

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.

**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

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## MEETING OF THE SENTENCING COUNCIL

30 JULY 2021

### MINUTES

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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 [McWilliams](#)<sup>1</sup> 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.

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<sup>1</sup> [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?**



## Preparation of terrorist acts Terrorism Act 2006, s.5

Triable only on indictment

Maximum: Life imprisonment

Offence range: 3 years' custody – Life Imprisonment (minimum term 40 years)

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

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

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

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

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

This guideline applies only to offenders aged 18 and older.

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

**Insert Applicability drop down**

## Step 1 – Determining the offence category

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

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

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

### Notes for culpability and harm

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

#### Culpability

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

Where the LEA is surveilling the offender and prevents the offender from proceeding further, this should be treated as apprehension of the offender.

#### Harm

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

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

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

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

**Culpability demonstrated by one or more of the following:****A**

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

**B**

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

**C**

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

**D**

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

## Harm

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

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

### Category 1

- Very immatver

### Category 2

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

### Category 3

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

## Step 2 - Starting point and category range

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

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

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

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

## Annex A

Harm	Culpability			
	A	B	C	D
1	<b>Starting point</b> Life imprisonment - minimum term 35 years' custody	<b>Starting point</b> Life imprisonment - minimum term 25 years' custody	<b>Starting point</b> Life imprisonment - minimum term 15 years' custody	<b>Starting point</b> 15 years' custody
	<b>Category range</b> Life imprisonment - minimum term 30 – 40 years' custody	<b>Category range</b> Life imprisonment - minimum term 20 - 30 years' custody	<b>Category range</b> Life imprisonment - minimum term 14 – 20 years' custody	<b>Category range</b> 10-20 years' custody**
2	<b>Starting point</b> Life imprisonment - minimum term 25 years' custody	<b>Starting point</b> Life imprisonment - minimum term 15 years' custody	<b>Starting point</b> 15 years' custody	<b>Starting point</b> 8 years' custody**
	<b>Category range</b> Life imprisonment - minimum term 20 - 30 years' custody	<b>Category range</b> Life imprisonment - minimum term 10- 20 years' custody*	<b>Category range</b> 10- 20 years' custody**	<b>Category range</b> 6-10 years' custody**
3	<b>Starting point</b> 16 years' custody	<b>Starting point</b> 12 years' custody	<b>Starting point</b> 8 years' custody	<b>Starting point</b> 4 years' custody
	<b>Category range</b> 12 – 20 years' custody	<b>Category range</b> 8- 16 years' custody	<b>Category range</b> 6 - 10 years' custody	<b>Category range</b> 3– 6 years' custody

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

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

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

## Factors increasing seriousness

### Statutory aggravating factors

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

### Other aggravating factors

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

## Factors reducing seriousness or reflecting personal mitigation

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

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

### Life Sentence Minimum Terms

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

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

### Serious Terrorism Sentence - Minimum Custodial Sentence

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

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

### Exceptional circumstances

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

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

either of which may give rise to exceptional circumstances

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

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

### Principles

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

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

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

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

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

### Where exceptional circumstances are found

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

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

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

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

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



## Step 5 – Reduction for guilty plea

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

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

## Step 6 – Dangerousness

The court should consider:

- 1) whether having regard to the criteria contained in [Chapter 6 of Part 10 of the Sentencing Code](#) it would be appropriate to impose a life sentence (sections [274](#) and [285](#))
- 2) whether having regard to sections [273](#) and [283](#) of the Sentencing Code it would be appropriate to impose a life sentence.
- 3) whether having regard to the criteria contained in [Chapter 6 of Part 10 of the Sentencing Code](#) it would be appropriate to impose an extended sentence (sections [266](#) and [279](#))

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

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

## Step 8 – Totality principle

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

## Step 9 – Ancillary orders

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

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

## **Step 10 – Reasons**

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

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

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

# Explosive Substances (Terrorism only)

**Causing explosion likely to endanger life or property - Explosive Substances Act 1883 (section 2)**

**Attempt to cause explosion, or making or keeping explosive with intent to endanger life or property - Explosive Substances Act 1883 (section 3)**

Triable only on indictment

Maximum: Life imprisonment

Offence range: 3 years' custody – Life Imprisonment (minimum term 40 years)

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

For offences committed on or after 13 April 2015, this is an offence listed in [Part 1 of Schedule 15](#) for the purposes of sections [273](#) and [283](#) (life sentence for second listed offence) of the Sentencing Code.

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

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

For offences committed on or after 29 June 2021, this is a serious terrorism offence listed in Part 2 of Schedule 17A for the purposes of sections 268B and 282B (serious terrorism sentence), section 323 (minimum term order: other life sentences), and section 268(4)(b)(iii) and 281(4)(b)(iii) (increase in extension period for serious terrorism offenders) of the Sentencing Code.

This guideline applies only to offenders aged 18 and older.

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

**Insert Applicability drop down**

## Step 1 – Determining the offence category

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

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

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

### Notes for culpability and harm

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

#### Culpability

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

Where the LEA is surveilling the offender and prevents the offender from proceeding further, this should be treated as apprehension of the offender.

#### Harm

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

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

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

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

## Culpability demonstrated by one or more of the following:

### A

- Offender caused an explosion or used, developed or was in possession of a viable explosive device
- Acting alone, or in a leading role, in terrorist activity involving explosives, where preparations were complete or were so close to completion that, but for apprehension, the activity was very likely to have been carried out

### B

- Offender took significant steps towards creating an explosion or developing or obtaining a viable explosive device
- Acting alone, or in a leading role, in terrorist activity involving explosives where preparations were advanced and, but for apprehension, the activity was likely to have been carried out
- Significant role in terrorist activity involving explosives where preparations were complete or were so close to completion that, but for apprehension, the activity was very likely to have been carried out

### C

- Leading role in terrorist activity involving explosives where preparations were not far advanced
- Significant role in terrorist activity involving explosives where preparations were advanced and, but for apprehension, the activity was likely to have been carried out
- Lesser role in terrorist activity involving explosives where preparations were complete or were so close to completion that, but for apprehension, the activity was very likely to have been carried out
- Act(s) of significant assistance or encouragement of other(s) involved in causing, developing or possessing an explosive device (where not falling within A or B)

### D

- Offender took very limited steps toward creating an explosion or developing or obtaining a viable explosive device
- Offender has engaged in very limited preparation of terrorist activity involving explosives
- Act(s) of lesser assistance or encouragement of other(s)
- Other cases not falling within A, B or C

## Harm

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

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

### Category 1

- Multiple deaths risked and very likely to be caused

### Category 2

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

### Category 3

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

## Step 2 - Starting point and category range

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

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

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

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

Harm	Culpability			
	A	B	C	D
1	<b>Starting point</b> Life imprisonment - minimum term 35 years' custody	<b>Starting point</b> Life imprisonment - minimum term 25 years' custody	<b>Starting point</b> Life imprisonment - minimum term 15 years' custody	<b>Starting point</b> 15 years' custody
	<b>Category range</b> Life imprisonment - minimum term 30 – 40 years' custody	<b>Category range</b> Life imprisonment - minimum term 20 - 30 years' custody	<b>Category range</b> Life imprisonment - minimum term 14 – 20 years' custody	<b>Category range</b> 10-20 years' custody**
2	<b>Starting point</b> Life imprisonment - minimum term 25 years' custody	<b>Starting point</b> Life imprisonment - minimum term 15 years' custody	<b>Starting point</b> 15 years' custody	<b>Starting point</b> 8 years' custody
	<b>Category range</b> Life imprisonment - minimum term 20 - 30 years' custody	<b>Category range</b> Life imprisonment - minimum term 10- 20 years' custody*	<b>Category range</b> 10- 20 years' custody**	<b>Category range</b> 6-10 years' custody**
3	<b>Starting point</b> 16 years' custody	<b>Starting point</b> 12 years' custody	<b>Starting point</b> 8 years' custody	<b>Starting point</b> 4 years' custody
	<b>Category range</b> 12 – 20 years' custody	<b>Category range</b> 8- 16 years' custody	<b>Category range</b> 6 - 10 years' custody	<b>Category range</b> 3– 6 years' custody

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

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

## Factors increasing seriousness

### Statutory aggravating factors

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

### Other aggravating factors

- Recent and/or repeated possession or accessing of extremist material
- Communication with other extremists
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection
- Offender attempted to disguise their identity to prevent detection
- Indoctrinated or encouraged others
- Failure to respond to warnings
- Failure to comply with current court orders
- Offence committed on licence or Post Sentence Supervision
- Offence committed whilst in prison

## Factors reducing seriousness or reflecting personal mitigation

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



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

### Life Sentence Minimum Terms

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

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

### Serious Terrorism Sentence - Minimum Custodial Sentence

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

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

### Exceptional circumstances

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

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

either of which may give rise to exceptional circumstances

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

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

### Principles

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

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

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

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

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

#### Where exceptional circumstances are found

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

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

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

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

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

## **Step 5 – Reduction for guilty plea**

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

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

## Step 6 – Dangerousness

The court should consider:

- 1) whether having regard to the criteria contained in [Chapter 6 of Part 10 of the Sentencing Code](#) it would be appropriate to impose a life sentence (sections [274](#) and [285](#))
- 2) whether having regard to sections [273](#) and [283](#) of the Sentencing Code it would be appropriate to impose a life sentence.
- 3) whether having regard to the criteria contained in [Chapter 6 of Part 10 of the Sentencing Code](#) it would be appropriate to impose an extended sentence (sections [266](#) and [279](#))

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

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

## Step 8 – Totality principle

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

## Step 9 – Ancillary orders

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

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

## Step 10 – Reasons

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

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

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

# Proscribed Organisations- Membership

Terrorism Act 2000 (section 11)

Triable either way

Maximum: 10 years' custody

Offence range: High level Community Order – 9 years' custody

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

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

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

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

This guideline applies only to offenders aged 18 and older

## STEP ONE

### Determining the offence category

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

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

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

**Culpability** demonstrated by one or more of the following:

A	<ul style="list-style-type: none"><li>• Prominent member of organisation</li></ul>
B	<ul style="list-style-type: none"><li>• Active (but not prominent) member of organisation</li></ul>
C	<ul style="list-style-type: none"><li>• All other cases</li></ul>

### Harm

There is no variation in the level of harm caused. Membership of any organisation which is concerned in terrorism either through the commission, participation, preparation, promotion or encouragement of terrorism is inherently harmful.

## STEP TWO

### Starting point and category range

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

Culpability	A	B	C
	<b>Starting point</b> 10 years' custody	<b>Starting point</b> 7 years' custody	<b>Starting point</b> 3 years' custody
	<b>Category range</b> 8 - 13 years' custody	<b>Category range</b> 5-9 years' custody	<b>Category range</b> High level community order - 4 years' custody

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

#### Factors increasing seriousness

##### *Statutory aggravating factors:*

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

##### *Other aggravating factors:*

- Length of time over which offending was committed
- Failure to respond to warnings
- Failure to comply with current court orders
- Offence committed on licence or Post Sentence Supervision
- Offence committed whilst in prison

#### Factors reducing seriousness or reflecting personal mitigation

- Unaware that organisation was proscribed

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

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

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

### **Step 4 – Reduction for guilty pleas**

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

### **Step 5 – Required special sentence for certain offenders of particular concern**

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

### **Step 6 – Totality principle**

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

### **Step 7 – Ancillary orders**

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

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

## **Step 8 – Reasons**

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

## **Step 9 – Consideration for time spent on bail (tagged curfew)**

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



# Proscribed Organisations

## Support

Terrorism Act 2000 (section 12)

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Triable either way

Maximum: 10 years' custody

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

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

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

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

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

This guideline applies only to offenders aged 18 and older

## Step 1 – Determining the offence category

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

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

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

**Culpability** demonstrated by one or more of the following:

### A

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

### B

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

### C

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

## Harm

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

### Category 1

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

### Category 2

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

### Category 3

- All other cases

## Step 2 - Starting point and category range

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

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

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

upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

## Factors increasing seriousness

### Statutory aggravating factors:

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

### Other aggravating factors:

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

## Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Good character and/or exemplary conduct
- Offender has no terrorist connections and/ or motivations
- *Unaware that organisation was proscribed*
- *Clear evidence of a change of mind set prior to arrest*
- Offender involved through coercion, intimidation or exploitation
- Offender's responsibility substantially reduced by mental disorder or learning disability

- Age and/or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives

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

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

### **Step 4 – Reduction for guilty plea**

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

### **Step 5 – Dangerousness**

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

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

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

### **Step 7 – Totality principle**

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

### **Step 8 – Ancillary orders**

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

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

## **Step 9 – Reasons**

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

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

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

**106 Life sentence not fixed by law: minimum term**

(1) In section 323 of the Sentencing Code (minimum term order for life sentence not fixed by law)—

(a) after subsection (1) insert— “(1A) The starting point, in determining the minimum term, is the relevant portion of the notional determinate sentence. (1B) The “notional determinate sentence”, in relation to a life sentence, is the custodial sentence that the court would have imposed if the court had not imposed the life sentence.

(1C) The “relevant portion” of the notional determinate sentence is— (a) where that sentence is within section 247A(2A) of the Criminal Justice Act 2003 (terrorist prisoners not entitled to early release), the term that the court would have determined as the appropriate custodial term (within the meaning given by subsection (8) of that section); (b) where that sentence is a sentence under section 252A, 254, 265, 266, 278 or 279 (and is not within paragraph (a)), two-thirds of the term that the court would have determined as the appropriate custodial term under that section; (c) where that sentence is any other custodial sentence, two-thirds of the term of the sentence.”;

(b) in subsection (2)— (i) for the words before paragraph (a), substitute “The minimum term must be the starting point adjusted as the court considers appropriate, taking into account—”; (ii) omit paragraph (b) (but not the final “and”)

1.1 The explanatory notes for this clause state the following:

Clause 106 amends section 323 of the Code. That section sets out the approach the court must take to determine a minimum term when it is required to make a minimum term order (rather than a whole life order) for those persons given a discretionary life sentence. A discretionary life sentence is a life sentence for offences other than murder where the judge has a discretion to impose a life sentence if the seriousness of the offence or the previous criminal record of an offender warrants it. The minimum term order must specify a minimum term, commonly referred to as a tariff, which the person is required to serve in custody before being considered for release by the Parole Board. The amendments change the starting point for the determination of the minimum term to at least two-thirds of the equivalent determinate sentence or custodial term of such sentence. The changes will apply to any sentence that is imposed after the provision comes into force, including in respect of offences committed before the provision comes into force.

New subsections (1A) and (1B) set out that the starting point in determining the minimum term is the relevant portion of the notional determinate sentence. The notional determinate

sentence is the custodial sentence that the court would have imposed if the court had not imposed a discretionary life sentence.

New subsection (1C) defines the relevant portion depending on the notional determinate sentence. Paragraph (a) provides that if the notional determinate sentence would be a determinate sentence that attracts no early release before the end of the appropriate custodial term, then the relevant portion is the whole of the appropriate custodial term that the court would have determined for such a sentence. Determinate sentences that attract no early release in this regard are extended determinate sentences (imposed under sections 254, 266 or 279 of the Code) and serious terrorism sentences (imposed under sections 268A or 282A of the Code) where, in accordance with section 247A(2) of the CJA 2003, the early release provisions of that section do not apply. Paragraph (b) provides that if the notional determinate sentence would be any other extended determinate sentence that is not within paragraph (a) or a sentence of particular concern (imposed under sections 252A, 265, or 278 of the Code) then the relevant portion is two-thirds of the appropriate custodial term that the court would have determined for that sentence. Paragraph (c) provides that if the notional determinate sentence is any other custodial sentence, then the relevant portion is two-thirds of the term that the court would have determined for that sentence.

Clause 106(1)(b) amends subsection (2) of section 323 of the Code. It provides that the minimum term must be the starting point (as determined in accordance with new subsections (1A)-(1C)) adjusted as the court considers appropriate, which retains judicial discretion to adjust the starting point for the minimum term where the court considers appropriate. Once the appropriate starting point is determined, the court then takes into account the matters set out in existing paragraphs (a) and (c). Paragraph (a) concerns the seriousness of the offence or the combination of the offence and one or more offences associated with it. Paragraph (c) concerns the crediting of periods on remand or similar. The Clause omits paragraph (b), which was the previous provision by which the court considered the release provisions that applied to determinate sentences against release for those subject to a discretionary life sentence.



## Consultation Stage Resource Assessment

### Terrorism Offences

#### Introduction

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

#### Rationale and objectives for new guideline

The Sentencing Council has previously produced guidelines covering 14 offences related to terrorism. This initial set of guidelines were consulted on in 2017 and then published in March 2018 to come into effect on 27 April 2018.<sup>2</sup> Less than a year after these new guidelines came into force, terrorism legislation was changed through the Counter-Terrorism and Border Security Act 2019.<sup>3</sup> This Act made significant changes to the legislation, some of which impacted upon the existing guidelines, for example by changing the statutory maximum for three offences.

In October 2019, the Council launched a consultation on a revised set of guidelines covering the subset of nine terrorism offences affected by the Act, taking into account these legislative changes, in addition to some other amendments reflecting changes to case law. However, before these draft guidelines were finalised, the Council was made aware of further changes to terrorism legislation which would potentially have an impact on the guidelines. The Council made the decision not to publish guidelines which might soon be superseded, so guideline development was paused in March 2020.

The Counter-Terrorism and Sentencing Act 2021<sup>4</sup> (the '2021 Act') received Royal Assent on 29 April 2021 and affects a slightly different subset of terrorism offences to those consulted on in 2019. The Council will now be consulting afresh on draft guidelines for the affected terrorism offences, to take into account the legislative changes resulting from the 2021 Act. In addition, one of these draft guidelines (Proscribed organisations – support) will also include amendments made following the 2019 consultation.

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<sup>1</sup> Coroners and Justice Act 2009 section 127: [www.legislation.gov.uk/ukpga/2009/25/section/127](http://www.legislation.gov.uk/ukpga/2009/25/section/127)

<sup>2</sup> <https://www.sentencingcouncil.org.uk/publications/item/terrorism-offences-definitive-guideline/>

<sup>3</sup> <https://www.legislation.gov.uk/ukpga/2019/3/contents>

<sup>4</sup> <https://www.legislation.gov.uk/ukpga/2021/11/contents>

The aim of these draft guidelines is to ensure sentencers have relevant and up-to-date guidance for this very serious type of offending, whilst also ensuring consistency of approach to sentencing.

## Scope

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

This resource assessment covers the following offences:

- Preparation of terrorist acts (Terrorism Act 2006, section 5);
- Causing explosion likely to endanger life or property/ Attempt to cause explosion, or making or keeping explosive with intent to endanger life or property ('Explosive substances offences') (Explosive Substances Act 1883, sections 2 and 3);
- Membership of a proscribed organisation (Terrorism Act 2000, section 11); and
- Support for a proscribed organisation (Terrorism Act 2000, section 12).

The other offences covered by the existing terrorism guidelines are not being revised at the moment and, consequently, are not covered in this resource assessment.

These revised terrorism guidelines apply to sentencing adults only; they will not directly apply to the sentencing of children and young people.

## Current sentencing practice

To ensure that the objectives of the guidelines are realised, and to understand better the potential resource impacts of the guidelines, the Council has carried out analytical and research work in support of them.

The intention is that the new guidelines will reflect the latest changes to terrorism legislation and also provide additional guidance for situations concerning the involvement of law enforcement authorities.<sup>5</sup> The guidelines are intended to encourage consistency of sentencing and ensure that the most serious offenders receive appropriate sentences, acknowledging the latest legislation.

In order to develop successful guidelines, knowledge of recent sentencing was required. Sources of evidence have included the analysis of sentencing transcripts of 33 cases, and references to case law and news articles. Knowledge of the sentencing starting points, ranges and factors used in previous cases has helped the Council to create guidelines that should encourage consistency of sentencing and reflect the serious nature of the offending.

Some small-scale research will also be conducted with a group of sentencers with the Preparation of terrorist acts guideline (Terrorism Act 2006, section 5) to check that the draft guideline will work as anticipated in practice.

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<sup>5</sup> Relevant for the Preparation of terrorist acts and Explosive substances offences guidelines.

Detailed sentencing statistics for terrorism offences covered by the draft guidelines have been published on the Sentencing Council website at the following link: <https://www.sentencingcouncil.org.uk/research-and-resources/publications?s&cat=statistical-bulletin>.

