractures to his pelvis. Because of his head injuries he was in a coma. Life changing effect on victim and family.

3.24 There are two options to consider for harm factors. Given the statutory maximum sentence is only 5 years it may be thought that only two categories of harm should be included, which provide for a distinction between life changing and other serious injuries. This would provide for wider sentencing ranges for each category of offence. It is thought that the GBH highest harm factor and attempted murder category 2 harm factor may be appropriate. The following harm factors are proposed if this option is preferred:

Category 1	<p>Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment</p> <p>Offence results in a permanent, irreversible injury or psychological condition which has a substantial and long term effect on the victim's ability to carry out normal day to day activities or on their ability to work</p>
Category 2	Serious physical or psychological harm not in category 1

3.25 Alternatively, if the Council considers that three categories of harm should be included the GBH harm factors would be appropriate given that the legislation specifies this as the level of harm involved:

Category 1	<p>Particularly grave and/or life-threatening injury caused</p> <p>Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment</p> <p>Offence results in a permanent, irreversible injury or condition which has a substantial and long term effect on the victim's ability to carry out normal day to day activities or on their ability to work</p>
Category 2	<p>Grave but non life-threatening injury caused</p> <p>Offence results in a permanent, irreversible injury or condition but no substantial and long term effect on victim's ability to carry out normal day to day activities or on their ability to work</p>
Category 3	All other cases

3.26 A potential disadvantage of the latter option is that in developing sentences there may be need to consider relativity with GBH s20 sentences as the offences share the same statutory maximum sentence of 5 years, and there is some similarity between the offences in that GBH s20 offences involve recklessness. There would also need to be relativity between sentences for dangerous driving where non serious injuries may be caused. A decision on the appropriate model could be reserved until the point at which sentences are considered.

Question 6: Does the Council prefer the two or three category harm model, or does it wish to reserve its decision subject to consideration of sentences?

Dangerous driving

3.27 The MCSG Dangerous driving guideline combines the assessment of culpability and harm, and provides for cases involving little or no damage or risk of personal injury, or bad driving involving deliberate disregard for the safety of others. Following this initial assessment, factors indicating greater harm provide for an increase to the sentence starting point. Those factors are 'Injury to others' and 'Damage to other vehicles or property'.

3.28 Transcript analysis indicates that where injury is caused to persons this is usually limited, and damage to other vehicles is a more common consequence of the offence. However, many of transcripts analysed highlighted that it is often sheer luck that prevents serious injuries and deaths occurring. Offences involving significant risks of harm, such as prolonged and highly dangerous driving in busy pedestrianised areas or narrowly avoiding collision with other drivers, receive higher sentences.

3.29 In order to ensure sentences do not decrease under a new guideline, consideration has been given to whether risk should be a consideration in assessing harm. While actual harm to others or property should be in the highest category, including risk of harm where none actually occurred may appear to be disproportionate. The nature of driving will be reflected in the culpability assessment, and there may be views that harm risked should not be aligned with actual harm caused. However, if only actual harm is included in the highest category this may not achieve a sentence which reflects the overall seriousness of the offence.

3.30 Some Crown Court sentencers do refer to the levels of seriousness in the death by dangerous guideline in assessing seriousness of dangerous driving offences, and an important aspect of the assessment is the level of risk the offence presented. However, there could be potential that assessment of risk in isolation (and not with reference to examples as in the existing guideline) could result in a high proportion of offences being assessed at the highest level of harm.