The offences covered by the draft revised terrorism guidelines are mostly low volume, with around 80 adult offenders<sup>6</sup> sentenced in total across all of the relevant offences over the period 2018 to 2020 (the period since the current guidelines have been in force).<sup>7</sup> However, this figure should be treated with caution; between 2018 and 2020, a little over half (55 per cent) of these offenders were sentenced for the offences of causing explosion likely to endanger life or property/ attempt to cause explosion, or making or keeping explosive with intent to endanger life or property ('explosive substances offences'). This figure includes all adult offenders sentenced under this legislation as it is not possible to separate these cases in the data and, from transcript analysis undertaken on these offences,<sup>8</sup> we can conclude that a high proportion will not be related to terrorism. Therefore, the true number of terrorist offenders sentenced between 2018 and 2020 for the offences covered by the draft guidelines is likely to be far fewer.<sup>9</sup>

The majority of offenders (91 per cent over the period 2018 to 2020) were sentenced to immediate custody. Average custodial sentence lengths vary across the different offences, due to their different statutory maximum sentences.

### **Preparation of terrorist acts (Terrorism Act 2006, section 5)**

There were around 20 adult offenders<sup>10</sup> sentenced between 2018 and 2020 for this offence, of whom 78 per cent were sentenced to immediate custody. The average custodial sentence length (ACSL)<sup>11</sup> was 11 years 5 months.<sup>12</sup>

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<sup>6</sup> Offenders aged 18 or over at the time of conviction.

<sup>7</sup> The Court Proceedings Database (CPD), maintained by the Ministry of Justice (MoJ), is the data source for these statistics. Data on average custodial sentence lengths presented in this resource assessment are those after any reduction for guilty plea. Further information about this sentencing data can be found in the accompanying data tables published here: <http://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>

<sup>8</sup> Of the 20 cases sentenced in 2019, reading through the transcript of the judge's sentencing remarks indicates that all 20 were non-terrorism related offences.

<sup>9</sup> As a result of these issues, this terrorism consultation and resource assessment are not accompanied by a separate statistical bulletin, however, sentencing data for these offences can still be found in the data tables, published here: <http://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>

<sup>10</sup> Figures may not appear to sum to totals, due to rounding. The volumes of offenders presented in this report have been rounded to the nearest 10 offenders.

<sup>11</sup> The average custodial sentence lengths presented in this report are mean average custodial sentence length values for offenders sentenced to determinate custodial sentences, after any reduction for guilty plea. The ACSLs in this section relate to the estimates using Court Proceedings Database (CPD) data.

<sup>12</sup> Due to a data issue currently under investigation, there are a number of cases of immediate custody which are incorrectly categorised in the Court Proceedings Database (CPD) as 'Otherwise dealt with'. This will impact upon the proportion of sentencing outcomes, sentence distributions and ACSLs for this offence, which should therefore be treated with caution.

### **Causing explosion likely to endanger life or property/ Attempt to cause explosion, or making or keeping explosive with intent to endanger life or property (Explosive Substances Act 1883, sections 2 and 3)**

There were around 40 adult offenders sentenced for these offences between 2018 and 2020. However, as previously stated, it is likely that a high proportion of these cases were non-terrorist related and the guideline would not have been applicable.<sup>13</sup>

### **Membership of a proscribed organisation (Terrorism Act 2000, section 11)**

Between 2018 and 2020, around 20 adult offenders were sentenced for membership of a proscribed organisation and 94 per cent received an immediate custodial sentence. The ACSL over this period was 5 years and all offenders received a sentence length of 8 years or less.

### **Support for a proscribed organisation (Terrorism Act 2000, section 12)**

Since the existing guideline came into force in 2018, no offenders have been sentenced for the offence of support for a proscribed organisation (section 12, Terrorism Act 2000), where this was the principal offence.<sup>14</sup>

## **Key assumptions**

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

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

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

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<sup>13</sup> As such, sentence outcomes and ACSLs have not been provided for these offences in this report. They are still available from the data tables published alongside this resource assessment.

<sup>14</sup> When a defendant has been found guilty of two or more offences this is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe.

In developing sentence levels for the different guidelines, existing guidance and data on current sentence levels has been considered, where available, as well as consideration of the impact of the legislative changes, for example increases in the statutory maxima, for the relevant offences.

While data exists on the number of offenders and the sentences imposed, assumptions have been made about how current cases would be categorised across the levels of culpability and harm proposed in the new guidelines, due to a lack of data available regarding the seriousness of current cases. As a consequence, it is difficult to ascertain how sentence levels may change under the new guidelines.

It therefore remains difficult to estimate with any precision the impact the guidelines may have on prison and probation resources. To mitigate against the risk of the guidelines having an unintended impact and to support the development of the definitive guidelines and the final resource assessment, interviews will be undertaken with sentencers using the Preparation of terrorist acts draft guideline.

## Resource impacts

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

### Summary

Overall, the guideline is anticipated to increase sentences in some cases. These increases are mainly expected to affect offenders categorised at the highest levels of harm and culpability, where the sentence levels have been driven by the changes to legislation introduced in the 2021 Act. In addition, there may be increases to cases sentenced using the Preparation of terrorist acts and Explosive substances guidelines where there was Law Enforcement Authority (LEA) involvement.

There has been little evidence on which to base any estimates of the impact of these guidelines, due to the infrequent nature of these offences, and so no attempt has been made to quantify the prison impacts. However, given that very few offenders overall are sentenced for these terrorism offences (since few offenders are prosecuted), it is expected that any anticipated longer sentences imposed as a result of the guidelines will have only a minimal impact on prison and probation services.

### Preparation of terrorist acts (Terrorism Act 2006, section 5)

The legislative changes introduced by the 2021 Act create a new category of terrorism offence called a 'serious terrorism offence' which has implications for the current Preparation of terrorist acts guideline. As a result, expanded wording has been proposed above the sentencing table in the new draft guideline and an additional step 3 has been added which sets out when a minimum sentence or serious terrorism sentence will apply, and also provides guidance on when exceptional circumstances might apply. Furthermore, in the case of a category C1 offence (category C culpability, highest harm level), the category range has been amended so that the minimum term (within the range) starts at 14 years, rather than the current 10 years. These changes have been proposed so that the guideline will comply with the latest legislation.

It is possible that these changes might increase sentence lengths in specific cases where the additional guidance applies, or for cases falling into category C1. However, given the very low number of offenders sentenced for this offence, any prison or probation<sup>15</sup> impacts are expected to be small. Additionally, conducting small-scale research with sentencers will provide an indication of how sentencers might apply the new provisions and should hopefully mitigate against the risk of any unanticipated impacts of the draft guideline.

In addition to these changes driven by the legislation, there is a further change proposed in the draft guideline: additional guidance for sentencing terrorist cases concerning Law Enforcement Authority (LEA) involvement. The draft guideline recommends that the court should identify the category of harm on the basis of the harm that the offender intended and the viability of the plan, and then apply a downward adjustment at step two. Similarly, culpability is to be assessed as if the LEA was a genuine conspirator or, where the offender is under surveillance by LEA, thus preventing the offender from proceeding further, this should be treated the same as apprehension of the offender. It suggests that a small reduction within the category range will usually be appropriate in cases where, but for the LEA involvement, the offender would have carried out the intended terrorist act.

It cannot yet be estimated what the likely impact of this additional guidance will be on prison or probation resources, given the scarcity of relevant cases available to be analysed. However, it is hoped that the small-scale research taking place with sentencers will help to provide additional information to support the final resource assessment.

### **Causing explosion likely to endanger life or property/ Attempt to cause explosion, or making or keeping explosive with intent to endanger life or property (Explosive Substances Act 1883, sections 2 and 3)**

The current guideline for these offences is also affected by the 2021 Act in the same way as the Preparation of terrorist acts guideline. It is possible that these changes might increase sentence lengths in specific cases where the additional guidance applies, or for cases falling in the lowest culpability and highest harm category. However, given that the draft guideline applies only to those offences which relate to terrorism, and a large proportion of the offenders sentenced for explosive substances offences are understood to be non-terrorism related,<sup>16</sup> any impacts on the prison and probation<sup>17</sup> services are expected to be minimal.

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<sup>15</sup> Changes to licence provisions resulting from the new legislation are likely to have some additional resource implications for the probation service, as calculated in the published impact assessment: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886106/cts-impact-assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886106/cts-impact-assessment.pdf).

<sup>16</sup> Of the 20 cases sentenced in 2019, transcript analysis suggests that all 20 are non-terrorism related.

<sup>17</sup> Changes to licence provisions resulting from the new legislation are likely to have some additional resource implications for the probation service, as calculated in the published impact assessment: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886106/cts-impact-assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886106/cts-impact-assessment.pdf).

## **Membership of a proscribed organisation (Terrorism Act 2000, section 11)**

The 2021 Act increased the statutory maximum for this offence from 10 years to 14 years. The draft guideline has been updated to ensure it complies with the will of Parliament.

The current definitive guideline for this offence contains three categories of culpability and one level of harm. The proposed draft guideline increases the starting points for all three culpability categories to reflect the increase in statutory maximum. It also broadens the category range for the highest culpability level and increases the sentence levels for the middle culpability, whilst maintaining a five year range, and retains the category range for the lowest culpability level so that the least serious cases can still receive a non-custodial sentence.

The estimated impact of these changes is that it may increase sentence lengths for this offence, particularly for the most serious type of offending. However, given the small volume of offenders sentenced for this offence, any prison or probation impact is not expected to be large.

## **Support for a proscribed organisation (Terrorism Act 2000, section 12)**

A revised version of the existing Proscribed organisations – support guideline was consulted on in 2019. The 2021 Act has since increased the statutory maximum for this offence from 10 years to 14 years. The aim of the new draft guideline is to reflect this new legislative change and ensure that the most serious offenders receive tougher sentences, whilst incorporating the previously consulted-on changes. Thus, in the current draft guideline, within the sentencing table, the starting points in the highest culpability categories and harm levels have been raised and the sentence ranges broadened compared with the existing guideline, to give sentencers greater discretion.

It is possible that this change may increase the severity of sentences for this offence, particularly at the top end of seriousness. However, since no offenders have been sentenced for this offence on a principal offence basis since 2017, the impact of the draft guideline on prison and probation resources is estimated to be negligible.

## **Risks**

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

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

The low volumes for all of the terrorism offences make it difficult to determine average sentence lengths or to be confident that cases that have gone before the courts in the past few years are representative of the sorts of cases that will be sentenced in future.

This risk is mitigated by information that is gathered by the Council as part of the guideline development and consultation phase. This includes inviting views on the guidelines through the consultation exercise and research with sentencers using case scenarios, which are intended to explore whether the guideline has any unintended effects. However, there are limitations on the number of factual scenarios which can be explored, so the risk cannot be fully eliminated.

**Risk 2: Sentencers do not interpret the new guidelines as intended**

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

The Council takes a number of precautions in issuing new guidelines to try to ensure that sentencers interpret it as intended. Sentencing ranges are agreed on by considering sentencing data in conjunction with Council members' experience of sentencing. Transcripts of sentencing remarks for 33 cases have also been studied to ensure that the guidelines are developed with current sentencing practice in mind. Planned research with sentencers should also enable any issues with implementation to be identified and addressed prior to the publication of the definitive guidelines.

Consultees can also feed back their views of the likely effect of the guidelines, and whether this differs from the effects set out in the consultation stage resource assessment. The Council also uses data from the Ministry of Justice to monitor the effects of its guidelines.



**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 4<sup>th</sup> 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 4<sup>th</sup> 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 strategic objectives 2021–2026**

# Sentencing Council strategic objectives 2021–2026

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9

Strategic objective 5: The Council will work to strengthen public confidence in sentencing by improving public knowledge and understanding of sentencing and showing the Council to be responsive and transparent

9

# Foreword

I am pleased to introduce the Sentencing Council's strategy for the next five years.

2020 marked the 10th anniversary of the Sentencing Council. On reaching this milestone, we undertook a review of what we had achieved so far and sought views on what our priorities should be for the next five to ten years. On behalf of the Council I would like to thank all those who contributed to this process, which is set out in the consultation response document published alongside this strategy.



It is clear from the responses to the consultation that the Council is seen as an important and integral part of criminal justice system. We are committed to fulfilling the duties set out for us in legislation as well as undertaking other work that helps ensure we have a clear, fair and consistent approach to sentencing and that we are able to promote awareness and understanding of sentencing among victims, witnesses, offenders and the public.

In this document we set out the strategic objectives and supporting priorities and actions for the Council over the next five years, taking into account the statutory duties of the Council, responses to the consultation, and the resources we have at our disposal. We have also responded to consultees' comments by placing a consideration of issues around equality and diversity at the heart of our work and exploring ways in which we can address any concerns that might arise where it is within our power and appropriate for us to do so.

I hope that you will find that this strategy document provides a useful summary of the Council's aims and priorities as we enter our second decade.

A handwritten signature in black ink, which reads "Tim Holroyde". The signature is written in a cursive, slightly stylized font.

**Lord Justice Holroyde**  
**Chairman of the Sentencing Council**

# Introduction

## Purpose

The Sentencing Council for England and Wales promotes a clear, fair and consistent approach to sentencing by issuing sentencing guidelines which provide clear structures and processes for judges and magistrates to use in court and promotes awareness and understanding of sentencing among victims, witnesses, offenders and the public.

This purpose is underpinned by the statutory duties for the Council that are set out in the Coroners and Justice Act 2009 (see Annex A for further details).

## Leadership and governance

### The Council

The Lord Chief Justice, the Right Honourable Lord Burnett of Maldon is President of the Council and appoints judicial members, with the agreement of the Lord Chancellor. The Lord Chancellor appoints non-judicial members, with the agreement of the Lord Chief Justice. All appointments are for a period of three years, with the possibility of extending up to a maximum of 10 years.

The Chairman of the Council is Lord Justice Holroyde who was appointed to this role on 1 August 2018. He is supported by seven additional judicial members and six non-judicial members.

The Sentencing Council meets for a full day ten times a year to consider business and is the primary decision-making body. The Council also has three sub-groups to provide oversight in specific areas: analysis and research, confidence and communication, and governance. The sub-groups' roles are mandated by the Council and, although some decision-making responsibilities are delegated to the sub-groups, all key decisions are made by the full membership. The sub-groups are internal rather than public-facing. From February 2020, the Council also set up a dedicated working group to explore and consider issues of equality and diversity as relevant to our work and recommend any necessary actions or further work in response.

### The Office of the Sentencing Council

The Council is supported in delivering its responsibilities by the Office of the Sentencing Council (OSC) The OSC is led by the Head of the Office of the Sentencing Council, Steve Wade who was appointed in October 2016, and staffed by civil servants employed via the Ministry of Justice (MoJ). The Office is funded by the MoJ and its budget is delegated to the Head of the OSC from the Chief Finance Officer MoJ, who is also accountable for ensuring that there are effective arrangements for oversight of the Council in its statutory functions and as one of the Ministry's arm's-length bodies.

The work of the OSC is overseen by a senior management team comprising the Head of Office and senior staff. The role of the team is to monitor and evaluate the progress of the Council's workplan, monitor budgetary expenditure, manage risks and make decisions on



issues relating to the work of the OSC in line with the priorities agreed by the Sentencing Council.

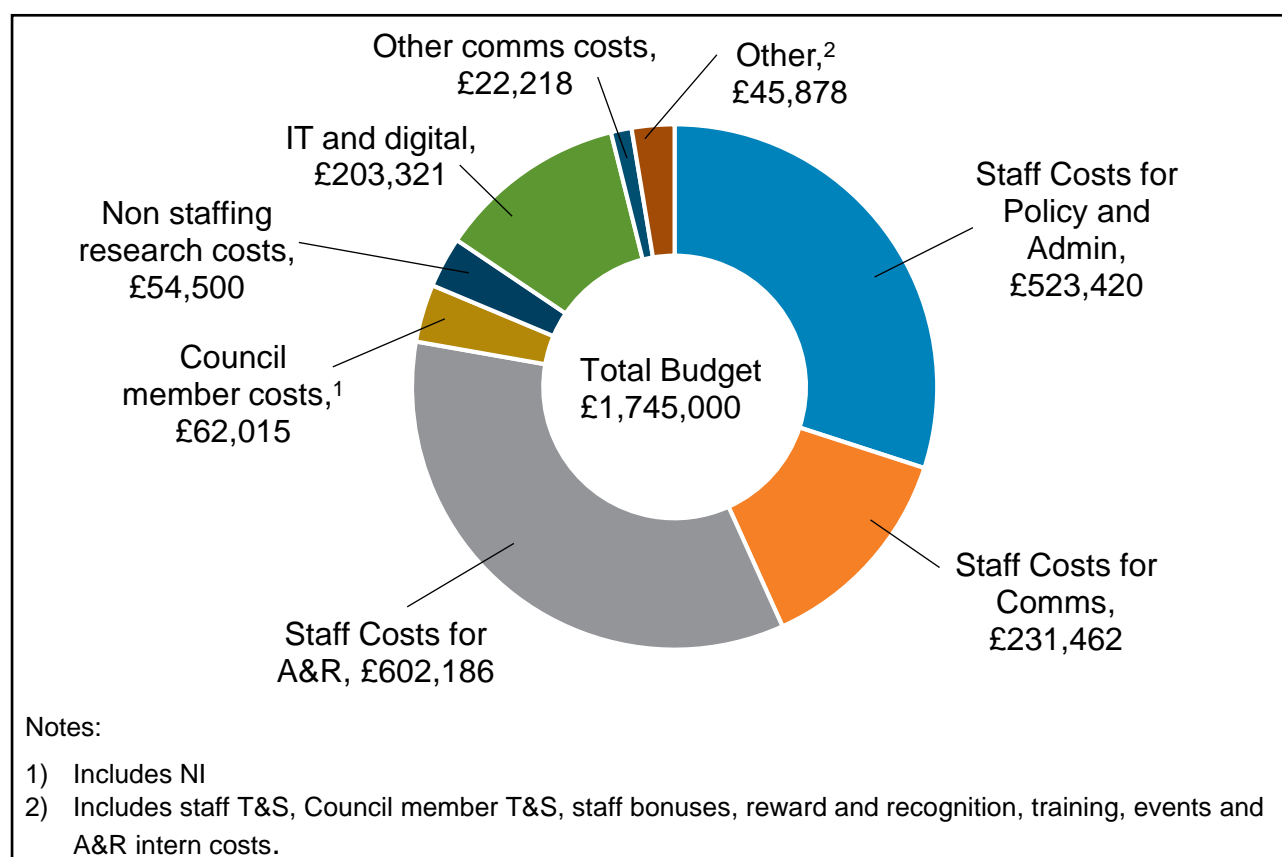
## Resources

The Sentencing Council is supported in its work by a multi-disciplinary team that comprises lawyers, policy officials, analysts, communication specialists and administrative support. As of April 2021, there were 15.1 full-time equivalent (FTE) members of staff.

The Sentencing Council's resources are made available through the Ministry of Justice. In the financial year 2021/22 the Council's budget is £1.745m. The Council's strategic objectives have been set in line with that level of funding.

The majority of the budget is allocated to staffing costs and in 2021/22 this accounted for 91 per cent of expenditure. The majority of the non-staffing budget is allocated to the development and maintenance of our digital resources and tools, with a small amount allocated to external contracts for analysis and research.

**Figure 1: Pie chart of budget breakdown, financial year 2020/2021**



## Background to developing this five-year strategy

The production and revision of guidelines (including analysis, research and communication activities to support guidelines) has formed a large part of the Council's focus. By 2020, we had produced 27 sets of definitive guidelines encompassing 145 separate guidelines covering 227 offences, as well as guidelines on eight overarching topics.

As part of our 10th anniversary year and in consideration of what our priorities should be for the next five to 10 years, we opened a consultation to seek the views of all those with

an interest in our work. The consultation covered what the Council's future objectives and priorities should be.

In anticipation of reviewing our achievements and future priorities at our 10-year point, the Council put in place some early work to consider:

- the statutory duties set out in the Coroners and Justice Act 2009;
- the independent review of the Council, conducted by Professor Sir Anthony Bottoms;
- the report from a Tailored Review undertaken by the Ministry of Justice; and
- commentaries published on the Council's work throughout the last 10 years (for example, from academics or interest groups).

In the autumn of 2019, Sentencing Council officials also undertook a series of informal discussions with internal and external partners in the criminal justice system and those with an interest in the system to discuss a range of issues that could feed into this consultation.

The consultation was published on 10 March 2020 and closed on 9 September 2020.

### **This strategy document**

A full consultation response document accompanies this document and provides further information on the rationale for the strategic objectives and priorities set out here. These priorities and actions will inform the Council's business plans for the next five years, which will be updated annually.

The last business plan published in May 2021 was an interim business plan setting out our aims for the financial years 2020/21 and 2021/22. It included some areas of work covered by this strategy document that the Council was keen to begin work on as soon as possible. The first business plan to focus fully on delivering the objectives set out in this document will be that relating to financial year 2022/23.

Ongoing annual business plans for the period covered by this document will continue to set out in more detail how the individual priorities falling under each strategic objective will be delivered each year.

Given the nature of our work and the increasing volume of legislation relating to sentencing that is being produced, the Council may need to respond flexibly to meet any urgent future demands. We will, therefore, look again at this document at least annually, at the time we publish each year's business plan, to consider whether wider events or priorities may require us to amend any of the dates indicated or to reflect any new priorities that may have arisen as a result of external circumstances.

# Strategic objectives

## Strategic objectives 2021–2026

The Sentencing Council for England and Wales promotes a clear, fair and consistent approach to sentencing by issuing sentencing guidelines which provide clear structure and processes for judges and magistrates to use in court and promotes awareness and understanding of sentencing among victims, witnesses, offenders and the public.

Based on our role and remit under the Coroners and Justice Act 2009 and as the independent body responsible for producing sentencing guidelines for England and Wales, the Sentencing Council will prioritise the following strategic objectives.

As stated above, the timings outlined in this document are provisional; more precise timings will be provided in the relevant business plan.

### Sentencing Council strategic objectives 2021–2026

- Strategic objective 1: The Council will promote consistency and transparency in sentencing through the development and revision of sentencing guidelines
- Strategic objective 2: The Council will ensure that all our work is evidence-based and will work to enhance and strengthen the data and evidence that underpins it
- Strategic objective 3: The Council will explore and consider issues of equality and diversity relevant to our work and take any necessary action in response
- Strategic objective 4: The Council will consider and collate evidence on effectiveness of sentencing and seek to enhance the ways in which we raise awareness of the relevant issues
- Strategic objective 5: The Council will work to strengthen public confidence in sentencing by improving public knowledge and understanding of sentencing and showing the Council to be responsive and transparent

Further detail on more specific actions that underpin these objectives is provided below, along with estimated timings. Please note that some actions are ongoing, particularly those relating to the core business of producing and evaluating guidelines, or will be undertaken when they become relevant, for example where they are dependent on the completion of a prior action.

# Achieving our strategic objectives

## Strategic objective 1: The Council will promote consistency and transparency in sentencing through the development and revision of sentencing guidelines

In order to achieve this, the Council will:

Actions for strategic objective 1	Provisional timing
Support consistent and transparent sentencing by continuing to produce and revise guidelines in accordance with published criteria. Specific guidelines produced or revised will be a result of the Council's annual discussions on priorities and will be included in annual business plans.	Ongoing
Ensure that all relevant issues are taken into account when considering guidelines for development, or evaluation, by reviewing and updating our guideline development/ revision criteria.	Completed; published in August 2021
Review the Totality guideline in the light of research findings and make any necessary changes	Consult on draft guideline by October 2022
Ensure that we draw fully on all relevant perspectives by formally considering at the outset of each guideline project whether to bring in additional external expertise to support a guideline's development.	Ongoing from June 2021
Ensure guidelines remain relevant and up to date by undertaking an annual consultation on cross-cutting and/ or minor revisions to guidelines.	Consultation to be issued annually from September 2021
Ensure minor uncontentious amendments to guidelines, that do not require consultation, are clear and transparent to all users by publishing a log of these.	Published as changes are made
Enable users to feedback on guidelines by providing a mechanism to report errors or difficulties.	By December 2021

## Strategic objective 2: The Council will ensure that all our work is evidence-based and will work to enhance and strengthen the data and evidence that underpins it

In order to achieve this, the Council will:

Actions for strategic objective 2	Provisional Timing
Support the development and evaluation of guidelines by continuing to access and analyse sentencing data - including on impacts and resources - and ensure this is understood and informs Council decision-making.	Ongoing
Provide evidence and analysis to support the Council's work across all of its statutory duties.	Ongoing
Finalise approach as to how we might access a great volume of data via the Common Platform and explore whether this might bring about efficiencies in the way in which we currently collect data from the courts.	By September 2022
Consider whether enhancements can be made to the way in which we measure and interpret the impact of our guidelines and our approaches to resource assessments by undertaking a review of our current practice.	By June 2022
Explore how the Council's expanded explanations are being interpreted and applied by sentencers in practice by undertaking an evaluation of these.	Start by March 2022
Inform development of Totality guideline by undertaking a small research study with sentencers.	Completed; published in October 2021
Explore the impact and implementation of the intimidatory offences guidelines by undertaking an evaluation.	Start by March 2022
Explore the impact and implementation of the domestic abuse overarching guideline by undertaking an evaluation.	Start by March 2022
Ensure the views of all relevant parties are fully considered in the development and revision of guidelines by considering on a case by case basis whether additional specific qualitative research is required.	Ongoing from June 2021
Collate the relevant evidence on issues related to effectiveness of sentencing and consider this as part of work to develop and revise guidelines by undertaking and publishing a review of the relevant evidence	Biennially from September 2022
Consider what further work in the area of consistency of sentencing is needed by reviewing the updated evidence in this area.	By September 2022

Consider how best to make use of local area data in our work by undertaking a review of the relevant data sources.	By March 2022
Permit access to data collected by the Council by preparing and publishing our drugs data collection.	By June 2022
Permit access to data collected by the Council by preparing and publishing our robbery offences data collection.	By September 2022
Continue to broaden the range of analytical work we can contribute to and draw on by seeking opportunities to collaborate with academics and external organisations.	Ongoing from June 2021

### **Strategic objective 3: The Council will explore and consider issues of equality and diversity relevant to our work and take any necessary action in response**

In order to achieve this, the Council has set up a dedicated working group and will:

<b>Actions for strategic objective 3</b>	<b>Provisional timing</b>
Explore the potential impact of sentencing guidelines on different demographic groups and groups with protected characteristics by collecting, analysing, and publishing data, where this is available, and undertaking more in-depth analytical work.	Ongoing from December 2020
Draw attention to any relevant issues relating to disparities in sentencing by providing tailored references to relevant information, to the Equal Treatment Bench Book, and to the need to apply guidelines fairly across all groups of offenders after reviewing evidence on disparity in sentencing for each guideline being developed or revised.	Ongoing from December 2020
Explore the potential for the Council's work inadvertently to cause disparity in sentencing across demographic groups by commissioning independent external contractors to undertake a project to review a sample of key guidelines and processes.	By December 2021
Ensure any evidence of disparity in sentencing between different demographic groups is taken into account when deciding whether to develop or review a guideline by including this as a consideration in the Council's criteria for developing and revising guidelines.	Completed; published August 2021
Consider whether separate guidance is needed for female offenders or young adults by conducting an evaluation of the relevant expanded explanations and, if so, add this to our workplan.	To be considered as part of the evaluation of expanded explanations

### **Strategic objective 4: The Council will consider and collate evidence on effectiveness of sentencing and seek to enhance the ways in which we raise awareness of the relevant issues**

In order to achieve this, the Council will:

<b>Actions for strategic objective 4</b>	<b>Provisional timing</b>
Ensure the Council continue to be informed on issues related to effectiveness of sentencing by publishing a research review of the relevant evidence and publishing that review.	Biennially from September 2022
Consider the possibility of future work with offenders to understand which elements of their sentence may have influenced their rehabilitation by undertaking a scoping exercise in this area.	By September 2022
Consider whether any changes are required to highlight to sentencers the need to consider issues relating to effectiveness of sentencing as a result of research work in this area and any work undertaken on the Imposition guideline.	From September 2022

### **Strategic objective 5: The Council will work to strengthen public confidence in sentencing by improving public knowledge and understanding of sentencing and showing the Council to be responsive and transparent**

In order to achieve this, the Council will:

<b>Actions for strategic objective 5</b>	<b>Provisional timing</b>
Ensure sentencers and other practitioners have easy and immediate access to sentencing guidelines by continuing to develop digital tools that meet their needs.	Ongoing
Inform public audiences, including victims, witnesses and offenders, about sentencing and sentencing guidelines by continuing to develop content for our website and seek media coverage relating to key Council activities.	Ongoing
Support the effective development of guidelines by continuing to promote Council consultations to practitioners who use the guidelines and individuals and groups who could potentially be affected by the guidelines.	Ongoing
Elicit a broader and more representative body of consultation responses to inform the development of guidelines by	By December 2021

undertaking a review of our target audiences and how we reach them.	
Teach young people about sentencing by developing sentencing-related materials for use by organisations such as Young Citizens who already engage extensively with schools.	Ongoing
Improve our ability to inform the public about sentencing by identifying relevant organisations willing to help us engage with their stakeholders.	Ongoing
Make our consultations more easily accessible to the Council’s public audiences by developing a template for more simplified introductions to consultation documents and embedding this within the Council’s processes.	Completed May 2021
Illustrate for our audiences the range of issues considered by the Council when developing and revising guidelines and the extent to which guidelines are influenced by consultation responses, by publishing information about the Council’s processes and procedures on our website.	By March 2022
Maintain an up-to-date insight into public confidence in the criminal justice system and its drivers, and explore whether there have been any changes over time, by re-running our previous survey questions and comparing findings to our previous research.	By September 2022
Increase parliamentarians’ knowledge and understanding of our work including by discussing how best to establish regular evidence sessions with the Justice Committee.	Ongoing by December 2021

**Lord Justice Holroyde**

**4<sup>th</sup> November 2021**

**Steve Wade**

**4<sup>th</sup> November 2021**



**Annex A: Sentencing Council statutory duties**

<b>Duty under Coroners' and Justice Act 2009</b>	<b>Description</b>
s.119	Publish report on the exercise of the Council's functions during the year
s.120(3)(a)	Prepare sentencing guidelines about guilty pleas
S.120(3)(b)	Prepare guidelines about the rule of law as to the totality of sentences
S.120(4)	(May) prepare other guidelines
s.120(5),(6a-d), (7), (8)	Must publish draft guidelines and consult when preparing guidelines (including the Lord Chancellor and Justice Select Committee); must then publish definitive guidelines after making necessary amendments
s.120(11a-f)	<p>When exercising the function of preparing guidelines, the Council should have regard to:</p> <ul style="list-style-type: none"> <li>- The sentences imposed by courts</li> <li>- The need to promote consistency</li> <li>- The impact of sentencing on victims</li> <li>- The need to promote public confidence in the CJS</li> <li>- The cost of different sentences and their relative effectiveness in preventing re-offending</li> <li>- The results of monitoring</li> </ul>
S121 (2), (3a-c)	Guidelines should illustrate varying degrees of seriousness with which offences are committed with factors relating to culpability, harm, and other relevant factors
s.121(4a,b), (5a,b), (6a-c)	Guidelines should provide an offence range, category range, starting point, aggravating and mitigating factors and criteria for determining the weight to be given to previous convictions.
s.121(7a-c)	Additional to mitigating factors are factors relating to guilty plea reductions, discounts for assistance to the prosecution, totality and these should be reflected in guidelines
s.121(10a, bii)	Starting points should relate to sentences that assume an offender has pleaded not guilty
s.122(2), (3), (4), (5), (6)	The Council must prepare allocation guidelines, issue them as draft, consult on them and then publish them as definitive guidelines; they may from time to time review the allocation guidelines; they should have regard to need to promote consistency and the results of monitoring.

s.123	The Council may prepare or revise guidelines and if urgent may dispense with the need to publish in draft and to consult (other than with the Lord Chancellor)
s.124 (1), (3), (5)	The Council may be asked to prepare guidelines by the Lord Chancellor or the Court of Appeal and it should consider doing so
s.127(1), (2)	The Council must prepare and publish resource assessments for both draft and definitive guidelines
s.127(3a-c)	Resource assessments must assess the resources required for the provision of prison places, probation provision and youth justice services
s.128(1), (2)	The Council must monitor the operation of its guidelines and consider what conclusions can be drawn, including: <ul style="list-style-type: none"> <li>- The frequency with which, and extent to which, courts depart from sentencing guidelines</li> <li>- Factors which influence the sentences imposed by the courts</li> <li>- The effect of guidelines in promoting consistency</li> <li>- The effect of guidelines on the promotion of public confidence in the criminal justice system</li> </ul>
s.128(3)	The Council should include in its Annual Report a summary of monitoring work undertaken and any conclusions drawn from this
s.129(1)	The Council must publish information regarding the sentencing practice of magistrates in relation to each local justice area; and information regarding the practice of the Crown Court in relation to each location at which the Crown Court sits
s.129(2)	The Council may also promote awareness of matters in relation to the sentencing of offenders, in particular the sentences imposed, the costs of different sentences and their relative effectiveness in preventing reoffending, and the operation and effect of guidelines
s.130(1), (2)	The Annual Report must contain a sentencing factors report which contains an assessment of the effect which any changes in sentencing practice is having on the resources required for: the provision of prison places; probation provisions; the provision of youth justice services
s.131(1),(2), (3), (4)	The Annual Report must contain a non-sentencing factors report (and at other times the Council may publish this type of information having provided it to the Lord Chancellor). The report should cover which non-sentencing factors are having/likely to have a significant quantitative effect on resources. These factors include prison recall, breach of orders, patterns of re-offending, Parole Board release decisions, remand issues etc
s.132(1)(3)	The Council has a duty to assess the effect, and prepare a report, where the Lord Chancellor refers any government policy or proposals

	likely to have a significant effect on resources for prison, probation or youth justice services
Schedule 15	This outlines the constitution of the Council and the experience members need to have to be appointed



**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):

<b>Court</b>	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
<b>Total</b>	<b>727</b>	<b>703</b>	<b>582</b>	<b>572</b>	<b>568</b>	<b>662</b>	<b>624</b>	<b>703</b>	<b>778</b>	<b>694</b>	<b>321</b>

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
<b>Total</b>	<b>727</b>	<b>703</b>	<b>582</b>	<b>572</b>	<b>568</b>	<b>662</b>	<b>624</b>	<b>703</b>	<b>778</b>	<b>694</b>	<b>321</b>

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:

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

<b>Category 3</b>	Band F fine	Band E fine or medium level community order – 26 weeks' custody
<b>Category 4</b>	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.

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Mr Steve Wade  
Head of the Office of the  
Sentencing Council  
EB16 East Block  
Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Reply to:  
Mr Duncan Jones  
Herts Fly Tipping Group  
c/o Hertfordshire County Council  
Postal Point CHN104  
County Hall  
Pegs Lane  
Hertford  
SG13 8DN

e-mail: [duncan.jones@hertfordshire.gov.uk](mailto:duncan.jones@hertfordshire.gov.uk)  
My Ref: FTG-SC-02  
Your Ref:  
Date: 2<sup>nd</sup> August 2021

Dear Mr Wade,

#### **Review of the Environmental Offences Definitive Guideline (2014)**

We are writing to you as the Executive Members responsible for waste and fly tipping issues in our respective resource and waste partnerships covering Bedfordshire, Buckinghamshire, Cambridgeshire, Devon, Hampshire, Hertfordshire, Kent, Lancashire, Lincolnshire, Merseyside, Norfolk, Oxfordshire, Somerset, Staffordshire, Suffolk and Warwickshire. Together with a number of other local authorities and other organisations who have co-signed this letter (see pages 6 – 13) we are experiencing significant challenges in relation to sentences handed down by the courts for offences under Section 33 of the Environmental Protection Act ('fly tipping offences') resulting in a lack of any serious deterrent arising from the justice system.

Between us we cover 158 local authorities and 10 professional bodies working in partnership to reduce the menace of fly tipping including its associated significant costs and damage to the environment. Our partnerships have been working with various stakeholders including the National Fly Tipping Prevention Group for some time to identify potential changes to the legislative framework to better address fly tipping. Part of this work has considered the penalties given to those found guilty of fly tipping; a matter which is also a concern for both the National Farmers' Union and the CLA, whose members are often directly affected by the illegal depositing of waste on their land and with whom we continue to work closely on this issue.

Whilst the Environmental Offences Definitive Guideline gives consideration to the culpability of the defendant and the harm caused by the offence, it is widely agreed that sentences handed down do not always match the severity of the offence committed; fairly reflect the costs incurred by the public purse; or therefore act as a suitable deterrent. This has become particularly noticeable following a surge in fly tipping and littering during the pandemic combined with a much wider use and appreciation of outdoor spaces. The media and public reaction to this has seriously questioned the existing level of deterrence. It seems that fly tipping has become a far more attractive option for criminals.

Under this context we would like to highlight the following areas for the Sentencing Council to consider with a view to reviewing and possibly updating the Definitive Guideline (2014) as needed.

## **Court imposed fines and costs versus Fixed Penalty Notices**

Recent experience in the local authorities who have contributed to this letter indicates a propensity for courts to issue fines for fly tipping below the level of a fixed penalty notice (FPN) for the same offence. For example in Hertfordshire during 2018/19, 2019/20 and 2020/21 the average fine for fly tipping issued by the courts was £341, £365 and £297 respectively versus a potential maximum FPN of £400. Linked to this at the other end of the scale in Buckinghamshire from 56 cases successfully prosecuted for fly tipping and duty of care offences (March 2020-Feb 2021) the average fine imposed was £738, with the highest fine imposed being £3500.

Further analysis demonstrates it is usual for fly tipping offences to be designated to incur 'minor' or risk of 'minor' environmental harm. Yet the Guideline for such an offence is a fine with starting point of Band F, which is 600% of weekly earnings. If we take the average UK earnings (£514 a week), then a Band F fine would be £3,084; anecdotally much larger than most of the fines issued by the courts. This would be a very welcome fine in our experience, and we believe it would go some way to restoring public confidence.

As you will be aware FPNs were introduced partly to alleviate pressure on the courts. However, current practice is having the opposite effect. This appears to be due to the current Guideline which instructs magistrates to ignore the availability of an FPN compounded by anecdotal evidence which suggests solicitors are aware that courts regularly render fines less than the FPN and therefore advise clients to go to court rather than pay the FPN.

It must be considered that the purpose of an FPN is to discharge the defendant's liability to prosecution, as well as the prospect of a higher financial penalty through a correctly functioning court system. As such, if a defendant chooses to go to court as is their right, then we believe it is only reasonable that the potential consequences of such a choice are considered.

As such the signatories to this letter believe it is vital that the Guideline allows for a strong deterrence factor to be built into court judgements where cases for fly tipping are successfully prosecuted. With deterrent sentencing FPN levels should be less of an issue as paying the FPN would be seen as the better option. Linked to this whilst we appreciate FPNs may be an issue for local authorities to deal with, our suggestions are based on the reasonable assumption that we agree the need to work together to ensure that fly tipping offences are dealt with fairly, consistently and as efficiently as possible by the justice system.

Taking the above into account we suggest that in cases where a defendant opts to go to court and loses, it seems logical that in order to encourage the use of FPNs and reduce pressure on the courts, court fines should exceed the maximum FPN available currently set in legislation at £400. Such an approach should also take into account costs incurred by the public purse in bringing the case to court including local authority related costs, as well as any costs incurred by the police especially where warrants for arrest have had to be issued for previous no shows. In addition we would suggest that when relevant aggravating factors related to fly tipping on private land are present including costs related to clear up and restoration these should be included as a default and therefore reflected in any such judgements.

## **Introduce stronger means testing, and Court Fine "maximum payment periods"**

Whilst we understand the role that means testing has to play, it would appear that its primary purpose is to determine the level of fine. However, we would submit that there is little evidence to suggest whether means declarations are being adequately tested by the courts. A number of local authorities have found in practice that little is done by the courts to test means declarations beyond the defendant's sworn assurance and this is despite the Guideline stating:

*“Obtaining financial information. In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied any financial information to the contrary. It is for the offender to disclose to the court such data relevant to their financial position as will enable it to assess what they can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender’s financial circumstances pursuant to section 162 of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender’s means from evidence it has heard and from all the circumstances of the case.”*

Much more needs to be done to reinforce the need for courts to undertake robust checks of means declarations in line with the existing guidance above.

A number of local authorities have also observed that around 80% of people prosecuted for fly tipping offences already have previous varied court convictions underlining that their assumed integrity should not be taken for granted. The issue is further compounded by some defendants declaring low official income levels but often benefitting from large undeclared sums of the type that can be gained through fly tipping.