3.31 Consideration has been given to other offences where the risk of harm can also be high, and comparisons can be drawn with arson with intent to endanger life or reckless as to whether life is endangered. The harm factors in that guideline do provide for offences involving a high risk of very serious physical and/or psychological harm to be assessed at the same level of actual very serious physical and/or psychological harm. The harm factors for that offence are as follows:

Harm

Category 1

- Very serious physical and/or psychological harm caused
 - High risk of very serious physical and/or psychological harm
 - Serious consequential economic or social impact of offence caused
 - Very high value of damage caused
-

Category 2

- Significant physical and/or psychological harm caused
 - Significant risk of serious physical and/or psychological harm
 - Significant value of damage caused
 - All other harm that falls between categories 1 and 3
-

Category 3

- No or minimal physical and/or psychological harm caused
- Low risk of serious physical and/or psychological harm
- Low value of damage caused

3.32 It is proposed that the same approach be adopted for dangerous driving, to ensure a proportionate assessment of seriousness where injury to others is only narrowly avoided by luck or evasive action of potential victims. It is proposed that the factor be worded to ensure the risk is assessed with reference to the circumstances of the offence, to avoid a subjective assessment of the risk. Proposed harm factors are as follows:

Category 1	Offence results in injury to others Circumstances of offence created a high risk of very serious harm to others Damage caused to vehicles or property
Category 2	All other cases

Question 7: Does the Council agree with the proposed harm factors for dangerous driving?

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 draft sentences for death by dangerous driving offences can be finalised.

Blank page

Sentencing Council meeting:
Paper number:

24 September 2021
**SC(21)SEP07- Perverting the Course of
Justice and Witness intimidation**

Lead Council member:
Lead official:

Juliet May
Mandy Banks
0207 071 5785

1 ISSUE

1.1 This is the second meeting to discuss the guidelines and will focus on draft perverting the course of justice (PTCJ) and witness intimidation guidelines. Future meetings will look at a draft assisting an offender guideline.

2 RECOMMENDATION

2.1 At today's meeting the Council are asked:

- To consider and agree the draft PTCJ guideline
- To consider and agree the draft witness intimidation guideline
- To note the volumes of Serious Crime Act offences and agree that they should not be included within the project.

3 CONSIDERATION

Perverting the Course of Justice

3.1 A draft guideline has been developed and is attached at **Annex A**. The Council may recall from the last meeting that there isn't a guideline currently for this offence. It is a common law offence, triable only on indictment, with a maximum penalty of life imprisonment. In 2019, around 580 offenders were sentenced for this offence, with the majority receiving a custodial sentence (51 per cent received immediate custody and 43 per cent suspended). The ACSL was around 14 months. The draft guideline has been developed by examining transcripts of sentencing remarks and considering case law.

3.2 The elements of the offence are:

- doing an act or series of acts (the offence cannot be committed by failing to do something);
- which has or have a tendency to pervert; and
- which is or are intended to pervert;
- the course of public justice.

3.3 The act does not have to give rise to some other independent criminal wrongdoing nor be concerned with a particular trial or investigation. Acts tending and intended to obstruct, divert or disrupt criminal proceedings or police investigations generally may suffice. PTCJ covers a wide range of conduct – examples include: avoiding prosecution, concealing evidence, helping an offender, offences connected to domestic abuse, and interfering with Jurors/witnesses where there can be a crossover with witness intimidation.

3.4 A sentence for doing an act tending to pervert the course of justice should normally be **consecutive** to any sentence for the substantive offence in relation to which the act was committed: Att.-Gen.'s Reference (No.1 of 1990) 12 Cr. App. R. (S.).

3.5 *Abdulwahab* [2018] EWCA Crim 1399 reviewed sentencing authorities and noted:

1. Conduct which tends and is intended to pervert the course of justice strikes at the heart of the administration of justice and almost invariably calls for a custodial sentence. Deterrence is an important aim of sentencing in such cases but the necessary deterrence may sometimes be achieved by the imposition of an immediate custodial sentence without necessarily requiring a sentence of great length.
2. The appropriate sentence depends on the particular circumstances of the specific case. The circumstances vary across a very wide range.
3. Relevant factors include:
 - a. the seriousness of the underlying offence,
 - b. the nature of the deceptive conduct,
 - c. the period of time over which it was continued,
 - d. whether it cast suspicion upon or led to the arrest of an innocent person, and
 - e. the success or otherwise of the attempt to pervert the course of justice.

These factors are frequently referenced in other cases.