If someone does not have the ability to pay a fine in full then ‘payment plans’ should not be used to tacitly discharge their liability to the extent that the defendant incurs no practical significant inconvenience or penalty that would hopefully motivate correct behaviours in the future.

At the moment such plans often have the practical consequence of relieving defendants of their responsibility for the negative impacts of their actions. A situation which is then exacerbated when defendants choose to stop paying, with the ‘court system’ unwilling to pursue such matters when the costs of doing so quickly outweigh the level of fine(s) and cost(s) involved. As a result the courts often look ‘soft’ on fly tipping, which can only encourage more defendants to opt for the court route as opposed to accepting an FPN.

We suggest that fly tipping offences should be looked at as *the offence* in the *first* instance, not the person who committed it, or their ability to pay. Arguably, all fines could be set like this i.e. in line with the Guideline but before a means test. Based on this approach we would suggest means testing should therefore be used to ascertain what *type* of fine(s) to give, and never how much.

Under this context we also suggest that a review of the Definitive Guideline needs to consider how can a Section 33 (fly tipping) offence be anything but deliberate? A person may refer to “previous good character” in the Court, but they clearly did not act as such when the offence was committed so why should there be an option to reduce the fine? To this end it also needs to be considered that much of the time people also have “better character” when they are on trial as they are presenting themselves in Court and need to come across as well as possible – this underlines the need to go back to the principle suggested above – fly tipping offences should be looked at as *the offence* in the *first* instance.

## **Community Based Sentences**

If a defendant cannot pay the fine in full, or in part, then we would ask that consideration is given to changing to the Guideline to allow for a much wider use of community based sentences as a matter of redress; such as the recent example in April of this year from Basingstoke where a defendant was ordered to pay £784 in costs and was also given a community punishment order requiring 80 hours of community service (*case brought by Basingstoke and Deane Borough Council*).

Whilst we appreciate the Guideline has the practical consequence of creating bespoke judgements for individual cases, logic suggests that the Guideline could be updated in a way that community orders become available in all offence categories and penalty ranges. We would therefore urge the Sentencing Council to review the Guideline to support much wider use of community sentences in circumstances where the defendant claims a lack of means.

To this end a review may also conclude there is opportunity to align any revisions to the Guideline with wider anti-social behaviour legislation including specifically the use of criminal behaviour orders. When considering fly tipping and similar offences under such a context the courts are required to take into account the inherent distress arising from fly tipping to landowners and the public alike. Such an alignment would also support police and local authority duties and strategies under section 6 Crime and Disorder Act which places an emphasis upon harm to environment as matter of crime and disorder.

We believe such an approach would do three things.

- Firstly it would send a clear message about the willingness of the courts to seek redress from defendants who claim a lack of means likely leading to a greater willingness to settle financial penalties as opposed to the longer term 'inconvenience' of a community based sentence.
- Secondly from a practical standpoint using money and time as sanctions should in turn lead to a perception that going to court is unlikely to be seen as the better option leading to a greater willingness on the part of defendants to pay an FPN if available, therefore relieving pressure on the courts as originally intended.
- Thirdly, properly executed, community based sentences should relieve the courts and other agencies from getting involved in ensuring 'payment plans' for fines are paid or chased up when payments are not made as agreed.

Under this context we further believe that the application of community sentences could be enhanced by introducing the principle of reparation where activities arising from community sentences are focused on clearing fly tips and litter as part of an overall rehabilitation strategy. Such an approach would likely be widely supported by the general public leading to greater recognition of the issue. Parallel discussions with Defra and the Ministry of Justice note that both departments support the use of community sentences especially where they involve training and rehabilitation for those carrying out unpaid work on probation, potentially further reducing the likelihood of reoffending.

Additionally, community based sentences address the issue of higher earners receiving greater fines, and vice versa. As we are suggesting sentencing based on the gravity of the offence, combining monetary fines and community sentences could enable the Courts to sentence more fairly. Just because someone has more money does not mean they should necessarily receive a greater punishment. Individuals should not be treated as businesses, where fine levels based on turnover makes sense; as the larger a company becomes, the more there is a reasonable expectation that responsibility and experience will encourage correct behaviours.

However, clearly individuals do not work like this and therefore the Guideline and the sentences arising from them should reflect this. Individuals should be dealt with on a level playing field, with all that separates them being the offence they may have committed, and the seriousness of that offence.



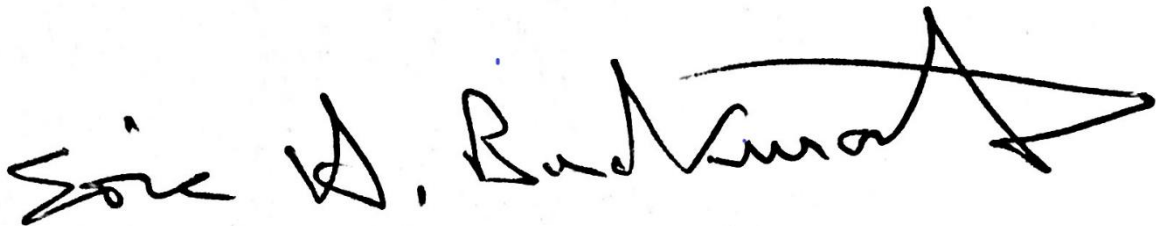
## Use of More Suspended Sentences

Evidence arising from 793 convictions secured in Buckinghamshire suggests the single most effective deterrent to reoffending by even the most aggressive serial fly-tippers has been a suspended prison sentence with Buckinghamshire suggesting that such an approach has prevented 20 case offenders from reoffending.

More specifically it is suggested that whilst a 24 month suspension is preferable to 12 months, the prospect of possible incarceration works as a worthwhile deterrent. As such we suggest that anyone convicted of a fly tipping offence for a second time is not given another suspended sentence.

Thank you for taking the time to consider the views expressed above. The local authorities and other organisations who have contributed to this letter stand ready to assist with any further queries you may have in preparation for responding to our suggestions as noted.

Yours sincerely,

A handwritten signature in black ink, reading "Eric W. Buckmaster". The signature is written in a cursive style with a large, sweeping flourish at the end.


Cllr Eric Buckmaster  
**Chair – Hertfordshire Waste Partnership**

*Please see overleaf for a list of signatories:*


CC: DEFRA – Under Secretary of State Rebecca Pow MP  
DEFRA – National Fly Tipping Prevention Group (Thomas Parrot / Pippa Harper)  
Chartered Institution of Wastes Management (Ray Parmenter / Tina Benfield)  
Environment Agency (Peter Kellet / Lee Rawlinson / Simon Hawkins / Alex Chown)  
HM Courts & Tribunals Service (South East) (Suzanne Gadd)  
Keep Britain Tidy (Rachel Scarisbrick)  
London Councils (Katharina Winbeck)  
Magistrates Association (Tom Franklin)  
National Farmers Union (Philippa Arnold / Rosalind David)  
Members of Parliament (as determined by each co-signing local authority / organisation)  
Natural Resources Wales  
Welsh Government – Environment Quality Department


On behalf of:

Waste Partnerships & Authorities

	<p>Cambridge City Council          East Cambridgeshire DC          Fenland District Council          Huntingdonshire DC          Peterborough City Council          South Cambridgeshire DC          Cambridgeshire CC</p>	 <p>Cllr Peter Murphy          RECAP Partnership</p>
<p>Devon Authorities          Strategic Waste Committee          (DASWC)</p>	<p>East Devon District Council          Exeter City Council          Mid Devon District Council          North Devon District Council          South Hams District Council          Teignbridge District Council          Torbay Council          Torridge District Council          West Devon Borough Council          Devon County Council</p>	 <p>Councillor Geoff Jung          Chairman DASWC</p>
	<p>Broxbourne Borough Council          Dacorum Borough Council          East Hertfordshire DC          Hertsmere Borough Council          North Hertfordshire DC          St Albans District Council          Stevenage Borough Council          Three Rivers District Council          Watford Borough Council          Welwyn Hatfield BC          Hertfordshire County Council</p>	 <p>Cllr Eric Buckmaster          Chair - Hertfordshire Waste          Partnership</p>
	<p>Ashford Borough Council          Canterbury City Council          Dartford Borough Council          Dover District Council          Folkestone &amp; Hythe DC          Gravesham Borough Council          Maidstone Borough Council          Sevenoaks District Council          Swale Borough Council          Thanet District Council          Tonbridge &amp; Malling BC          Tunbridge Wells BC          Kent County Council</p>	 <p>Cllr Nick Kenton          Chair – Kent Resource          Partnership</p>

 <p>LANCASHIRE WASTE PARTNERSHIP</p>	<p>Blackpool Council          Blackburn with Darwen BC          Burnley Borough Council          Chorley Council          Fylde Council          Hyndburn Borough Council          Lancaster City Council          Pendle Borough Council          Preston City Council          Ribble Valley BC          Rossendale Borough Council          South Ribble Borough Council          West Lancashire BC          Wyre Council          Lancaster County Council</p>	 <p>Cllr Shaun Turner          Cabinet Member for Environment          and Climate Change          Chair of the Lancashire Waste          Partnership.</p>
 <p>CLEANER GREENER          today tomorrow  <small>Lincolnshire Waste Partnership Tackling waste together</small></p>	<p>Boston Borough Council          City of Lincoln Council          East Lindsey District Council          North Kesteven DC          North East Lincolnshire          Council          North Lincolnshire Council          South Holland District Council          South Kesteven DC          West Lindsey District Council          Lincolnshire County Council</p>	 <p>Cllr Danny McNally          Chair Lincolnshire Waste          Partnership</p>
 <p>MRWA          MERSEYSIDE RECYCLING &amp; WASTE AUTHORITY</p>	<p>Merseyside and Halton Waste          Partnership:</p> <p>Liverpool City Council          Halton Council          Knowsley Council          Sefton Council          St Helens Council          Wirral Council          Halton Council</p>	 <p>Carl Beer - Chief Executive          Merseyside Recycling and Waste          Authority</p>
 <p>Norfolk          Waste          Partnership</p>	<p>Breckland District Council          Broadland District Council          Great Yarmouth BC          Kings Lynn &amp; West Norfolk DC          Norwich City Council          North Norfolk District Council          South Norfolk District Council          Norfolk County Council</p>	 <p>Cllr Andy Grant          Chair – Norfolk Waste          Partnership</p>
<p>Oxfordshire          Resources &amp; Waste          Partnership</p>	<p>Cherwell District Council          Oxford City Council          South Oxfordshire DC          Vale of White Horse DC          West Oxfordshire DC          Oxfordshire County Council</p>	<p>Cllr Lubna Arshad, Chair –          Oxfordshire Resources &amp; Waste          Partnership</p>

 	<p>Basingstoke &amp; Deane BC  East Hampshire DC  Eastleigh Borough Council  Fareham Borough Council  Gosport Borough Council  Hart District Council  Havant Borough Council  New Forest District Council  Portsmouth City Council  Rushmoor Borough Council  Southampton City Council  Test Valley Borough Council  Winchester City Council  Hampshire County Council</p>	<p>Cllr Eachus  Chair – Project Integra</p>  <p>Cllr Rob Humby  Deputy Leader of Hampshire  County Council, Executive Lead  Member for Economy, Transport  and Environment</p>
	<p>Mendip District Council  Sedgemoor District Council  Somerset West &amp; Taunton  South Somerset DC  Somerset County Council</p>	 <p>Cllr Sarah Dyke – Chair  Somerset Waste Partnership</p>
	<p>Cannock Chase DC  East Staffordshire BC  Lichfield District Council  Newcastle under Lyme BC  Stafford Borough Council  Staffordshire Moorland DC  South Staffordshire DC  Tamworth Borough Council  Stoke on Trent City Council  Staffordshire County Council</p>	 <p>Cllr Jonathan Price – Chair  Joint Waste Management Board  Somerset Waste Partnership</p>
	<p>Babergh District Council  East Suffolk Council  Ipswich Borough Council  Mid Suffolk District Council  West Suffolk Council  Suffolk County Council</p>	 <p>Cllr James Mallinder  Chair - Suffolk Waste Partnership</p>
	<p>Elmbridge Borough Council  Epsom &amp; Ewell BC  Guildford Borough Council  Mole Valley District Council  Reigate &amp; Banstead BC  Runnymede Borough Council  Spelthorne Borough Council  Surrey Heath BC  Tandridge District Council  Waverley Borough Council  Woking Borough Council  Surrey County Council</p>	 <p>Cllr Neil Dallen  Chair – Surrey Environment  Partnership</p>

	<p>North Warwickshire BC Nuneaton &amp; Bedworth BC Rugby Borough Council Stratford District Council Warwick District Council Warwickshire County Council</p>	<p><i>Heather Timms</i></p> <p>Cllr Heather Timms Chair – Warwickshire Waste Partnership</p>
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**On behalf of:**

**Individual local authorities:**

	<p><i>C. Lamb</i></p> <p><i>J. Platts</i></p> <p>Cllr Chris Lamb / Cllr Jenny Platts Barnsley Council</p>
	<p><i>Charles Royden</i></p> <p>Cllr Charles Royden Deputy Mayor &amp; Portfolio Holder for Environment, Highways and Transport</p>
	<p><i>W. Schmitt</i></p> <p>Cabinet Member, Environment Braintree District Council</p>
	<p><i>Maria Pearson</i></p> <p>Cllr Maria Pearson Chair of Environment, Enforcement and Housing Committee</p>
	<p>Cllr Peter Strachan – Portfolio Holder for Environment &amp; Climate Change Buckinghamshire Council</p>

	 <p>Cllr Ian Dalgarno Executive Member for Community Services</p>
	 <p>Councillor Rose Moore Cabinet Member for Greener and Safer Chelmsford</p>
	 <p>Cllr Roger Croad Devon County Council</p>
	 <p>Cllr Joe Blackman Cabinet Member for Highways, Infrastructure and Enforcement Doncaster Borough Council</p>
	 <p>Cllr Jill Haynes Cabinet Member for Customers Services &amp; Community Dorset Council</p>
	 <p>James Warwick / Cllr Nigel Avey Service Director – Contracts / Portfolio Holder Environmental and Technical Epping Forest District Council</p>
	 <p>Cllr Malcolm Buckley (Cabinet Member for Waste Reduction and Recycling)</p>

	 <p>Cllr Abbas Hussain Portfolio Holder – Neighbourhood Services</p>
	 <p>Cllr Sarah Rouse Leader of Malvern Hills District Council</p>
	 <p>Cllr Wendy Stamp Leader – Maldon District Council</p>
	 <p>Cllr Heather Shearer Portfolio holder for Community Health Services</p>
	 <p>Cllr Dominic Beck Portfolio Holder for Transport &amp; Environment Rotherham Metropolitan Borough Council</p>
	 <p>Cllr Paul Wood Executive Member for Housing, Roads and Waste Management</p>
	 <p>Cllr Bradley Thomas Leader of Wychavon District Council</p>

On behalf of:

Professional Bodies

 <p>Association of Directors of Environment, Economy, Planning &amp; Transport</p>	 <p>Steve Palfrey Chair of ADEPT Waste Group</p>
 <p>Association of London Cleansing Officers</p>	 <p>Neil Carret – Chair Association of London Street Cleansing Officers</p>
	 <p>Mark Tufnell CLA Deputy President</p>
	 <p>Jacob Hayler Executive Director Environmental Services Association</p>
 <p>www.hertfordshire.gov.uk/flytipping</p>	 <p>Duncan Jones – Chair Hertfordshire Fly Tipping Group</p>
 <p>Local Authority Recycling Advisory Committee</p>	 <p>Carole Taylor - Chair Local Authority Recycling Advisory Committee</p>
<p>London Environment Directors' Network</p> 	 <p>Chair London Environment Directors Network</p>



<p>LINCOLNSHIRE  <b>Environmental  Crime  Partnership</b></p> 	<p><i>A. Kirkham.</i></p> <p>Ayeisha Kirkham (MCIEH; CEnvH)  Chair – Lincolnshire Environmental  Crime Partnership</p>
 <p><b>Local</b>  <b>Government  Association</b></p>	<p><i>David Renard</i></p> <p>Cllr David Renard  Leader, Swindon Council  Haydon Wick Ward (Conservative)</p> <p>Chairman - Economy, Environment,  Housing and Transport Board  Local Government Association (LGA)</p>
 <p><b>NAWDO</b>  NATIONAL ASSOCIATION OF WASTE DISPOSAL OFFICERS</p>	<p><i>Emma Beal</i></p> <p>Emma Beal – Chair  National Association of Waste Disposal  Officers</p>

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Mr Duncan Jones  
Herts Fly Tipping Group  
c/o Hertfordshire County Council  
Postal Point CHN104  
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Pegs Lane  
Hertford  
SG13 8DN

Your Ref: FTG-SC-02

By email to: [duncan.jones@hertfordshire.gov.uk](mailto:duncan.jones@hertfordshire.gov.uk)

3 August 2021

Dear Mr Jones

## **Review of the Environmental Offences Definitive Guideline (2014)**

Thank you for the letter from Councillor Buckmaster on behalf of the various local authorities and other organisations who co-signed.

The letter raises a number of very interesting points, and while some of the suggestions made may be outside of the remit of the Sentencing Council (for example there is a requirement in law for a court to take into account the financial circumstances of the offender in setting a fine), others could possibly be addressed by changes to the sentencing guideline. As such, the views and suggestions will require careful consideration and my team will look at them in detail and refer the matter to the Sentencing Council for a decision as to whether the guideline should be revised.

The Sentencing Council next meets at the end of September and so no decision can be made before then. I will revert to you once the Council has considered the letter.

Yours sincerely,



**Steve Wade**

**Head of Office of the Sentencing Council**

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**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:

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

<b>Animal Welfare Act 2006, s9</b>	Failing to ensure needs of animal are met as required by good practice	156	136	48
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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 sentience 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?**

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## Sentencing statistics

Table 1: Number of adults sentenced for animal cruelty offences under the Animal Welfare Act 2006, 2010-2020

Section of Animal Welfare Act 2006	Sex	Number of adults sentenced										
		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
<b>S4 &amp; 32(1):</b> Causing, permitting or failing to prevent unnecessary suffering	Female	309	351	394	369	268	205	178	189	192	157	94
	Male	457	550	576	492	445	317	287	316	297	278	153
	Unknown	66	92	109	132	75	76	107	83	119	116	51
	<b>Total</b>	<b>832</b>	<b>993</b>	<b>1,079</b>	<b>993</b>	<b>788</b>	<b>598</b>	<b>572</b>	<b>588</b>	<b>608</b>	<b>551</b>	<b>298</b>
<b>S5 &amp; 32(1):</b> Carrying out, permitting or causing to be carried out or failing to prevent prohibited procedure on a protected animal	Female	0	0	0	0	0	0	0	0	0	0	0
	Male	4	0	0	1	1	0	1	1	1	3	0
	Unknown	0	0	0	0	0	0	0	0	0	0	2
	<b>Total</b>	<b>4</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>3</b>	<b>2</b>
<b>S6(1) &amp; (2) &amp; 32(1):</b> Removing or causing or permitting or failing to prevent removal of dog's tail other than for medical treatment	Female	0	2	2	0	0	0	0	0	0	0	0
	Male	0	5	7	1	1	1	0	1	1	0	1
	Unknown	0	0	1	0	1	0	0	0	0	0	0
	<b>Total</b>	<b>0</b>	<b>7</b>	<b>10</b>	<b>1</b>	<b>2</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>1</b>
<b>S7 &amp; 32(1):</b> Administration of poisons etc to a protected animal	Female	0	0	0	0	0	0	0	0	0	0	0
	Male	1	0	1	0	2	0	0	2	0	0	0
	Unknown	0	0	0	0	0	0	0	0	0	0	0
	<b>Total</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>S8 &amp; 32(1):</b> Offences relating to animal fights	Female	0	0	0	0	0	1	0	0	0	0	0
	Male	2	9	13	11	9	4	2	5	9	0	0
	Unknown	0	0	0	1	0	3	0	0	0	0	0
	<b>Total</b>	<b>2</b>	<b>9</b>	<b>13</b>	<b>12</b>	<b>9</b>	<b>8</b>	<b>2</b>	<b>5</b>	<b>9</b>	<b>0</b>	<b>0</b>

<b>S9 &amp; 32(2):</b> Failing to ensure needs of animal are met as required by good practice	Female	64	101	134	108	92	79	61	52	56	38	15
	Male	85	136	159	166	137	103	80	54	76	61	29
	Unknown	11	28	34	31	34	26	26	25	24	37	4
	<b>Total</b>	<b>160</b>	<b>265</b>	<b>327</b>	<b>305</b>	<b>263</b>	<b>208</b>	<b>167</b>	<b>131</b>	<b>156</b>	<b>136</b>	<b>48</b>
<b>Total</b>	Female	376	456	532	477	360	285	239	241	248	195	109
	Male	557	700	759	671	595	426	370	379	384	342	183
	Unknown	77	120	144	164	110	105	133	108	143	153	57
	<b>Total</b>	<b>1,010</b>	<b>1,276</b>	<b>1,435</b>	<b>1,312</b>	<b>1,065</b>	<b>816</b>	<b>742</b>	<b>728</b>	<b>775</b>	<b>690</b>	<b>349</b>

Section of Animal Welfare Act 2006	Sex	Percentage of adults sentenced <sup>1</sup>										
		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
<b>S4 &amp; 32(1):</b> Causing, permitting or failing to prevent unnecessary suffering	Female	40%	39%	41%	43%	38%	39%	38%	37%	39%	36%	38%
	Male	60%	61%	59%	57%	62%	61%	62%	63%	61%	64%	62%
	Unknown											
	<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>
<b>S5 &amp; 32(1):</b> Carrying out, permitting or causing to be carried out or failing to prevent prohibited procedure on a protected animal	Female	0%	-	-	0%	0%	-	0%	0%	0%	0%	-
	Male	100%	-	-	100%	100%	-	100%	100%	100%	100%	-
	Unknown											
	<b>Total</b>	<b>100%</b>	<b>0%</b>	<b>0%</b>	<b>100%</b>	<b>100%</b>	<b>0%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>0%</b>
<b>S6(1) &amp; (2) &amp; 32(1):</b> Removing or causing or permitting or failing to prevent removal of dog's tail other than for medical treatment	Female	-	29%	22%	0%	0%	0%	-	0%	0%	-	0%
	Male	-	71%	78%	100%	100%	100%	-	100%	100%	-	100%
	Unknown											
	<b>Total</b>	<b>0%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>0%</b>	<b>100%</b>	<b>100%</b>	<b>0%</b>	<b>100%</b>
<b>S7 &amp; 32(1):</b> Administration of poisons etc to a protected animal	Female	0%	-	0%	-	0%	-	-	0%	-	-	-
	Male	100%	-	100%	-	100%	-	-	100%	-	-	-
	Unknown											
	<b>Total</b>	<b>100%</b>	<b>0%</b>	<b>100%</b>	<b>0%</b>	<b>100%</b>	<b>0%</b>	<b>0%</b>	<b>100%</b>	<b>0%</b>	<b>0%</b>	<b>0%</b>

<b>S8 &amp; 32(1):</b> Offences relating to animal fights	Female	0%	0%	0%	0%	0%	20%	0%	0%	0%	-	-
	Male	100%	100%	100%	100%	100%	80%	100%	100%	100%	-	-
	Unknown											
	<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>0%</b>
<b>S9 &amp; 32(2):</b> Failing to ensure needs of animal are met as required by good practice	Female	43%	43%	46%	39%	40%	43%	43%	49%	42%	38%	34%
	Male	57%	57%	54%	61%	60%	57%	57%	51%	58%	62%	66%
	Unknown											
	<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>
<b>Total</b>	Female	40%	39%	41%	42%	38%	40%	39%	39%	39%	36%	37%
	Male	60%	61%	59%	58%	62%	60%	61%	61%	61%	64%	63%
	Unknown											
	<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

<sup>1</sup>Percentage calculations do not include cases where the sex was unknown.

**Table 2: Sentencing outcomes for adults sentenced for animal cruelty offences under the Animal Welfare Act 2006, 2010-2020**

Section of Animal Welfare Act 2006	Outcome	Number of adults sentenced										
		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
<b>S4 &amp; 32(1):</b> Causing, permitting or failing to prevent unnecessary suffering	Discharge	140	168	177	130	79	51	44	46	26	21	12
	Fine	192	203	175	169	145	95	114	113	152	110	65
	Community sentence	367	399	465	423	278	239	210	193	216	201	117
	Suspended sentence	74	131	149	177	184	147	128	173	144	151	64
	Immediate custody	47	81	101	78	77	55	61	49	61	61	36
	Otherwise dealt with	12	11	12	16	25	11	15	14	9	7	4
	<b>Total</b>	<b>832</b>	<b>993</b>	<b>1079</b>	<b>993</b>	<b>788</b>	<b>598</b>	<b>572</b>	<b>588</b>	<b>608</b>	<b>551</b>	<b>298</b>
<b>S8 &amp; 32(1):</b> Offences relating to animal fights	Discharge	0	0	0	0	0	0	0	0	0	0	0
	Fine	0	0	1	0	0	0	0	0	0	0	0
	Community sentence	1	0	2	5	0	0	0	4	2	0	0
	Suspended sentence	0	3	5	1	4	5	0	1	4	0	0
	Immediate custody	1	6	5	6	4	3	2	0	3	0	0
	Otherwise dealt with	0	0	0	0	1	0	0	0	0	0	0
	<b>Total</b>	<b>2</b>	<b>9</b>	<b>13</b>	<b>12</b>	<b>9</b>	<b>8</b>	<b>2</b>	<b>5</b>	<b>9</b>	<b>0</b>	<b>0</b>
<b>S9 &amp; 32(2):</b> Failing to ensure needs of animal are met as required by good practice	Discharge	41	50	90	49	50	36	18	15	20	11	1
	Fine	46	93	86	93	73	46	46	45	45	57	21
	Community sentence	50	89	121	97	85	68	72	42	51	41	15
	Suspended sentence	11	20	16	48	31	30	21	17	25	24	8
	Immediate custody	7	6	7	8	10	21	6	8	7	1	2
	Otherwise dealt with	5	7	7	10	14	7	4	4	8	2	1
	<b>Total</b>	<b>160</b>	<b>265</b>	<b>327</b>	<b>305</b>	<b>263</b>	<b>208</b>	<b>167</b>	<b>131</b>	<b>156</b>	<b>136</b>	<b>48</b>





**Table 3: Final average custodial sentence lengths (ACSL) in months for adults sentenced to immediate custody under section 4 and section 9 of the Animal Welfare Act 2006, 2010-2020**

		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
<b>S4 &amp; 32(1):</b> Causing, permitting or failing to prevent unnecessary suffering <sup>1</sup>	Mean	3.1	3.3	3.5	3.6	3.3	3.4	3.6	3.6	3.7	3.7	3.7
	Median	2.8	2.8	3.7	3.9	3.3	3.7	4.0	3.7	4.0	3.7	4.2
<b>S9 &amp; 32(2):</b> Failing to ensure needs of animal are met as required by good practice <sup>2</sup>	Mean	3.2	2.6	3.0	2.1	2.4	3.3	3.5	3.1	3.5	*	*
	Median	2.8	2.7	3.3	2.1	2.5	3.0	4.0	3.0	3.0	*	*

**Table 3a: Pre guilty-plea average custodial sentence lengths (ACSL) for adults sentenced to immediate custody under section 4 and section 9 of the Animal Welfare Act 2006, 2010-2020**

		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
<b>S4 &amp; 32(1):</b> Causing, permitting or failing to prevent unnecessary suffering <sup>1</sup>	Mean	4.2	4.6	4.9	4.9	4.7	4.7	5.1	4.9	5.2	5.0	5.3
	Median	4.2	4.2	4.9	4.7	4.9	4.2	5.3	5.0	5.6	5.3	5.6
<b>S9 &amp; 32(2):</b> Failing to ensure needs of animal are met as required by good practice <sup>2</sup>	Mean	4.2	3.4	4.3	2.9	3.4	4.7	4.8	4.5	5.0	*	*
	Median	3.3	3.9	4.9	2.22	3.15	4.5	5.63	4.55	4.4	*	*

\* = ACSL has not been calculated where the number of offenders sentenced to immediate custody is fewer than 5.

**Table 4: Final sentence length distributions for adults sentenced to immediate custody for animal cruelty offences under the Animal Welfare Act 2006, 2010-2020**

Section of Animal Welfare Act 2006	Sentence band <sup>2</sup>	Number of adults sentenced to immediate custody										
		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
<b>S4 &amp; 32(1):</b> Causing, permitting or failing to prevent unnecessary suffering <sup>1</sup>	Less than 1 month	2	3	3	1	5	4	1	1	1	0	1
	1 to 2	9	16	13	11	10	7	8	7	4	6	3
	2 to 3	18	24	23	20	17	11	17	9	15	15	9
	3 to 4	6	12	27	11	25	14	8	14	11	14	4
	4 to 5	9	17	25	26	13	12	20	11	22	18	14
	5 to 6 months	3	9	9	9	7	7	7	7	8	7	5
	<b>Total</b>	<b>47</b>	<b>81</b>	<b>100</b>	<b>78</b>	<b>77</b>	<b>55</b>	<b>61</b>	<b>49</b>	<b>61</b>	<b>60</b>	<b>36</b>
<b>S8 &amp; 32(1):</b> Offences relating to animal fights	Less than 1 month	0	0	0	0	0	0	0	0	0	0	0
	1 to 2	0	1	0	0	0	0	1	0	0	0	0
	2 to 3	0	3	0	0	1	0	0	0	0	0	0
	3 to 4	0	1	0	4	1	1	0	0	1	0	0
	4 to 5	0	1	2	1	2	1	1	0	1	0	0
	5 to 6 months	1	0	3	1	0	1	0	0	1	0	0
	<b>Total</b>	<b>1</b>	<b>6</b>	<b>5</b>	<b>6</b>	<b>4</b>	<b>3</b>	<b>2</b>	<b>0</b>	<b>3</b>	<b>0</b>	<b>0</b>
<b>S9 &amp; 32(2):</b> Failing to ensure needs of animal are met as required by good practice	Less than 1 month	1	1	1	2	2	2	1	1	0	0	0
	1 to 2	2	1	1	2	2	2	1	0	1	0	1
	2 to 3	1	2	1	3	5	8	0	3	3	0	0
	3 to 4	0	1	3	1	0	2	1	3	1	0	1
	4 to 5	2	1	1	0	1	4	2	0	1	1	0
	5 to 6 months	1	0	0	0	0	3	1	1	1	0	0
	<b>Total</b>	<b>7</b>	<b>6</b>	<b>7</b>	<b>8</b>	<b>10</b>	<b>21</b>	<b>6</b>	<b>8</b>	<b>7</b>	<b>1</b>	<b>2</b>

Section of Animal Welfare Act 2006	Sentence band <sup>2</sup>	Proportion of adults sentenced										
		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
<b>S4 &amp; 32(1):</b> Causing, permitting or failing to prevent unnecessary suffering <sup>1</sup>	Less than 1 month	4%	4%	3%	1%	6%	7%	2%	2%	2%	0%	3%
	1 to 2	19%	20%	13%	14%	13%	13%	13%	14%	7%	10%	8%
	2 to 3	38%	30%	23%	26%	22%	20%	28%	18%	25%	25%	25%
	3 to 4	13%	15%	27%	14%	32%	25%	13%	29%	18%	23%	11%
	4 to 5	19%	21%	25%	33%	17%	22%	33%	22%	36%	30%	39%
	5 to 6 months	6%	11%	9%	12%	9%	13%	11%	14%	13%	12%	14%
	<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>
<b>S8 &amp; 32(1):</b> Offences relating to animal fights	Less than 1 month	0%	0%	0%	0%	0%	0%	0%	-	0%	-	-
	1 to 2	0%	17%	0%	0%	0%	0%	50%	-	0%	-	-
	2 to 3	0%	50%	0%	0%	25%	0%	0%	-	0%	-	-
	3 to 4	0%	17%	0%	67%	25%	33%	0%	-	33%	-	-
	4 to 5	0%	17%	40%	17%	50%	33%	50%	-	33%	-	-
	5 to 6 months	100%	0%	60%	17%	0%	33%	0%	-	33%	-	-
	<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>
<b>S9 &amp; 32(2):</b> Failing to ensure needs of animal are met as required by good practice	Less than 1 month	14%	17%	14%	25%	20%	10%	17%	13%	0%	0%	0%
	1 to 2	29%	17%	14%	25%	20%	10%	17%	0%	14%	0%	50%
	2 to 3	14%	33%	14%	38%	50%	38%	0%	38%	43%	0%	0%
	3 to 4	0%	17%	43%	13%	0%	10%	17%	38%	14%	0%	50%
	4 to 5	29%	17%	14%	0%	10%	19%	33%	0%	14%	100%	0%
	5 to 6 months	14%	0%	0%	0%	0%	14%	17%	13%	14%	0%	0%
	<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Source: Court Proceedings Database, Ministry of Justice

### Case studies shared by the RSPCA

#### *Cases where sentencing reached the ceiling under the Animal Welfare Act 2006*

**Case 1** (18 November 2020) A dead dog was found hidden under a tyre at the bottom of a garden with five sharp trauma wounds to his neck, shoulder, and left leg. These wounds were believed to have been caused by a knife and the vet who examined him stated that it could have taken the animal hours to die as the wounds missed the main arteries. The man convicted of causing unnecessary suffering first claimed he had no memory of the incident, then claimed someone else had killed the dog.

Sentencing: He was sentenced to 26 weeks imprisonment.

**Case 2** (18 November 2020) A man was found guilty of twelve charges; eight under the Animal Welfare Act 2006 and four under the Protection of Badgers Act 1992 of causing unnecessary suffering to two dogs and badger baiting. It was the opinion of an expert vet that the man had caused his dogs to suffer unnecessarily on multiple occasions by allowing and encouraging them to fight with wild mammals including badgers causing them to sustain injuries which led to their unnecessary suffering by a failure to seek appropriate and timely veterinary intervention.

Sentencing: He was sentenced to 20 weeks imprisonment and disqualified him from keeping dogs for eight years. A deprivation order was also issued with regard to the two dogs.

**Case 3** (3 November 2020) A man who tortured a hedgehog by cutting off its limbs and covering its face with candle wax was jailed for 26 weeks. He caused unnecessary suffering to a hedgehog by cutting its legs, by burning/singeing the animal and covering the hedgehog's head and eyes with molten candle wax. He was also charged with a second offence under the Wild Mammals (Protection) Act 1996.

Sentencing: The District Judge sentenced him to the maximum 26 weeks imprisonment, disqualified him from keeping all animals for 10 years and ordered him to pay £122 victim surcharge.

**Case 4** (7 September 2020) A man who burned a cat in a hot oven, tried to flush her down the toilet, attempted to strangle her and threw her against the wall was given a suspended prison sentence. He was given the cat, Sweetie, by his sister as she thought it would be good for him but the defendant said the cat disobeyed him and he heard the voice of a wrestler who told him to attack the cat. The cat was taken to the vet and found to have third degree burns and loss of skin. The owner admitted putting her in the oven for up to five minutes. The magistrate called him "extremely dangerous and she "would have liked to put him in prison for as long as she could".

Sentencing: He was sentenced to 18 weeks suspended for two years, banned from keeping pets for ten years, pay £440 costs and ordered to undertake six months mental health treatment.

**Case 5** (12 January 2020) Two brothers were convicted for mistreating animals after one repeatedly stabbed a deer and the other let a bay horse starve to death. One was found guilty of causing unnecessary suffering to two dogs just a month after a gruesome video emerged of him knifing the deer. His brother was sentenced in the same court after he let a bay horse starve to death.

A third man was convicted following the seizure of three horses in March, just two months after RSPCA officials rescued a mare and its foal. He had been previously convicted last year of causing

unnecessary suffering to a foal which was seen hauling a cart of people at a horse fair. Four of the horses were emaciated and the foal had breathing problems, fleas and was described as "very thin." A Shetland Pony was also found with a deep cut across the nose.

Sentencing: The first brother was jailed for seven and a half months and will spend half that time in custody. He was also banned from keeping dogs for five years and ordered to pay £5,115. The second brother was given a 12 month community order, will have to do 150 hours unpaid work and pay £1,585.

The third man was also convicted alongside the two brothers, after four of his horses were found emaciated in the same RSPCA raid. He was jailed for 26 weeks after previously pleading not guilty to five counts of causing unnecessary suffering to horses. He was also banned from owning horses for five years and fined £5,000.

**Case 6** (20 December 2019) A man kicked his pet dog to death in a "cowardly and vicious" attack after drinking. The Staffordshire bull terrier, Diesel, was called by the man into the kitchen where the dog was kicked six of seven times. Sentencing: He pled guilty and was jailed for 17 weeks and banned from keeping animals for life.

**Case 7** (29 November 2019) A man admitted causing suffering after beating his 11 month old German Shepherd puppy to death. The puppy was punched to death before her body was dumped near some trees.

Sentencing: He was jailed for four months and banned from keeping animals for the rest of his life.

**Case 8** (14 November 2019) A man deliberately set his dog on a pet cat, which was mauled to death. This incident was caught on CCTV and his actions caused outrage on social media after the video footage was released in a bid to identify him.

The owner of the cat made a victim impact statement which was read to the Court and said that "The attack has affected my sleep. My cat Cleo would always be there in the morning but now she is not. "I don't want to go home because I know Cleo is not there. I feel as if a big part of my life is missing."

Sentencing: He was jailed for 18 weeks after admitting causing cruelty and was also banned from keeping animals for life. He was also ordered to pay a victim surcharge of £122 and £250 in compensation to the cat's owner.

Passing sentence, chairman of the bench Brian Benton told the defendant: "This court is restricted to a maximum sentence of 26 weeks for the offence to which you have pleaded. "Due to your guilty plea, you are entitled to a reduction of one-third, to 18 weeks. However, due to the circumstances, we would if we were actually permitted to do so have imposed a far greater custodial sentence."

**Case 9** (13 September 2019) A dog breeder who was breeding dogs but struggling to sell them. Her house was full of over 100 dogs in poor conditions, including some with injuries and disease, many living in cages and none having access to clean fresh water. Some were so suffering so much they had to be euthanised.

Sentencing: The defendant was found guilty of 16 charges of cruelty and neglect. She was given a 21 week prison sentence, disqualified from keeping or breeding animals for at least 15 years and ordered to pay £50,000 in costs.

**Case 10** (17 August 2019) Two people fed their dog anti-freeze then beat her with a metal pole to death and stabbed her. Their crimes came to light when an RSPCA inspector was contacted by environmental health officers.

Sentencing: The defendants admitted two counts of causing unnecessary suffering to a protected animal, one count of poisoning and one count of failing to see an animal receive proper medical attention. The judge jailed the pair for ten weeks and banned them from keeping animals for life. They can appeal after a 10-year period.

**Case 11** (1 May 2019) A man from Fulham was jailed and banned from keeping animals for life after he was found guilty of kicking his four-month-old puppy to death. A post-mortem examination of the dog's body revealed that there were also three historical injuries of blunt force trauma to the dog's body which occurred between May and June before the final incident which led to her death.

Sentencing: The defendant was found guilty of four offences for causing unnecessary suffering to a Staffordshire bull terrier by the infliction of physical abuse, namely blunt force trauma. Sentenced to an immediate 26-week custodial sentence in total for the four charges and banned from keeping all animals for life and ordered to pay £1,000 in costs.

**Case 12** (4 December 2018) The RSPCA joined Lancashire police to execute a warrant after intelligence suggested the person was involved in wildlife crimes with his two dogs. The RSPCA obtained videos of him setting his dogs on a pet cat and a fox and images of a dog being encouraged to attack a gerbil and still images of the fox attack which showed the animal being baited by the dog.

Sentencing: The defendant pleaded guilty to four offences under the Animal Welfare Act in relation to encouraging his two dogs to attack a cat and a fox, as well as failing to provide veterinary attention for the dogs themselves. The person was jailed for 22 weeks and disqualified from keeping animals for life. He was also ordered to pay £375 in costs and £115 victim surcharge.

## **Other cases referenced during the Bill's passage (taken from Hansard)**

### **Case 1**

Last year the RSPCA was called to a property in Wales, and inspectors found 35 ponies trapped in dilapidated barns, outbuildings and overgrown paddocks. During the inspection, three other ponies were discovered trapped underneath a fallen metal roof, pinned to the ground by its weight. The trapped ponies could not move and were found with lacerations and injuries across their bodies. Elsewhere on the property, starving ponies were found in tiny paddocks, and all had overgrown hooves and various injuries. Six of the ponies were lame, and another horse was found dumped on a rubbish heap. It is just horrendous.