3.6 The draft guideline is mainly based on the factors outlined in *Abdulwahab*, some reflected within the assessment of harm and some within culpability. Starting with high culpability on page two, the first three proposed factors reflect the factors outlined above:

- Conduct over a sustained period of time
- Extremely sophisticated nature of conduct
- Underlying offence extremely serious

3.7 The last factor proposed in high culpability, '*offence committed in the context of other serious criminal activity*' has been included to reflect offences that relate to other serious

offences- for example organised crime groups who commit the offence in order to protect large scale criminal enterprises, and/or evade detection or halt trials.

3.8 Careful thought has been to the wording of the factors in medium culpability, as we know that sentencers value specific factors in this category, rather than just a catch all of *'offending which falls between higher and lower culpability.'* However, it can be quite difficult to articulate exactly the kinds of conduct that fall into this category, it is generally much easier to define higher and lower culpability factors. And it has proved difficult to find the right wording for medium factors for this offence. The wording of factors may not yet be exactly right, but hopefully they are a starting point for discussion at the meeting.

The proposed factors are: *'conduct of more than a brief duration'*, *'conduct was somewhat sophisticated,'* and *'underlying offence reasonably serious'*. Also there is:

- Other cases that fall between categories A and C because:
 - 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

3.9 In lower culpability there is: *'conduct was of a brief duration'*, *'unsophisticated nature of conduct'* and *'underlying offence was not serious'*. Also proposed is: *'Involved through coercion, intimidation or exploitation'* as offenders are sometimes pressured into committing the offence by others. *'Offender's responsibility substantially reduced by mental disorder or learning disability'* is included as it is a more relevant consideration than the similar factor sometimes used of: *'mental disorder or learning disability, where linked to the commission of the offence'*.

Question 1: Does the Council agree with the proposed culpability factors? Are there any that should be added or amended?

3.10 Turning now to harm, the first two category one factors reflect the factor mentioned in *Abdulwahab*, whether suspicion was cast upon or led to the arrest of an innocent person. The harm has been separated out firstly into the more physical harm caused, such as time spent in custody/arrest, and then the more psychological, the distress caused, for example loss of reputation. There is also a factor that refers to the high level of costs that can be caused to the justice system by serious examples of this type of offence, and *'conduct succeeded in perverting the course of justice'*, another one of the factors referred to in *Abdulwahab*.

3.11 Category two has a proposed factor of '*suspicion cast upon an innocent person as a result of the offence*' suspicion being not as serious as the harm caused by actual arrest or time spent in custody as a result of the offence. There is also a proposed factor of '*some costs incurred as a result of the offence*', and '*conduct partially successful in perverting the course of justice*'. 'In category three there is: '*conduct did not succeed in perverting the course of justice*' and '*limited effects of the offence on victim/costs incurred*' which it is proposed will cover the other less serious harm caused by the offence.

Question 2: Does the Council agree with the proposed harm factors? Are there any that should be added or amended?

3.12 The proposed sentence ranges are just indicative at this stage-they will be finalised once the factors have been agreed, so the Council are not asked to consider these today. The aggravating and mitigating factors proposed are standard ones that are used in guidelines, it has not been clear from reading cases that there needs to be any offence specific ones included, but of course the Council may wish to suggest some.

Question 3: Are there any offence specific aggravating or mitigating factors that the Council thinks should be included?

Question 4: Does the Council feel that the draft adequately captures the types of offending which can be varied for this serious offence?

Witness Intimidation

3.13 The draft witness intimidation guideline is at **Annex B**. This draft incorporates both s.51 and s.52 offences (as set out below), as agreed at the last Council meeting. Both offences are triable either way, with a maximum penalty of five years imprisonment. In 2019, around 210 offenders were sentenced for the s.51(1) offence, with the majority receiving a custodial sentence (60 per cent received immediate custody and 31 per cent suspended). The ACSL was around 10 months. In 2019 for the s.51(2) offence only around 20 offenders were sentenced.

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

3.14 The draft is based on the existing MCSG guideline for the [s.51\(1\) offence](#), suitably adapted for use in all courts. The more serious instances of offending, '*threats of violence to*

witnesses and/or their families;/deliberately seeking out witnesses' is in high culpability, medium culpability contains the factor: 'Non-violent conduct amounting to a threat (for example staring at, approaching or following witnesses)' with 'offence limited in scope and duration' in low culpability. The last factor rewords the factor in the MCSG guideline which was 'sudden outburst in chance encounter'. It is designed to capture brief, not planned or sophisticated incidents of offending. Other factors that the MCSG guideline had as indicating higher culpability: 'breach of bail conditions' and 'offender involves others in the conduct' have been placed in higher culpability. Also proposed are 'sustained period of conduct' as it can make the offending more serious if the conduct is prolonged, compared to a one-off incident which would be in lesser culpability.

3.15 The higher culpability factor proposed in the PTCJ guideline 'Offence committed in the context of other serious criminal activity' is also included here as a higher culpability factor, as witness intimidation can be seen in relation to other serious criminal activity.

3.16 Medium culpability also contains the factor 'attempts to alter or stop evidence' and:

- Other cases that fall between categories A and C because:
 - 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

In lower culpability there are two further factors in addition to the one described above:

- Involved through coercion, intimidation or exploitation
- Offender's responsibility substantially reduced by mental disorder or learning disability

These may be relevant as sometimes offenders commit the offence under duress from others, or their responsibility for the offence is reduced.

Question 5: Does the Council agree with the proposed culpability factors? Are there any others that should be added or amended?

3.17 Now turning to harm factors, category one harm has: 'Considerable detrimental impact on administration of justice' and 'contact made at or in vicinity of victim's home' these are based on factors from the MCSG that indicated greater harm. It is proposed that category one also has 'considerable distress caused to the victim'. Category two harm contains the factors: 'Some detrimental impact on administration of justice' and 'some distress caused to the victim'. Category three harm contains the factor 'limited effect of the offence.'

Question 6: Does the Council agree with the proposed harm factors? Are there any that should be added or amended?

3.18 Again the sentence ranges are indicative only at this stage, and will be finalised once the factors are settled, so the Council does not need to focus on these at the meeting.

Turning to aggravating and mitigating factors, the general aggravating and mitigating factors have been included, but it has proved difficult to think of any offence specific ones. The Council may wish to propose some.

Question 7: Are there any offence specific aggravating or mitigating factors that the Council think should be added?

Serious Crime Act offences

3.19 At the last meeting it was suggested that certain offences under the Serious Crime Act could be considered within the scope of the project. These are set out below, with the different statutory maxima involved and with the volumes of these offences for 2019 included in brackets:

Serious Crime Act 2007

s44 Intentionally encouraging or assisting an offence (around 30);

- Where the anticipated offence is murder, max sentence is life
- Otherwise the maximum sentence is that available for the full anticipated offence if it had been committed

s 45 Encouraging or assisting an offence believing it will be committed (around 10);

- Where one of the anticipated offences is murder, max sentence is life
- Otherwise the maximum sentence is that available for the full anticipated offence if it had been committed

s46 Encouraging or assisting offences believing one or more will be committed (around 10)

- Where the anticipated offence is murder, max sentence is life
- Otherwise if the one of the offences is imprisonable the maximum sentence is that available for the anticipated offence with the highest stat max
- Otherwise max is a fine

Serious Crime Act 2015

s45 Offence of participating in activities of organised crime group (12)

- Max sentence 5 years

3.20 As can be seen the volumes for these offences are very low. Contact was made with the Head of Legal Services at CPS to ask whether charges for these offences were likely to remain at around current levels or were likely to see any significant increase in the near future. The response was that there is no reason to suspect that there will be a marked increase or decrease in the use of them. They also commented that S45 of the 2015 Act can

be a difficult offence in practice and is not widely used as the substantive conduct is usually preferred. They said they would be surprised if there was a wide variation in the volumes for these offences.