Sentencing: In that case, the owners were sentenced to 16 weeks and 12 weeks respectively, suspended for one year. It seems that the courts are not taking animal cruelty offences most seriously, and we need to change that in Parliament. As has been said, we must also ensure that we enforce these regulations, not just bring them in.

### **Case 2**

In November 2019, a man admitted to beating his 11-month-old German Shepherd puppy to death.

Sentencing: He was sent to prison for four months.

### **Case 3**

In 2018, there was the Northampton cat killer, a man who killed and mutilated seven family pets before leaving them outside their homes for their owners to find them.

Sentencing: That case was horrific, but he was sentenced to just three months in prison.

### **Case 4**

In 2019 in Wellingborough, a man stabbed a miniature horse over 20 times with a kitchen knife. He also cut the wings off three chickens. All those animals had to be put down.

Sentence: He received just a two-month sentence and, in fact, a longer sentence for carrying the knife, which is obviously a serious offence as well. I do not think anyone would consider two or three-month sentences at all appropriate in both those cases.

### **Case 5**

A bulldog called Baby, was lifted above her owner's head and thrown down the stairs repeatedly. Not content with simply abusing Baby, the two young men video-recorded their actions for further entertainment and thank goodness they did or perhaps they would have never faced justice. The RSPCA investigated the case of Baby and took forward a private prosecution after a secure digital card was found in a supermarket some three years after the original incident, which had the video evidence filmed by one of the abusers. The RSPCA inspector Gemma Lynch described the clip for the court, saying that Baby was "totally submissive throughout, not even making a noise when she lands on the stairs, bouncing to the foot of them where there is a baby gate which she crashes into before hitting the ground." She described how a second clip showed Baby's abuser "stamping on her neck repeatedly at the bottom of the stairs, then picking her up and throwing her to the ground with force over and over again...Another clip shows him standing on Baby's chest...before jumping up and down on her. This is the only time you hear her make a noise, and she is crying throughout." During the RSPCA's investigation, it discovered that Baby had to be put down three months following the incident, after losing the use of her hindlegs.

Sentencing: The two men pleaded guilty to animal cruelty and were sentenced to 21 weeks in prison, suspended for two years, given a six-month tagged evening curfew, and ordered to pay £300 in costs. They were also banned from keeping animals for life, with no appeal for 20 years.

### **Case 6**

A little terrier called Scamp was found buried alive with a nail hammered in his head in a shallow grave in Redcar. Scamp was discovered by a walker who heard grunting from a mound in Kirkleatham woods and took the animal to a vet. The vet who examined the terrier described the abusers' actions as the worst case of animal cruelty that he had ever seen.

Sentencing: The two men who admitted the charges and pled guilty to the offence relating to the dog's death were jailed for just four months, the maximum that they could have received owing to their guilty pleas, and banned from keeping animals for life.

### **Case 7**

In one case, a cat was left in a washing machine for hours before it ultimately died.

Sentencing: The perpetrator received only a disqualification from keeping animals for five years.

### **Case 8**



4 1/2yrs ago, Jimmy was a cross-breed dog who had been mistreated for some time. Eventually, his owner had strung him up in the garden, taken a hammer and an air rifle to him, and then left him to experience what must have been a truly horrific and painful death. When we got into court, we were presented with photographs and mobile phone footage recovered by the RSPCA, which was bringing the prosecution. It was one of the most harrowing, deliberate and gratuitous attempts to cause suffering to an animal that I could ever imagine. The deliberate and prolonged nature of it, alongside what had obviously been neglect as a result of malnutrition for some time, was truly harrowing for everyone in the court. Jimmy the dog died a painful, slow and deliberate death as a result of a barbaric and irrational act by a 23-year-old man.

Sentencing: The individual on trial pleaded guilty at the first opportunity and was being convicted for a first offence. The sentence he received after mitigation was nowhere near the level that any one of us may have wanted to award, even within the current guidelines.

### **Case 9**

Archie, a dog who was so badly beaten, almost literally to a pulp, that only the whites of his eyes and his fast breathing could be seen. He suffered severe swelling on the left of his face, his neck, his left eye, the left side of his jaw and the base of his skull. An X-ray showed that Archie had a fractured spine and blood was also found in his urine. If someone had done that to a human being, they would meet the full force of law.

Sentencing: The man who had beaten Archie and put him in that life-threatening state, who was his former owner, his carer and the man responsible for his wellbeing, was sentenced to just 18 weeks' imprisonment—18 weeks for all that—and ordered to pay £500 in costs.

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## **Cruelty to a child – assault and ill treatment, abandonment, neglect, and failure to protect**

### **Children and Young Persons Act 1933, s.1(1)**

#### **Culpability**

##### **A High culpability**

- Prolonged and/or multiple incidents of serious cruelty, including serious neglect
- Gratuitous degradation of victim and/or sadistic behaviour
- Use of very significant force
- Use of a weapon
- Deliberate disregard for the welfare of the victim
- Failure to take any steps to protect the victim from offences in which the above factors are present
- Offender with professional responsibility for the victim (where linked to the commission of the offence)

##### **B Medium culpability**

- Use of significant force
- Prolonged and/or multiple incidents of cruelty, including neglect
- Limited steps taken to protect victim in cases with category A factors present
- Other cases falling between A and C because:
  - Factors in both high and lesser categories are present which balance each other out; and/or
  - The offender's culpability falls between the factors as described in high and lesser culpability

##### **C Lesser culpability**

- Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- Offender is victim of domestic abuse, including coercion and/or intimidation (where linked to the commission of the offence)
- Steps taken to protect victim but fell just short of what could reasonably be expected
- Momentary or brief lapse in judgement including in cases of neglect
- Use of some force or failure to protect the victim from an incident involving some force
- Low level of neglect

## Harm

### Category 1

- Serious psychological, developmental, and/or emotional harm
- Serious physical harm (including illnesses contracted due to neglect)

### Category 2

- Cases falling between categories 1 and 3
- A high likelihood of category 1 harm being caused

### Category 3

- Little or no psychological, developmental, and/or emotional harm
- Little or no physical harm

Harm	Culpability		
	A	B	C
Category 1	<b>Starting point</b> 6 years' custody	<b>Starting point</b> 3 years' custody	<b>Starting point</b> 1 year's custody
	<b>Category range</b> 4 – 8 years' custody	<b>Category range</b> 2 – 6 years' custody	<b>Category range</b> High level community order – 2 years 6 months' custody
Category 2	<b>Starting point</b> 3 years' custody	<b>Starting point</b> 1 year's custody	<b>Starting point</b> High level community order
	<b>Category range</b> 2 – 6 years' custody	<b>Category range</b> High level community order – 2 years 6 months' custody	<b>Category range</b> Medium level community order – 1 year's custody
Category 3	<b>Starting point</b> 1 year's custody	<b>Starting point</b> High level community order	<b>Starting point</b> Medium level community order
	<b>Category range</b> High level community order – 2 years 6 months' custody	<b>Category range</b> Medium level community order – 1 year's custody	<b>Category range</b> Low level community order – 6 months' custody

## **Causing or allowing a child to suffer serious physical harm/ Causing or allowing a child to die**

### **Domestic Violence, Crime and Victims Act 2004, s.5**

#### **Culpability**

##### **A High culpability**

- Prolonged and/or multiple incidents of serious cruelty, including serious neglect
- Gratuitous degradation of victim and/or sadistic behaviour
- Use of very significant force
- Use of a weapon
- Deliberate disregard for the welfare of the victim
- Failure to take any steps to protect the victim from offences in which the above factors are present
- Offender with professional responsibility for the victim (where linked to the commission of the offence)

##### **B Medium culpability**

- Use of significant force
- Prolonged and/or multiple incidents of cruelty, including neglect
- Limited steps taken to protect victim in cases with category A factors present
- Other cases falling between A and C because:
  - Factors in both high and lesser categories are present which balance each other out; and/or
  - The offender's culpability falls between the factors as described in high and lesser culpability

##### **C Lesser culpability**

- Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- Offender is victim of domestic abuse, including coercion and/or intimidation (where linked to the commission of the offence)
- Steps taken to protect victim but fell just short of what could reasonably be expected
- Momentary or brief lapse in judgement including in cases of neglect
- Use of some force or failure to protect the victim from an incident involving some force
- Low level of neglect

## Harm

### Category 1

- Death

### Category 2

- Serious physical harm which has a substantial and/or long term effect
- Serious psychological, developmental and/or emotional harm
- Significantly reduced life expectancy
- A progressive, permanent or irreversible condition

### Category 3

- Serious physical harm that does not fall into category 2

Harm	Culpability		
	A	B	C
Category 1	<b>Starting point</b> 9 years' custody	<b>Starting point</b> 5 years' custody	<b>Starting point</b> 2 years' custody
	<b>Category range</b> 7 – 14 years' custody	<b>Category range</b> 3 – 8 years' custody	<b>Category range</b> 1 – 4 years' custody
Category 2	<b>Starting point</b> 7 years' custody	<b>Starting point</b> 3 years' custody	<b>Starting point</b> 1 year 6 months' custody
	<b>Category range</b> 5 – 9 years' custody	<b>Category range</b> 1 year 6 months – 6 years' custody	<b>Category range</b> 6 months – 3 years' custody
Category 3	<b>Starting point</b> 3 years' custody	<b>Starting point</b> 1 year 6 months' custody	<b>Starting point</b> 9 months' custody
	<b>Category range</b> 1 year 6 months – 6 years' custody	<b>Category range</b> 6 months – 3 years' custody	<b>Category range</b> High level community order – 2 years' custody

## **Assault occasioning actual bodily harm / Racially or religiously aggravated ABH**

### **Crime and Disorder Act 1998, s.29, Offences against the Person Act 1861, s.47**

#### **Culpability**

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

#### **A – High culpability**

- Significant degree of planning or premeditation
- Victim obviously vulnerable due to age, personal characteristics or circumstances
- Use of a highly dangerous weapon or weapon equivalent\*
- Strangulation/suffocation/asphyxiation
- Leading role in group activity
- Prolonged/persistent assault

#### **B – Medium culpability**

- Use of a weapon or weapon equivalent which does not fall within category A
- Lesser role in group activity
- Cases falling between category A or C because:
  - Factors in both high and lesser categories are present which balance each other out; and/or
  - The offender's culpability falls between the factors as described in high and lesser culpability

#### **C – Lesser culpability**

- No weapon used
- Excessive self defence
- Impulsive/spontaneous and short-lived assault
- Mental disorder or learning disability, where linked to the commission of the offence

#### **Harm**

##### **Category 1**

- Serious physical injury or serious psychological harm and/or substantial impact upon victim

**Category 2**

- Harm falling between categories 1 and 3

**Category 3**

- Some level of physical injury or psychological harm with limited impact upon victim

Harm	Culpability		
	A	B	C
	<b>Starting point</b> 2 years 6 months' custody	<b>Starting point</b> 1 year 6 months' custody	<b>Starting point</b> 36 weeks' custody
<b>Harm 1</b>	<b>Category range</b> 1 year 6 months' – 4 years' custody	<b>Category range</b> 36 weeks' – 2 years 6 months' custody	<b>Category range</b> High level community order – 1 year 6 months' custody
	<b>Starting point</b> 1 year 6 months' custody	<b>Starting point</b> 36 weeks' custody	<b>Starting point</b> High level community order
<b>Harm 2</b>	<b>Category range</b> 36 weeks' – 2 years 6 months' custody	<b>Category range</b> High level community order – 1 year 6 months' custody	<b>Category range</b> Low level community order – 36 weeks' custody
	<b>Starting point</b> 36 weeks' custody	<b>Starting point</b> High level community order	<b>Starting point</b> Medium level community order
<b>Harm 3</b>	<b>Category range</b> High level community order – 1 year 6 months' custody	<b>Category range</b> Low level community order – 36 weeks' custody	<b>Category range</b> Band B fine – 26 weeks' custody



**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 Appeal<sup>1</sup> 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

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<sup>1</sup> *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><b>Level 1</b></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><b>8 years custody</b></p>	<p><b>7 - 14 years custody</b></p>
<p><b>Level 2</b></p> <p>Driving that created a <i>substantial</i> risk of danger</p>	<p><b>5 years custody</b></p>	<p><b>4 - 7 years custody</b></p>
<p><b>Level 3</b></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><b>3 years custody</b></p>	<p><b>2 - 5 years custody</b></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:

<b>CULPABILITY FACTORS</b>	
High	<ul style="list-style-type: none"><li>• Consumption of substantial amounts of alcohol or drugs leading to gross impairment (<i>existing level 1 example SGC; high culpability factor DD MCSG</i>)</li><li>• Prolonged, persistent and deliberate course of bad driving (<i>existing level 1 seriousness factor in SGC death by dangerous and DD MCSG</i>)</li><li>• 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>)</li><li>• Racing or competitive driving against another vehicle (<i>listed as determinate of seriousness in SGC gl and high culpability factor in DD MCSG</i>)</li><li>• 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>)</li><li>• 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>)</li></ul>
Medium	<ul style="list-style-type: none"><li>• Brief but obviously seriously dangerous manoeuvre (<i>level 3 of SGC gl</i>)</li></ul>

	<ul style="list-style-type: none"> <li>• 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>)</li> <li>• 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>)</li> <li>• Driving when knowingly suffering from a medical condition which significantly impaired the offender's driving skills (<i>MCSG DD</i>)</li> <li>• Driving at a speed that is inappropriate for the prevailing road or weather conditions (although is not greatly excessive) (<i>level 3 SGC</i>)</li> <li>• Driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs (<i>level 2 SGC</i>)</li> <li>• 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>)</li> <li>• Driving when knowingly deprived of adequate sleep or rest (<i>level 3 of existing SGC but tiredness high culpability factor in MCSG DD</i>)</li> </ul>
Lesser	<ul style="list-style-type: none"> <li>• Momentary lapse of concentration</li> <li>• Genuine mistake (<i>lower culpability MCSG DD</i>)</li> <li>• Genuine emergency (<i>lower culpability MCSG DD</i>)</li> <li>• 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>)</li> <li>• Speed not excessive (<i>lower culpability MCSG DD</i>)</li> </ul>

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:

<b>Category 1</b>	<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>
<b>Category 2</b>	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:

<b>Category 1</b>	<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>
<b>Category 2</b>	<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>
<b>Category 3</b>	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:

<b>Category 1</b>	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
<b>Category 2</b>	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.

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**Sentencing Guidelines Council**

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# Causing Death by Driving

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**Definitive Guideline**



## Foreword

In accordance with section 170(9) of the Criminal Justice Act (CJA) 2003, the Sentencing Guidelines Council issues this guideline as a definitive guideline.

By virtue of section 172 of the CJA 2003, every court must have regard to relevant guideline. This guideline applies to the sentencing of offenders convicted of any of the offences dealt with herein who are sentenced on or after **4 August 2008**.

This guideline applies only to the sentencing of offenders aged 18 and older. The legislative provisions relating to the sentencing of youths are different; the younger the age, the greater the difference. A separate guideline setting out general principles relating to the sentencing of youths is planned.

The Council has appreciated the work of the Sentencing Advisory Panel in preparing the advice on which this guideline is based and is grateful to those who responded to the consultation of both the Panel and Council.

The advice and this guideline are available on [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk) or can be obtained from the Sentencing Guidelines Secretariat at 4th Floor, 8–10 Great George Street, London SW1P 3AE.

A summary of the responses to the Council's consultation also appears on the website.

Chairman of the Council  
July 2008



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## Introduction

1. This guideline applies to the four offences of *causing death by dangerous driving*, *causing death by driving under the influence of alcohol or drugs*, *causing death by careless driving* and *causing death by driving: unlicensed, disqualified or uninsured drivers*.

2. The Crown Prosecution Service's *Policy for Prosecuting Cases of Bad Driving* sets out the approach for prosecutors when considering the appropriate charge based on an assessment of the standard of the offender's driving. This has been taken into account when formulating this guideline. [Annex A](#) sets out the statutory definitions for dangerous, careless and inconsiderate driving together with examples of the types of driving behaviour likely to result in the charge of one offence rather than another.

3. Because the principal harm done by these offences (the death of a person) is an element of the offence, the factor that primarily determines the starting point for sentence is the culpability of the offender. Accordingly, for all offences other than *causing death by driving: unlicensed, disqualified or uninsured drivers*, the central feature should be an evaluation of the quality of the driving involved and the degree of danger that it foreseeably created. These guidelines draw a distinction between those factors of an offence that are intrinsic to the quality of driving (referred to as "determinants of seriousness") and those which, while they aggravate the offence, are not.

4. The levels of seriousness in the guidelines for those offences based on dangerous or careless driving alone have been determined by reference only to determinants of seriousness. Aggravating factors will have the effect of either increasing the starting point within the sentencing range provided or, in certain circumstances, of moving the offence up to the next sentencing range.<sup>1</sup> The outcome will depend on both the number of aggravating factors present and the potency of those factors. Thus, the same outcome could follow from the presence of one particularly bad aggravating factor or two or more less serious factors.

5. The determinants of seriousness likely to be relevant in relation to *causing death by careless driving under the influence* are both the degree of carelessness and the level of intoxication. The guideline sets out an approach to assessing both those aspects but giving greater weight to the degree of intoxication since Parliament has provided for a maximum of 14 years imprisonment rather than the maximum of 5 years where the death is caused by careless driving only.

6. Since there will be no allegation of bad driving, the guideline for *causing death by driving: unlicensed, disqualified or uninsured drivers* links the assessment of offender culpability to the nature of the prohibition on the offender's driving and includes a list of factors that may aggravate an offence.

7. The degree to which an aggravating factor is present (and its interaction with any other aggravating and mitigating factors) will be immensely variable and the court is best placed to judge the appropriate impact on sentence. Clear identification of those factors relating to the standard of driving as the initial determinants of offence seriousness is intended to assist the adoption of a common approach. 2.

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<sup>1</sup> See page 8 for a description of the meaning of range, starting point etc. in the context of these guidelines.

## **A. Assessing seriousness**

### **(i) Determinants of seriousness**

8. There are five factors that may be regarded as determinants of offence seriousness, each of which can be demonstrated in a number of ways. Common examples of each of the determinants are set out below and key issues are discussed in the text that follows in paragraphs 10-18.

Examples of the determinants are:

- **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

9. Issues relating to the determinants of seriousness are considered below.

**(a) Alcohol/drugs**

10. For those offences where the presence of alcohol or drugs is not an element of the offence, where there is sufficient evidence of driving impairment attributable to alcohol or drugs, the consumption of alcohol or drugs prior to driving will make an offence more serious. Where the drugs were legally purchased or prescribed, the offence will only be regarded as more serious if the offender knew or should have known that the drugs were likely to impair driving ability.

11. Unless inherent in the offence or charged separately, failure to provide a specimen for analysis (or to allow a blood specimen taken without consent to be analysed) should be regarded as a determinant of offence seriousness.

12. Where it is established to the satisfaction of the court that an offender had consumed alcohol or drugs unwittingly before driving, that may be regarded as a mitigating factor. However, consideration should be given to the circumstances in which the offender decided to drive or continue to drive when driving ability was impaired.

**(b) Avoidable distractions**

13. A distinction has been drawn between **ordinary** avoidable distractions and those that are more significant because they divert the attention of the driver for longer periods or to a greater extent; in this guideline these are referred to as a **gross** avoidable distraction. The guideline for *causing death by dangerous driving* provides for a *gross* avoidable distraction to place the offence in a higher level of seriousness.

14. Any avoidable distraction will make an offence more serious but the degree to which an offender's driving will be impaired will vary. Where the reaction to the distraction is significant, it may be the factor that determines whether the offence is based on *dangerous* driving or on *careless* driving; in those circumstances, care must be taken to avoid "double counting".

15. Using a hand-held mobile phone when driving is, in itself, an unlawful act; the fact that an offender was avoidably distracted by using a hand-held mobile phone when a causing death by driving offence was committed will always make an offence more serious. Reading or composing text messages *over a period of time* will be a *gross* avoidable distraction and is likely to result in an offence of causing death by dangerous driving being in the highest level of seriousness.

16. Where it is proved that an offender was briefly distracted by reading a text message or adjusting a hands-free set or its controls at the time of the collision, this would be on a par with consulting a map or adjusting a radio or satellite navigation equipment, activities that would be considered an avoidable distraction.