3.21 Given the low volumes, the response from the CPS and the fact that these are preparatory offences which do not really fit with the rest of the guidelines being developed, it is recommended that these are not included within the scope of the project. They would also be quite complicated to develop, given the different disposals- there would need to be different sentencing tables within each guideline, which would be based on very few cases and for the volumes involved it is suggested that it is not a priority to be developed.

Question 8: Does the Council agree not to include the Serious Crime Act offences within the scope of this project?

4 EQUALITIES

4.1 Statistics showing sentencing outcomes by demographic group, (sex, age group and ethnicity of offenders) are attached at **Annex C**.

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

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

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

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

4.6 To note, figures presented here are from 2020, for which volumes were affected by the COVID-19 pandemic, however, the volume of adult offenders sentenced for intimidating a witness each year are low and in 2020 the majority of those sentenced were White males (making up 81 per cent of offenders where both sex and ethnicity was known in 2020). pandemic, however, the demographic trends seen above are consistent with those seen in 2019.

4.7 The data for assisting an offender will be included in next month's paper when we look at the draft guideline.

Question 9: Does the Council have any comments or questions around the contents of Annex C?

5 IMPACT AND RISKS

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

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

24 September 2021
SC(21)SEP08 – Firearms importation
Maura McGowan
Ruth Pope

1 ISSUE

1.1 This is the first 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 harm and culpability at this meeting and the sentence levels, step 2 factors and remaining steps at the October meeting. The definitive guideline can then be published towards the end of November to come into effect on 1 January 2022.

2 RECOMMENDATION

2.1 That the Council considers the responses to the draft guideline at **Annex A** relating to harm and culpability and agrees any changes to be made.

3 CONSIDERATION

The consultation and summary of responses

3.1 There are 14 responses to the consultation from:

- three individual magistrates
- the Legal Committee of HM Council of District Judges
- the Justices' Legal Advisers and Court Officers' Service (formerly the Justices' Clerks' Society or JCS)
- the Chief Magistrate
- the Criminal sub-committee of the Council of HM Circuit Judges (CHMCJ)
- the Sentencing Academy
- the National Crime Agency (NCA)
- the Criminal Law Solicitors' Association (CLSA)
- the Lord Chancellor
- the Justice Select Committee
- the Crown Prosecution Service (CPS)
- the Transition to Adulthood Alliance (T2A)

3.2 The NCA hosted a consultation event on 3 September to consider their response which was attended by Ruth and Maura.

3.3 The responses to the consultation are largely supportive of the draft guideline, although several respondents raise objections or suggest changes.

Culpability – type of weapon

3.4 The guideline has a two stage culpability assessment. The sentencer is first required to identify the type of weapon from the table:

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 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)

Ammunition (where not at Type 3)

- This would normally include ammunition under 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 to be lethal

- This would **normally** include:
 - a weapon prohibited under section 5(1)(b)
 - or a stun gun prohibited under section 5(1A)(a)

Very small quantity of ammunition

3.5 The NCA have concerns that the:

reference to a 'weapon that is designed to be capable of killing two or more people at the same time or in rapid succession' is ambiguous and subject to confusion and argument.

In relation to many of the firearms prohibited under subsections set out under 'Type1', there is scope for considerable disagreement and confusion as to whether they are capable of 'killing two or more people at the same time or in quick succession'.

R v Rhodes [2015] 2 Cr.App.R. 16 suggests that the words 'designed or adapted' mean no more than 'is capable of' (in which case the words 'designed to' are redundant). However, elsewhere in firearms legislation and case law, 'designed to be used' is interpreted to import the intention of the designer.

Many of the firearms that are both lawfully and unlawfully imported into the UK have been adapted in some way since their original manufacture []. There is scope for considerably more disagreement and confusion as to whether they were originally designed with that intention.

This ambiguity is likely to require forensic or other experts to seek to interpret the wording of the guidelines.

3.6 The wording 'is designed to be capable' is used in the existing [Possession of a prohibited weapon](#) guideline. That phrase was used to make it clear that even if the firearm was incomplete or not functioning if it was of a type that would have that level of lethality if fully functional it should be in that category. We are unaware of any issues with the categorisation of type of weapon in the current guideline, but have sent a short survey to some judges in the research pool to test whether the issue identified by the NCA could cause problems in practice. We will report on the findings at the meeting.

3.7 The CLSA commented on 'Weapon that is designed to be capable of killing two or more people at the same time or in rapid succession', stating:

This could easily include pump action shotguns, double barrelled shot guns all of which can be held by a license holder. It is the view of the CLSA that this term needs to be properly defined and explained. A bland definition is not adequate.

Clearly there is a huge discrepancy between smooth bore shotguns with two barrels and a machine gun or rapid-fire pistol. These are weapons which can never be lawfully held in England and Wales, and this should be noted in the consultation document.

Consequently, it is the view of the Criminal Law Solicitors' Association that the assessment of culpability must specifically identify the type of weapon.

3.8 A magistrate queried the definition of a stun gun noting that they vary in dangerousness and can be lethal – the implication being that the guideline should provide more guidance on the definition of the different types.

3.9 The Council took the view that while it would be helpful to list (by reference to the Firearms Act 1968) weapons that would normally fall under each type in the guideline, it was important not to be too prescriptive as the lethality of weapons can vary. In practice, importation offences usually relate to hand guns (s5(1)(aba)) or stun guns (5(1)(b) or 5(1A)(a)) but within these categories there could be wide variation. The guideline specifically states ‘**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.**’ The JCS suggest that this could be made even clearer by adding ‘rather than relying on purely the subsection which prohibits the weapon’ to the first sentence.

Question 1: Does the Council agree not to change the approach to categorising the type of weapon?

3.10 The CPS and the JCS point out an inconsistency with the *Possession of a prohibited weapon* guideline in the way that disguised stun guns are dealt with in the type of weapon table. Disguised weapons are prohibited under s5(1A)(a) of the Firearms Act 1968. Where the disguised weapon is a stun gun (which it will be in the vast majority of cases), the CPS will charge it as if it is an undisguised stun gun under s5(1)(b) unless there are aggravating circumstances. The CPS policy currently applies to the possession of a prohibited weapon offence and will shortly be in place for the importation offence. This is significant because s5(1A)(a) weapons are subject to a minimum five year term for the possession offence and to a maximum life sentence for the importation offence. Both guidelines seek to ensure that stun guns are categorised appropriately, but take a slightly different approach. The relevant parts of each guideline are reproduced side by side below:

Importation	Prohibited weapon
<p>Type 2 All other weapons falling between Type 1 and Type 3</p> <ul style="list-style-type: none"> • This would normally include a weapon requiring certification or prohibited under the following sections of the Firearms Act 1968: <ul style="list-style-type: none"> ○ section 1 ○ section 5(1)(af) 	<p>Type 2 All other weapons falling between Type 1 and Type 3</p> <ul style="list-style-type: none"> • This would normally include a weapon under: <ul style="list-style-type: none"> ○ section 5(1)(af) ○ section 5(1A)(a) (including disguised stun guns when charged under that section)
<p>Type 3 Weapon that is not designed to be lethal</p> <ul style="list-style-type: none"> • This would normally include: <ul style="list-style-type: none"> ○ a weapon prohibited under section 5(1)(b) ○ or a stun gun prohibited under section 5(1A)(a) 	<p>Type 3 Weapon that is not designed to be lethal</p> <ul style="list-style-type: none"> • This would normally include a weapon under section 5(1)(b)

3.11 Looking back through Council papers and the record of decisions, there does not appear to have been a discussion about taking a different approach in the importation guideline. A consistent approach seems preferable unless there is a reason to diverge.