**(c) Vulnerable road users**

17. Cyclists, motorbike riders, horse riders, pedestrians and those working in the road are vulnerable road users and a driver is expected to take extra care when driving near them. Driving too close to a bike or horse; allowing a vehicle to mount the pavement; driving into a cycle lane; and driving without the care needed in the vicinity of a pedestrian crossing, hospital, school or residential home, are all examples of factors that should be taken into account when determining the seriousness of



an offence. See paragraph 24 below for the approach where the actions of another person contributed to the collision.

18. The fact that the victim of a causing death by driving offence was a particularly vulnerable road user is a factor that should be taken into account when determining the seriousness of an offence.

## **(ii) Aggravating and mitigating factors**

### *(a) More than one person killed*

19. The seriousness of any offence included in these guidelines will generally be greater where more than one person is killed since it is inevitable that the degree of harm will be greater. In relation to the assessment of culpability, whilst there will be circumstances in which a driver could reasonably anticipate the possible death of more than one person (for example, the driver of a vehicle with passengers (whether that is a bus, taxi or private car) or a person driving badly in an area where there are many people), there will be many circumstances where the driver could not anticipate the number of people who would be killed.

20. The greater obligation on those responsible for driving other people is not an element essential to the quality of the driving and so has not been included amongst the determinants of seriousness that affect the choice of sentencing range. In practical terms, separate charges are likely to be brought in relation to each death caused. Although concurrent sentences are likely to be imposed (in recognition of the fact that the charges relate to one episode of offending behaviour), each individual sentence is likely to be higher because the offence is aggravated by the fact that more than one death has been caused.

21. Where more than one person is killed, that will aggravate the seriousness of the offence because of the increase in harm. Where the number of people killed is high and that was reasonably foreseeable, the number of deaths is likely to provide sufficient justification for moving an offence into the next highest sentencing band.

### *(b) Effect on offender*

22. Injury to the offender may be a mitigating factor when the offender has suffered very serious injuries. In most circumstances, the weighting it is given will be dictated by the circumstances of the offence and the effect should bear a direct relationship to the extent to which the offender's driving was at fault – the greater the fault, the less the effect on mitigation; this distinction will be of particular relevance where an offence did not involve any fault in the offender's standard of driving.

23. Where one or more of the victims was in a close personal or family relationship with the offender, this may be a mitigating factor. In line with the approach where the offender is very seriously injured, the degree to which the relationship influences the sentence should be linked to offender culpability in relation to the commission of the offence; mitigation for this reason is likely to have less effect where the culpability of the driver is particularly high.

### *(c) Actions of others*

24. Where the actions of the victim or a third party contributed to the commission of an offence, this should be acknowledged and taken into account as a mitigating factor.

*(d) Offender's age/lack of driving experience*

25. The Council guideline *Overarching Principles: Seriousness*<sup>2</sup> includes a generic mitigating factor “*youth or age, where it affects the responsibility of the individual defendant*”. There is a great deal of difference between recklessness or irresponsibility – which may be due to youth – and inexperience in dealing with prevailing conditions or an unexpected or unusual situation that presents itself – which may be present regardless of the age of the offender. The fact that an offender’s lack of driving experience contributed to the commission of an offence should be treated as a mitigating factor; in this regard, the age of the offender is not relevant.

**(iii) Personal mitigation**

*(a) Good driving record*

26. This is not a factor that automatically should be treated as a mitigating factor, especially now that the presence of previous convictions is a statutory aggravating factor. However, any evidence to show that an offender has previously been an exemplary driver, for example having driven an ambulance, police vehicle, bus, taxi or similar vehicle conscientiously and without incident for many years, is a fact that the courts may well wish to take into account by way of personal mitigation. This is likely to have even greater effect where the driver is driving on public duty (for example, on ambulance, fire services or police duties) and was responding to an emergency.

*(b) Conduct after the offence*

*- Giving assistance at the scene*

27. There may be many reasons why an offender does not offer help to the victims at the scene – the offender may be injured, traumatised by shock, afraid of causing further injury or simply have no idea what action to take – and it would be inappropriate to assess the offence as more serious on this ground (and so increase the level of sentence). However, where an offender gave direct, positive, assistance to victim(s) at the scene of a collision, this should be regarded as personal mitigation.

*- Remorse*

28. Whilst it can be expected that anyone who has caused death by driving would be expected to feel remorseful, this cannot undermine its importance for sentencing purposes. Remorse is identified as personal mitigation in the Council guideline<sup>3</sup> and the Council can see no reason for it to be treated differently for this group of offences. It is for the court to determine whether an expression of remorse is genuine; where it is, this should be taken into account as personal mitigation.

*(c) Summary*

29. Evidence that an offender is normally a careful and conscientious driver, giving direct, positive assistance to a victim and genuine remorse may be taken into account as personal mitigation and may justify a reduction in sentence.

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<sup>2</sup> *Overarching Principles: Seriousness*, paragraph 1.25, published 16 December 2004, [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

<sup>3</sup> *ibid.*, paragraph 1.27

## **B. Ancillary orders**

### *(i) Disqualification for driving*

30. For each offence, disqualification is a mandatory part of the sentence (subject to the usual (very limited) exceptions), and therefore an important element of the overall punishment for the offence. In addition, an order that the disqualification continues until the offender passes an extended driving test order is compulsory<sup>4</sup> for those convicted of causing death by dangerous driving or by careless driving when under the influence, and discretionary<sup>5</sup> in relation to the two other offences.

31. Any disqualification is effective from the date on which it is imposed. When ordering disqualification from driving, the duration of the order should allow for the length of any custodial period in order to ensure that the disqualification has the desired impact. In principle, the minimum period of disqualification should either equate to the length of the custodial sentence imposed (in the knowledge that the offender is likely to be released having served half of that term), or the relevant statutory minimum disqualification period, whichever results in the longer period of disqualification.

### *(ii) Deprivation order*

32. A general sentencing power exists which enables courts to deprive an offender of property used for the purposes of committing an offence.<sup>6</sup> A vehicle used to commit an offence included in this guideline can be regarded as being used for the purposes of committing the offence.

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<sup>4</sup> Road Traffic Offenders Act 1988, s.36(1)

<sup>5</sup> *ibid.*, s.36(4)

<sup>6</sup> Powers of Criminal Courts (Sentencing) Act 2000, s.143

## C. Sentencing ranges and starting points

1. Typically, a guideline will apply to an offence that can be committed in a variety of circumstances with different levels of seriousness. It will apply to a “*first time offender*” who has been **convicted after a trial**. Within the guidelines, a “*first time offender*” is a person who does not have a conviction which, by virtue of section 143(2) of the Criminal Justice Act 2003, must be treated as an aggravating factor.
2. As an aid to consistency of approach, the guideline describes a number of levels or types of activity which would fall within the broad definition of the offence.
3. The expected approach is for a court to identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed. This will identify a **starting point** from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the offence (beyond those contained within the column describing the nature of the offence) to reach a **provisional sentence**.
4. The **sentencing range** is the bracket into which the provisional sentence will normally fall after having regard to factors which aggravate or mitigate the seriousness of the offence. The particular circumstances may, however, make it appropriate that the provisional sentence falls outside the range.
5. Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the provisional sentence beyond the range given particularly where there are significant other aggravating factors present.
6. Once the provisional sentence has been identified by reference to those factors affecting the seriousness of the offence, the court will take into account any relevant factors of personal mitigation, which may take the sentence beyond the range given.
7. Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. This reduction may take the sentence below the range provided.
8. A court must give its reasons for imposing a sentence of a different kind or outside the range provided in the guidelines.

## **The decision making process**

**The process set out below is intended to show that the sentencing approach for offences of causing death by driving is fluid and requires the structured exercise of discretion.**

### **1. Identify Dangerous Offenders**

Offences under s.1 and s.3A of the Road Traffic Act 1988 are specified offences for the purposes of the public protection provisions in the 2003 Act (as amended). The court must determine whether there is a significant risk of serious harm by the commission of a further specified offence. The starting points in the guidelines are a) for offenders for whom a sentence under the public protection provisions is not appropriate and b) as the basis for the setting of a minimum term within an indeterminate sentence under those provisions.

### **2. Identify the appropriate starting point**

Identify the level or description that most nearly matches the particular facts of the offence for which sentence is being imposed.

### **3. Consider relevant aggravating factors, both general and those specific to the type of offence**

This may result in a sentence level being identified that is higher than the suggested starting point, sometimes substantially so.

### **4. Consider mitigating factors and personal mitigation**

There may be general or offence specific mitigating factors and matters of personal mitigation which could result in a sentence that is lower than the suggested starting point (possibly substantially so), or a sentence of a different type.

### **5. Reduction for guilty plea**

The court will then apply any reduction for a guilty plea following the approach set out in the Council's Guideline "*Reduction in Sentence for a Guilty Plea*" (revised July 2007).

### **6. Consider ancillary orders**

The court should consider whether ancillary orders are appropriate or necessary.

### **7. The totality principle**

The court should review the total sentence to ensure that it is proportionate to the offending behaviour and properly balanced.

### **8. Reasons**

When a court moves from the suggested starting points and sentencing ranges identified in the guidelines, it should explain its reasons for doing so.

## D. Offence guidelines

### Causing Death by Dangerous Driving Factors to take into consideration

1. The following guideline applies to a “*first-time offender*” aged 18 or over convicted after trial (see page 8 above), who has **not** been assessed as a dangerous offender requiring a sentence under ss. 224-228 Criminal Justice Act 2003 (as amended).
2. When assessing the seriousness of any offence, the court must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness<sup>7</sup> as well as those set out in the adjacent table as being particularly relevant to this type of offending behaviour.

#### 3. **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.

4. Sentencers should take into account relevant matters of personal mitigation; see in particular guidance on **good driving record, giving assistance at the scene** and **remorse** in paragraphs 26-29 above.

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<sup>7</sup> *Overarching Principles: Seriousness*, published 16 December 2004, [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

## Causing death by dangerous driving

Road Traffic Act 1988 (section 1)

**THIS IS A SERIOUS OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003**

**Maximum penalty: 14 years imprisonment  
minimum disqualification of 2 years with compulsory extended re-test**

Nature of offence	Starting point	Sentencing range
<b>Level 1</b> 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	<b>8 years custody</b>	<b>7 - 14 years custody</b>
<b>Level 2</b> Driving that created a <i>substantial</i> risk of danger	<b>5 years custody</b>	<b>4 - 7 years custody</b>
<b>Level 3</b> Driving that created a <i>significant</i> risk of danger  <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>	<b>3 years custody</b>	<b>2 - 5 years custody</b>

Additional aggravating factors	Additional mitigating factors
<ol style="list-style-type: none"> <li>1. Previous convictions for motoring offences, particularly offences that involve bad driving or the consumption of excessive alcohol or drugs before driving</li> <li>2. More than one person killed as a result of the offence</li> <li>3. Serious injury to one or more victims, in addition to the death(s)</li> <li>4. Disregard of warnings</li> <li>5. 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</li> <li>6. 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</li> <li>7. Driving off in an attempt to avoid detection or apprehension</li> </ol>	<ol style="list-style-type: none"> <li>1. Alcohol or drugs consumed unwittingly</li> <li>2. Offender was seriously injured in the collision</li> <li>3. The victim was a close friend or relative</li> <li>4. Actions of the victim or a third party contributed significantly to the likelihood of a collision occurring and/or death resulting</li> <li>5. The offender's lack of driving experience contributed to the commission of the offence</li> <li>6. The driving was in response to a proven and genuine emergency falling short of a defence</li> </ol>

## Causing Death by Careless Driving when under the influence of Drink or Drugs or having failed without reasonable excuse either to provide a specimen for analysis or to permit the analysis of a blood sample

### Factors to take into consideration

1. The following guideline applies to a “*first-time offender*” aged 18 or over convicted after trial (see page 8 above), who has **not** been assessed as a dangerous offender requiring a sentence under ss. 224-228 Criminal Justice Act 2003 (as amended).
2. When assessing the seriousness of any offence, the court must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness<sup>8</sup> as well as those set out on the facing page as being particularly relevant to this type of offending behaviour.
3. This offence can be committed through:
  - (i) being unfit to drive through drink or drugs;
  - (ii) having consumed so much alcohol as to be over the prescribed limit;
  - (iii) failing without reasonable excuse to provide a specimen for analysis within the timescale allowed; or
  - (iv) failing without reasonable excuse to permit the analysis of a blood sample taken when incapable of giving consent.
5. In comparison with *causing death by dangerous driving*, the level of culpability in the actual manner of driving is lower but that culpability is increased in all cases by the fact that the offender has driven after consuming drugs or an excessive amount of alcohol. Accordingly, there is considerable parity in the levels of seriousness with the deliberate decision to drive after consuming alcohol or drugs aggravating the *careless* standard of driving onto a par with *dangerous* driving.
6. The fact that the offender was under the influence of drink or drugs is an inherent element of this offence. For discussion on the significance of driving after having consumed drink or drugs, see paragraphs 10-12 above.
7. The guideline is based both on the level of alcohol or drug consumption and on the degree of carelessness.
8. The increase in sentence is more marked where there is an increase in the level of intoxication than where there is an increase in the degree of carelessness reflecting the 14 year imprisonment maximum for this offence compared with a 5 year maximum for causing death by careless or inconsiderate driving alone.
9. A refusal to supply a specimen for analysis may be a calculated step by an offender to avoid prosecution for driving when having consumed in excess of the prescribed amount of alcohol, with a view to seeking to persuade the court that the amount consumed was relatively small. A court is entitled to draw adverse inferences from a refusal to supply a specimen without reasonable excuse and should treat with caution any attempt to persuade the court that only a limited amount of alcohol had been consumed.<sup>9</sup> The three levels of seriousness where the offence has been committed in this way derive from the classification in the Magistrates' Court Sentencing Guidelines.
10. Sentencers should take into account relevant matters of personal mitigation; see in particular guidance on **good driving record, giving assistance at the scene and remorse** in paragraphs 26-29 above. 12.

<sup>8</sup> *Overarching Principles: Seriousness*, published 16 December 2004, [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

<sup>9</sup> *Attorney-General's Reference No. 21 of 2000* [2001] 1 Cr App R (S) 173



## Causing death by careless driving when under the influence of drink or drugs or having failed either to provide a specimen for analysis or to permit analysis of a blood sample

Road Traffic Act 1988 (section 3A)

**THIS IS A SERIOUS OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003**

**Maximum penalty: 14 years imprisonment  
minimum disqualification of 2 years with compulsory extended re-test**

<b>The legal limit of alcohol is 35µg breath (80mg in blood and 107mg in urine)</b>	<b>Careless / inconsiderate driving arising from momentary inattention with no aggravating factors</b>	<b>Other cases of careless / inconsiderate driving</b>	<b>Careless / inconsiderate driving falling not far short of dangerousness</b>
71µ or above of alcohol / high quantity of drugs OR deliberate non-provision of specimen where evidence of serious impairment	<b>Starting point:</b> 6 years custody  <b>Sentencing range:</b> 5-10 years custody	<b>Starting point:</b> 7 years custody  <b>Sentencing range:</b> 6-12 years custody	<b>Starting point:</b> 8 years custody  <b>Sentencing range:</b> 7-14 years custody
51- 70 µg of alcohol / moderate quantity of drugs OR deliberate non-provision of specimen	<b>Starting point:</b> 4 years custody  <b>Sentencing range:</b> 3-7 years custody	<b>Starting point:</b> 5 years custody  <b>Sentencing range:</b> 4-8 years custody	<b>Starting point:</b> 6 years custody  <b>Sentencing range:</b> 5-9 years custody
35-50 µg of alcohol / minimum quantity of drugs OR test refused because of honestly held but unreasonable belief	<b>Starting point:</b> 18 months custody  <b>Sentencing range:</b> 26 weeks-4 years custody	<b>Starting point:</b> 3 years custody  <b>Sentencing range:</b> 2-5 years custody	<b>Starting point:</b> 4 years custody  <b>Sentencing range:</b> 3-6 years custody
<b>Additional aggravating factors</b>	<b>Additional mitigating factors</b>		
<ol style="list-style-type: none"> <li>1. Other offences committed at the same time, such as driving other than in accordance with the terms of a valid licence; driving while disqualified; driving without insurance; taking a vehicle without consent; driving a stolen vehicle</li> <li>2. Previous convictions for motoring offences, particularly offences that involve bad driving or the consumption of excessive alcohol before driving</li> <li>3. More than one person was killed as a result of the offence</li> <li>4. Serious injury to one or more persons in addition to the death(s)</li> <li>5. Irresponsible behaviour such as failing to stop or falsely claiming that one of the victims was responsible for the collision</li> </ol>	<ol style="list-style-type: none"> <li>1. Alcohol or drugs consumed unwittingly</li> <li>2. Offender was seriously injured in the collision</li> <li>3. The victim was a close friend or relative</li> <li>4. The actions of the victim or a third party contributed significantly to the likelihood of a collision occurring and/or death resulting</li> <li>5. The driving was in response to a proven and genuine emergency falling short of a defence</li> </ol>		

## Causing death by careless or inconsiderate driving

### Factors to take into consideration

1. The following guideline applies to a “*first-time offender*” aged 18 or over convicted after trial (see page 8 above).
2. When assessing the seriousness of any offence, the court must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness<sup>10</sup> as well as those set out in the table below as being particularly relevant to this type of offending behaviour.
3. The maximum penalty on indictment is 5 years imprisonment. The offence is triable either way and, in a magistrates’ court, statute provides that the maximum sentence is 12 months imprisonment; this will be revised to 6 months imprisonment until such time as the statutory provisions increasing the sentencing powers of a magistrates’ court are implemented.<sup>11</sup>
4. Disqualification of the offender from driving and endorsement of the offender’s driving licence are mandatory, and the offence carries between 3 and 11 penalty points when the court finds special reasons for not imposing disqualification. There is a discretionary power<sup>12</sup> to order an extended driving test where a person is convicted of this offence.
5. Since the maximum sentence has been set at 5 years imprisonment, the sentence ranges are generally lower for this offence than for the offences of *causing death by dangerous driving* or *causing death by careless driving under the influence*, for which the maximum sentence is 14 years imprisonment. However, it is unavoidable that some cases will be on the borderline between *dangerous* and *careless* driving, or may involve a number of factors that significantly increase the seriousness of an offence. As a result, the guideline for this offence identifies three levels of seriousness, the range for the highest of which overlaps with ranges for the lowest level of seriousness for *causing death by dangerous driving*.
6. The three levels of seriousness are defined by the degree of carelessness involved in the standard of driving. The most serious level for this offence is where the offender’s driving fell *not that far short of dangerous*. The least serious group of offences relates to those cases where the level of culpability is low – for example in a case involving an offender who misjudges the speed of another vehicle, or turns without seeing an oncoming vehicle because of restricted visibility. Other cases will fall into the intermediate level.
7. The starting point for the most serious offence of *causing death by careless driving* is lower than that for the least serious offence of *causing death by dangerous driving* in recognition of the different standards of driving behaviour. However, the range still leaves scope, within the 5 year maximum, to impose longer sentences where the case is particularly serious.

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<sup>10</sup> *Overarching Principles: Seriousness*, published 16 December 2004, [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

<sup>11</sup> Criminal Justice Act 2003, ss.154(1) and 282; Road Safety Act 2006, s.61(5)

<sup>12</sup> Road Traffic Offenders Act 1988, s.36(4)

8. Where the level of carelessness is low and there are no aggravating factors, even the fact that death was caused is not sufficient to justify a prison sentence.
9. A fine is unlikely to be an appropriate sentence for this offence; where a non-custodial sentence is considered appropriate, this should be a community order. The nature of the requirements will be determined by the purpose<sup>13</sup> identified by the court as of primary importance. Requirements most likely to be relevant include unpaid work requirement, activity requirement, programme requirement and curfew requirement.
10. Sentencers should take into account relevant matters of personal mitigation; see in particular guidance on **good driving record, giving assistance at the scene and remorse** in paragraphs 26-29 above.