3.12 The suggested approach would be to align with the existing guideline to read:

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 under 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 to be lethal

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

Very small quantity of ammunition

Question 2: Does the Council agree to align the wording relating to stun guns with the possession of a prohibited weapon guideline as shown above?

Culpability – ‘other’ and harm

3.13 The second stage of the culpability assessment considers factors such as role and planning:

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

3.14 The harm factors relate to the scale of the importation regardless of role:

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 organised criminal group(s)

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/or unsophisticated enterprise – indicators may include:
 - Limited number of firearms/ ammunition involved
 - Minimal/no connection to organised criminal group(s)

3.15 The JCS suggest some additional 'other' culpability factors:

We can understand why the culpability factors have been based on the transfer and manufacture guideline however often importation may often relate to single items brought into the country for personal use/possession etc. We believe that there should therefore be some mention of the factors from the possession guideline of High Culpability - "Offender intends firearm/ammunition to be used for a criminal purpose, or is reckless as to whether it would be so used", Medium Culpability – "Offender intends firearm/ammunition to be used or is reckless as to whether it would be used (where not at High culpability)" and Lower Culpability- "No intention to use"

3.16 The Council of District Judges make a related point but in relation to harm:

We agree that the volume of the firearms imported should be a significant feature when determining the harm caused. We also agree that connections with organised crime should be a factor. We believe that the intention as to the use of the firearms, particularly where the number is limited may be a relevant feature when determining harm. We accept that establishing such intention may be difficult, and often this may fall to the accused – the court will be sceptical of a person’s explanations for importing firearms for otherwise “legitimate” use, noting the offender could chose to acquire them in a legitimate manner. Nevertheless, a person importing a shotgun to shoot game may be regarded as causing less harm than someone importing that weapon for no legitimate reason (even if it cannot be established the importer has any connection with organised crime). We would suggest that category 3 harm might include a further bullet point

- For personal use for otherwise legitimate purposes (considering reasonableness of account in all the circumstances)

We do acknowledge that such an addition may be otiose as such cases are likely to be caught by the “Smaller-scale and/or unsophisticated enterprise harm” classification and we note that the list of examples given is not closed in any event.

3.17 A magistrate also makes a point relating to the purpose of the weapon:

Harm is defined here purely in terms of the commercial size of the operation. But if there is additional evidence as to why the weapons are being imported (eg for the specific purpose of harm to a specific individual (s)) or there is evidence that the commercial operation has supplied arms known to have been used to harm others, then this should be considered

3.18 In this guideline (as with other firearms guidelines) the distinction between harm and culpability is not clear cut. The Sentencing Academy comment that the two stage culpability process is unwieldy and suggest that the lethality of the weapon relates to harm rather than to culpability. The NCA are concerned about a single weapon being categorised as lower harm when it could still cause great harm and suggest that lower harm should be reserved for ‘Firearms which are not capable of producing live fire and which have not been converted (successfully or unsuccessfully) from blank firing.’

3.19 The Chief Magistrate is concerned about the wording in the lower harm category – ‘minimal/no connection to organised criminal group(s)’:

it may give an improper perception to the general public to see that any connection to organised criminal groups might be considered “low harm” when concerned with the illegal importation of firearms – whether lethal or not. Surely it would be more appropriate if that category was reserved for cases where it could be positively shown that there was no connection to OCG(s).

3.20 At the consultation event the NCA were concerned that judges may interpret the term ‘organised criminal groups’ in the harm factors as relating solely to serious organised crime.

3.21 In developing the guideline the intention was that any organised criminal activity (such as being involved in drug dealing) would be captured by the factor but where the connection was minimal (such as being the customer of a drug dealer) the lowest category could still apply. We have included a question relating to harm in our survey and will report back on the findings.

3.22 In order to determine whether any of these concerns are valid it is necessary to put all of the step one elements together to assess whether the guideline produces a fair and consistent categorisation and thereby sentence range.

Culpability category

3.23 The two stages of the culpability assessment (type of weapon and ‘other’) combine to give one of four overall culpability levels:

Type of weapon			
Other culpability factors	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 D	Culpability category D

3.24 The Council of District Judges and the Chief Magistrate point out that in the guideline as currently constructed it makes no difference to the overall categorisation of culpability if a weapon is type 2 (for example a shot gun) or type 3 (for example a stun gun) unless the ‘other culpability’ is high.

3.25 The Chief Magistrate suggests creating an additional level of A* to enable more distinction and adjusting the other levels as shown:

Other Culpability Factors	Weapon Type		
	1	2	3
High	A*	A	B
Medium	A	B	C
Low	B	C	D

3.26 Prior to consultation the guideline was tested against transcripts of sentencing remarks to ensure that it worked as intended. All of the cases related to prohibited firearms and so the position relating to shot guns was not fully explored.

3.27 To take a theoretical example:

D has been clearing out the home of a deceased relative in France and drives back to the UK with a shot gun and cartridges alongside other personal effects of the deceased in their car.

It would be a type 2 weapon;

If the court was satisfied that there was little planning and no intention to sell it could be lower culpability;

Leading to an overall culpability level of D.

Harm would be assessed as category 3.

Sentence table 2 would apply leading to a starting point of a low level community order.

3.28 This would be exactly the same outcome if the weapon had been a non-lethal stun gun. If the Council feels that there should be a distinction, the overall culpability level for a type 2/ lower case could be changed to C which (all other things being equal in the scenario) would give a starting point of 1 year's custody (with a community order in the range). This would mean that only non-lethal weapons would ever fall into the lowest starting point/ category range.

Type of weapon			
Other culpability factors	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

3.29 If this change were made culpability C would apply in five of the nine categories – but in practice most of these categories do not apply very often.

Question 3: Should the category level for type 3 weapon/ lower culpability be changed to C?

3.30 Considering the NCA's concern that a single lethal weapon would fall into low harm even though it could go on to be used in multiple shootings – again it may be helpful to consider how the guideline would work in practice. There are several examples of such cases in the transcripts and the guideline appears to work well for them.

Facts	Sentence (pre plea)	Sentence using guideline
Used dark web to source Glock 19 handgun and ammunition from US to be delivered to a former address hidden inside a music speaker. Police intercepted delivery and substituted dummy items. Took delivery and went to partner's home where there were young children.	14 years	Culp: Type 1/ High = A Harm 2 or 3 A2/A3 Table 1 SP A2 14 years A3 10 years

Imported gun and 250 rounds of ammunition by post, stated intention was to use it for target practice and for interest. Was a collector of weapons (knives and air weapons held legally). Used false name to buy gun. Intercepted by FBI	4 years	Culp: Type 1/ Med = B Harm 3 B3 Table 1 SP 5 years
Tried to import a Glock 19 handgun through dark web using crypto currency	4.5 years	Culp: Type 1/ Med = B Harm 3 B3 Table 1 SP 5 years

3.31 If the Council wanted to ensure that a single weapon did not automatically equate to low harm, a slight change could be made to the wording of Category 3 so that instead of saying 'Smaller-scale and/or unsophisticated enterprise' it says 'Smaller-scale **and** unsophisticated enterprise'.

3.32 Regarding the comments/ suggestions made above on including factors relating to the intention of the offender, consideration was given to this in developing the guideline but it was found to be difficult to incorporate. An element of intention/ recklessness as to the use of the weapon is implicit in the factors in harm 1 and 2. Anything more specific than that may cause evidential issues. There is a mitigating factor 'Genuine belief that firearm/ammunition will not be used for criminal purpose' which allows the court to distinguish the cases of lowest criminal intent.

Question 4: Should the Category 3 harm factor be changed as suggested?

Question 5: Should any other changes to harm or culpability factors?

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 included suggestions relating to the sentencing of young adults. This will be considered at the October meeting.

5 IMPACT AND RISKS

5.1 A resource assessment will be provided for the October meeting which is unlikely to change much from the one published with the consultation which anticipated that any impact on prison and probation resources from the guideline would be small.