## Causing death by careless or inconsiderate driving

### Road Traffic Act 1988 (section 2B)

**Maximum penalty: 5 years imprisonment**  
**minimum disqualification of 12 months, discretionary re-test**

Nature of offence	Starting Point	Sentencing range
Careless or inconsiderate driving falling not far short of dangerous driving	<b>15 months custody</b>	<b>36 weeks - 3 years custody</b>
Other cases of careless or inconsiderate driving	<b>36 weeks custody</b>	<b>Community order (HIGH) - 2 years custody</b>
Careless or inconsiderate driving arising from momentary inattention with no aggravating factors	<b>Community order (MEDIUM)</b>	<b>Community order (LOW) – Community order (HIGH)</b>

Additional aggravating factors	Additional mitigating factors
<ol style="list-style-type: none"> <li>1. Other offences committed at the same time, such as driving other than in accordance with the terms of a valid licence; driving while disqualified; driving without insurance; taking a vehicle without consent; driving a stolen vehicle</li> <li>2. Previous convictions for motoring offences, particularly offences that involve bad driving</li> <li>3. More than one person was killed as a result of the offence</li> <li>4. Serious injury to one or more persons in addition to the death(s)</li> <li>5. Irresponsible behaviour, such as failing to stop or falsely claiming that one of the victims was responsible for the collision</li> </ol>	<ol style="list-style-type: none"> <li>1. Offender seriously injured in the collision</li> <li>2. The victim was a close friend or relative</li> <li>3. The actions of the victim or a third party contributed to the commission of the offence</li> <li>4. The offender's lack of driving experience contributed significantly to the likelihood of a collision occurring and/or death resulting</li> <li>5. The driving was in response to a proven and genuine emergency falling short of a defence</li> </ol>

<sup>13</sup> Criminal Justice Act 2003, s.142(1)

## Causing death by driving: unlicensed, disqualified or uninsured drivers

### Factors to take into consideration

1. The following guideline applies to a “*first-time offender*” aged 18 or over convicted after trial (see page 8 above). An offender convicted of causing death by driving whilst disqualified will always have at least one relevant previous conviction for the offence that resulted in the disqualification. The starting point and range take this into account; any other previous convictions should be considered in the usual way.
2. When assessing the seriousness of any offence, the court must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness<sup>14</sup> as well as those set out in the table below as being particularly relevant to this type of offending behaviour.
3. This offence has a maximum penalty of 2 years imprisonment and is triable either way. In a magistrates’ court, statute provides that the maximum sentence is 12 months imprisonment; this will be revised to 6 months imprisonment until such time as the statutory provisions increasing the sentencing powers of a magistrates’ court are implemented.<sup>15</sup>
4. Disqualification of the offender from driving and endorsement of the offender’s driving licence are mandatory, and the offence carries between 3 and 11 penalty points when the court finds special reasons for not imposing disqualification. There is a discretionary power<sup>16</sup> to order an extended driving test where a person is convicted of this offence.
5. Culpability arises from the offender driving a vehicle on a road or other public place when, by law, not allowed to do so; the offence does not require proof of any fault in the standard of driving.
6. Because of the significantly lower maximum penalty, the sentencing ranges are considerably lower than for the other three offences covered in this guideline; many cases may be sentenced in a magistrates’ court, particularly where there is an early guilty plea.
7. A fine is unlikely to be an appropriate sentence for this offence; where a non-custodial sentence is considered appropriate, this should be a community order.
8. Since driving whilst disqualified is more culpable than driving whilst unlicensed or uninsured, a higher starting point is proposed when the offender was disqualified from driving at the time of the offence.
9. Being uninsured, unlicensed or disqualified are the only determinants of seriousness for this offence, as there are no factors relating to the standard of driving. The list of aggravating factors identified is slightly different as the emphasis is on the decision to drive by an offender who is not permitted by law to do so.

16.

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<sup>14</sup> *Overarching Principles: Seriousness*, published 16 December 2004, [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

<sup>15</sup> Criminal Justice Act 2003, ss.154(1) and 282; Road Safety Act 2006, s.61(5)

<sup>16</sup> Road Traffic Offenders Act 1988, s.36(4)

10. In some cases, the extreme circumstances that led an offender to drive whilst unlicensed, disqualified or uninsured may result in a successful defence of 'duress of circumstances.'<sup>17</sup> In less extreme circumstances, where the *decision to drive was brought about by a genuine and proven emergency*, that may mitigate offence seriousness and so it is included as an additional mitigating factor.
11. A driver may hold a reasonable belief in relation to the validity of insurance (for example having just missed a renewal date or relied on a third party to make an application) and also the validity of a licence (for example incorrectly believing that a licence covered a particular category of vehicle). In light of this, an additional mitigating factor covers those situations where an offender genuinely believed that there was valid insurance or a valid licence.
12. Sentencers should take into account relevant matters of personal mitigation; see in particular guidance on **good driving record, giving assistance at the scene and remorse** in paragraphs 26-29 above.

## Causing death by driving: unlicensed, disqualified or uninsured drivers

Road Traffic Act 1988 (section 3ZB)

Maximum penalty: 2 years imprisonment

minimum disqualification of 12 months, discretionary re-test

Nature of offence	Starting point	Sentencing range
The offender was disqualified from driving <b>OR</b> The offender was unlicensed or uninsured plus 2 or more aggravating factors from the list below	<b>12 months custody</b>	<b>36 weeks - 2 years custody</b>
The offender was unlicensed or uninsured plus at least 1 aggravating factor from the list below	<b>26 weeks custody</b>	<b>Community order (HIGH) - 36 weeks custody</b>
The offender was unlicensed or uninsured – no aggravating factors	<b>Community order (MEDIUM)</b>	<b>Community order (LOW) – Community order (HIGH)</b>

Additional aggravating factors	Additional mitigating factors
<ol style="list-style-type: none"> <li>1. Previous convictions for motoring offences, whether involving bad driving or involving an offence of the same kind that forms part of the present conviction (i.e. unlicensed, disqualified or uninsured driving)</li> <li>2. More than one person was killed as a result of the offence</li> <li>3. Serious injury to one or more persons in addition to the death(s)</li> <li>4. Irresponsible behaviour such as failing to stop or falsely claiming that someone else was driving</li> </ol>	<ol style="list-style-type: none"> <li>1. The decision to drive was brought about by a proven and genuine emergency falling short of a defence</li> <li>2. The offender genuinely believed that he or she was insured or licensed to drive</li> <li>3. The offender was seriously injured as a result of the collision</li> <li>4. The victim was a close friend or relative</li> </ol>

<sup>17</sup> In *DPP v Mullally* [2006] EWHC 3448 the Divisional Court held that the defence of necessity must be strictly controlled and that it must be proved that the actions of the defendant were reasonable in the given circumstances. See also *Hasan* [2005] UKHL 22

## Annex A: DANGEROUS AND CARELESS DRIVING

### Statutory definitions and examples

#### Dangerous driving

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.

Examples of the types of driving behaviour likely to result in this offence being charged include:

- Aggressive driving (such as sudden lane changes or cutting into a line of vehicles) **or** Racing or competitive driving **or** Speed that is highly inappropriate for the prevailing road or traffic conditions
- Disregard of traffic lights and other road signs which, on an objective analysis, would appear to be deliberate
- Driving a vehicle knowing it has a dangerous defect or with a load which presents a danger to other road users
- Using a hand-held mobile phone or other hand-held electronic equipment when the driver was avoidably and dangerously distracted by that use
- Driving when too tired to stay awake or where the driver is suffering from impaired ability such as having an arm or leg in plaster, or impaired eyesight

#### Careless driving

Careless driving is driving that “falls *below* what would be expected of a competent and careful driver” and a person is to be regarded as driving without reasonable consideration for other persons “only if those persons are inconvenienced by his driving”.<sup>18</sup>

Examples of the types of driving behaviour likely to result in an offence of *causing death by careless or inconsiderate driving* being charged are:

(i) Careless Driving

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

(ii) Inconsiderate Driving

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

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

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

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<sup>18</sup> 1988 Act, s.3ZA as inserted by the Road Safety Act 2006

**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.

# **Perverting the Course of Justice**

**Common law**

**Triable only on indictment**

**Maximum: Life imprisonment**

**Offence range: x – xx years' custody**

## STEP ONE

### Determining the offence category

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

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

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

<b>HARM</b>	
<b>The level of harm is assessed by weighing up all the factors in the case.</b>	
Category 1	<ul style="list-style-type: none"><li>• Serious consequences for an innocent person(s) as a result of the offence (for example time spent in custody/arrest)</li><li>• Serious distress caused to innocent party (for example loss of reputation)</li><li>• High level of financial costs (police/prosecution/court) incurred as a result of the offence</li><li>• Conduct succeeded in perverting the course of justice</li></ul>
Category 2	<ul style="list-style-type: none"><li>• Suspicion cast upon an innocent person as a result of the offence</li><li>• Some costs incurred as a result of the offence</li></ul>



	<ul style="list-style-type: none"><li>• Conduct partially successful in perverting the course of justice</li></ul>
Category 3	<ul style="list-style-type: none"><li>• Conduct did not succeed in perverting the course of justice</li><li>• Limited effects of the offence on victim/costs incurred</li></ul>

## STEP TWO

### Starting point and category range

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

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

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

#### Factors increasing seriousness

##### *Statutory aggravating factors:*

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

##### *Other aggravating factors:*

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

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

**Factors reducing seriousness or reflecting personal mitigation**

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

**STEP THREE**

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

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

**STEP FOUR**

**Reduction for guilty pleas**

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

**STEP FIVE**

**Totality principle**

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

**STEP SIX**

**Compensation and ancillary orders**

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

**STEP SEVEN**

**Reasons**

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

**STEP EIGHT**

**Consideration for time spent on bail**

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

# **Witness Intimidation**

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

**Triable either way**

**Maximum when tried summarily: 6 months or level 5 fine**

**Maximum when tried on indictment: 5 years**

**Offence range: x – xx years' custody**

## STEP ONE

### Determining the offence category

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

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

<b>CULPABILITY</b>	
Demonstrated by one or more of the following:	
<b>A-</b> High Culpability	<ul style="list-style-type: none"><li>• Threats of violence to witnesses and/or their families; deliberately seeking out witnesses</li><li>• Breach of bail conditions</li><li>• Sustained period of conduct</li><li>• Offender involves others in the conduct</li><li>• Offence committed in the context of other serious criminal activity</li></ul>
<b>B-</b> Medium culpability	<ul style="list-style-type: none"><li>• Non-violent conduct amounting to a threat (for example staring at, approaching or following witnesses)</li><li>• Attempts to alter or stop evidence</li><li>• Other cases that fall between categories A and C because:<ul style="list-style-type: none"><li>○ Factors are present in A and C which balance each other out <b>and/or</b></li><li>○ The offender's culpability falls between the factors described in A and C</li></ul></li></ul>
<b>C-</b> Lower culpability	<ul style="list-style-type: none"><li>• Offence limited in scope and duration</li><li>• Involved through coercion, intimidation or exploitation</li><li>• Offender's responsibility substantially reduced by mental disorder or learning disability</li></ul>
<b>HARM</b>	
The level of harm is assessed by weighing up all the factors in the case.	
Category 1	<ul style="list-style-type: none"><li>• Considerable detrimental impact on administration of justice</li><li>• Considerable distress caused to victim</li><li>• Contact made at or in vicinity of victim's home</li></ul>
Category 2	<ul style="list-style-type: none"><li>• Some detrimental impact on administration of justice</li><li>• Some distress caused to the victim</li></ul>
Category 3	<ul style="list-style-type: none"><li>• Limited effect of the offence</li></ul>

## STEP TWO

### Starting point and category range

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

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

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

#### Factors increasing seriousness

##### *Statutory aggravating factors:*

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

##### *Other aggravating factors:*

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

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

**Factors reducing seriousness or reflecting personal mitigation**

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



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

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

**STEP FOUR****Reduction for guilty pleas**

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

**STEP FIVE****Totality principle**

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

**STEP SIX****Compensation and ancillary orders**

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

**STEP SEVEN****Reasons**

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

**STEP EIGHT****Consideration for time spent on bail**

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

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**Annex C: Demographic data for perverting the course of justice and witness intimidation offences, 2020.**

**Perverting the course of justice**

Number and proportion of adult offenders sentenced for perverting the course of justice, by sex, 2020

<b>Sex</b>	<b>Number of adults sentenced</b>						<b>Total</b>
	<b>Absolute and conditional discharge</b>	<b>Fine</b>	<b>Community sentence</b>	<b>Suspended sentence</b>	<b>Immediate custody</b>	<b>Otherwise dealt with<sup>2</sup></b>	
Female	2	1	4	60	33	7	<b>107</b>
Male	0	0	11	111	173	2	<b>297</b>

<b>Sex</b>	<b>Proportion of adults sentenced</b>						<b>Total</b>
	<b>Absolute and conditional discharge</b>	<b>Fine</b>	<b>Community sentence</b>	<b>Suspended sentence</b>	<b>Immediate custody</b>	<b>Otherwise dealt with<sup>2</sup></b>	
Female	2%	1%	4%	56%	31%	7%	<b>100%</b>
Male	0%	0%	4%	37%	58%	1%	<b>100%</b>

Number and proportion of adult offenders sentenced for perverting the course of justice, by age group, 2020

<b>Age group</b>	<b>Number of adults sentenced</b>						<b>Total</b>
	<b>Absolute and conditional discharge</b>	<b>Fine</b>	<b>Community sentence</b>	<b>Suspended sentence</b>	<b>Immediate custody</b>	<b>Otherwise dealt with<sup>2</sup></b>	
18 to 21	0	0	1	8	13	1	<b>23</b>
22 to 29	2	0	3	50	78	5	<b>138</b>
30 to 39	0	0	2	43	68	1	<b>114</b>
40 to 49	0	1	4	40	28	1	<b>74</b>
50 to 59	0	0	3	26	15	1	<b>45</b>
60 and over	0	0	2	4	4	0	<b>10</b>

Age group	Proportion of adults sentenced						Total
	Absolute and conditional discharge	Fine	Community sentence	Suspended sentence	Immediate custody	Otherwise dealt with <sup>2</sup>	
18 to 21	0%	0%	4%	35%	57%	4%	<b>100%</b>
22 to 29	1%	0%	2%	36%	57%	4%	<b>100%</b>
30 to 39	0%	0%	2%	38%	60%	1%	<b>100%</b>
40 to 49	0%	1%	5%	54%	38%	1%	<b>100%</b>
50 to 59	0%	0%	7%	58%	33%	2%	<b>100%</b>
60 and over	0%	0%	20%	40%	40%	0%	<b>100%</b>

Number and proportion of adult offenders sentenced for perverting the course of justice, by age group, 2020

Ethnicity	Number of adults sentenced						Total
	Absolute and conditional discharge	Fine	Community sentence	Suspended sentence	Immediate custody	Otherwise dealt with <sup>2</sup>	
Asian	0	0	3	14	14	0	<b>31</b>
Black	0	0	0	8	16	1	<b>25</b>
Mixed	0	0	0	4	9	1	<b>14</b>
Other	0	1	1	0	2	0	<b>4</b>
White	1	0	11	81	111	5	<b>209</b>
Not recorded/not known	1	0	0	64	54	2	<b>121</b>

Ethnicity	Proportion of adults sentenced						Total
	Absolute and conditional discharge	Fine	Community sentence	Suspended sentence	Immediate custody	Otherwise dealt with <sup>2</sup>	
Asian	0%	0%	10%	45%	45%	0%	<b>100%</b>
Black	0%	0%	0%	32%	64%	4%	<b>100%</b>
Mixed	0%	0%	0%	29%	64%	7%	<b>100%</b>
Other	0%	25%	25%	0%	50%	0%	<b>100%</b>
White	0%	0%	5%	39%	53%	2%	<b>100%</b>
Not recorded/not known	1%	0%	0%	53%	45%	2%	<b>100%</b>

#### Intimidating a witness (section 51(1) and 51(2) combined)

Number and proportion of adult offenders sentenced for intimidating a witness, by sex, 2020

Sex	Number of adults sentenced						Total
	Absolute and conditional discharge	Fine	Community sentence	Suspended sentence	Immediate custody	Otherwise dealt with <sup>2</sup>	
Female	0	0	5	4	6	1	<b>16</b>
Male	0	1	8	42	103	4	<b>158</b>
Not recorded/not known	0	0	0	0	1	0	<b>1</b>

Sex	Proportion of adults sentenced						Total
	Absolute and conditional discharge	Fine	Community sentence	Suspended sentence	Immediate custody	Otherwise dealt with <sup>2</sup>	
Female	0%	0%	31%	25%	38%	6%	<b>100%</b>
Male	0%	1%	5%	27%	65%	3%	<b>100%</b>
Not recorded/not known	0%	0%	0%	0%	100%	0%	<b>100%</b>

Number and proportion of adult offenders sentenced for intimidating a witness, by age group, 2020

Age group	Number of adults sentenced						Total
	Absolute and conditional discharge	Fine	Community sentence	Suspended sentence	Immediate custody	Otherwise dealt with <sup>2</sup>	
18 to 21	0	1	4	8	15	0	<b>28</b>
22 to 29	0	0	3	11	28	3	<b>45</b>
30 to 39	0	0	5	17	44	1	<b>67</b>
40 to 49	0	0	1	5	12	0	<b>18</b>
50 to 59	0	0	0	4	7	1	<b>12</b>
60 and over	0	0	0	1	4	0	<b>5</b>

Age group	Proportion of adults sentenced						Total
	Absolute and conditional discharge	Fine	Community sentence	Suspended sentence	Immediate custody	Otherwise dealt with <sup>2</sup>	
18 to 21	0%	4%	14%	29%	54%	0%	<b>100%</b>
22 to 29	0%	0%	7%	24%	62%	7%	<b>100%</b>
30 to 39	0%	0%	7%	25%	66%	1%	<b>100%</b>
40 to 49	0%	0%	6%	28%	67%	0%	<b>100%</b>
50 to 59	0%	0%	0%	33%	58%	8%	<b>100%</b>
60 and over	0%	0%	0%	20%	80%	0%	<b>100%</b>

Number and proportion of adult offenders sentenced for intimidating a witness, by ethnicity, 2020

Ethnicity	Number of adults sentenced						Total
	Absolute and conditional discharge	Fine	Community sentence	Suspended sentence	Immediate custody	Otherwise dealt with <sup>2</sup>	
Asian	0	0	0	0	6	0	6
Black	0	0	1	1	3	0	5
Mixed	0	0	1	1	0	0	2
Other	0	0	0	0	0	0	0
White	0	1	9	37	77	4	128
Not recorded/not known	0	0	2	7	24	1	34

Ethnicity	Proportion of adults sentenced						Total
	Absolute and conditional discharge	Fine	Community sentence	Suspended sentence	Immediate custody	Otherwise dealt with <sup>2</sup>	
Asian	0%	0%	0%	0%	100%	0%	100%
Black	0%	0%	20%	20%	60%	0%	100%
Mixed	0%	0%	50%	50%	0%	0%	100%
Other	-	-	-	-	-	-	-
White	0%	1%	7%	29%	60%	3%	100%
Not recorded/not known	0%	0%	6%	21%	71%	3%	100%

Source: Court Proceedings Database, Ministry of Justice

- = No proportions have been calculated as no offenders were sentenced.

Notes:

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

- 2) 2) The category 'Otherwise dealt with' includes victim surcharge, restraining order and otherwise dealt with on conviction.
- 3) 3) Ethnicity is the self-identified ethnicity as defined by the individual and is categorised using the 5+1 self-identified classification based on the 18+1 classification used in the 2011 Census.



**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:

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

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 <b>Glock 19 handgun and ammunition</b> 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 <b>gun and 250 rounds of ammunition</b> 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.

# Firearms – Importation

## **Improper importation of goods**

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

## **Fraudulent evasion of prohibition / restriction**

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

Triable either way

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

Offence range: Fine – 28 years' custody

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

## Step 1 – Determining the offence category

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

### Culpability – Type of weapon

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

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

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

#### Type 1

Weapon that is designed 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 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 under section 5(1)(b)
  - a stun gun under section 5(1A)(a)

Very small quantity of ammunition

**Culpability – other culpability factors**

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

**High culpability:**

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

**Medium culpability:**

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

**Lower culpability:**

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

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

**Harm**

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

**Category 1**

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

## Step 2 – Starting point and category range

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

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

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

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

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

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

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

### Factors increasing seriousness

#### **Statutory aggravating factors:**

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

#### **Other aggravating factors:**

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

### Factors reducing seriousness or reflecting personal mitigation

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

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

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

### **Step 4 – Reduction for guilty pleas**

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

### **Step 5 – Totality principle**

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

### **Step 6 – Ancillary orders**

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

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

### **Forfeiture of firearms**

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

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

### **Serious Crime Prevention Order**

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

### **Step 7 – Reasons**

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

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

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