Office of the Sentencing Council
Room EB16 East Block
Royal Courts of Justice
Strand
London WC2A 2LL
DX 44450 Strand
T 020 7071 5793
E Steve.Wade@sentencingcouncil.gsi.gov.uk

www.sentencingcouncil.org.uk

9 December 2022

Dear Members

Meeting of the Sentencing Council – 16 December 2022

The next Council meeting will be held in the **Queens Building Conference Suite, 2nd Floor Mezzanine** at the Royal Courts of Justice, on Friday 16 December 2022 at 9:45. This will be a hybrid meeting, so a Microsoft Teams invite is also included below.

To note this meeting will be held in the original room used previously for Council meetings on floor 2M of the Queens Building.

A security pass is **not** needed to gain access to this meeting room and members can head straight to the room. Once at the Queen's building, go to the lifts and the floor is **2M** Alternatively, call the office on 020 7071 5793 and a member of staff will come and escort you to the meeting room.

The agenda items for the Council meeting are:

▪ Agenda	SC(22)DEC00
▪ Minutes of meeting held on 18 November	SC(22)NOV01
▪ Action log	SC(22)DEC02
▪ Child Cruelty	SC(22)DEC03
▪ Miscellaneous amendments	SC(22)DEC04
▪ Motoring offences	SC(22)DEC05
▪ Imposition	SC(22)DEC06

Sentencing Council Meeting dates for 2024 and the external communication evaluation for November are also included with the papers.

Christmas Jumpers
Members of the office will be wearing Christmas jumpers for the meeting and we invite Council members to take part if they wish to. You can also donate to the save the children site here:
https://christmas.savethechildren.org.uk/fundraising/amber-isaac-christmas-jumper-day

Members can access papers via the members' area of the website. As ever, if you are unable to attend the meeting, we would welcome your comments in advance.

The link to join the meeting is: Click here to join the meeting

Best wishes

Steve Wade

Head of the Office of the Sentencing Council

Sentencing Council

COUNCIL MEETING AGENDA

16 December 2022
Royal Courts of Justice
Queen's Building

09:45 – 10:00	Minutes of the last meeting and matters arising (papers 1 and 2)
10:00 – 10:45	Child cruelty - presented by Ollie Simpson (paper 3)
10:45 – 11:30	Miscellaneous amendments - presented by Ruth Pope (paper 4)
11:30 – 11:45	Break
11:45 – 12:30	Motoring offences - presented by Ollie Simpson (paper 5)
12:30 – 13:15	Imposition - presented by Jessie Stanbrook (paper 6)

COUNCIL MEETING AGENDA

Blank page

Sentencing Council

MEETING OF THE SENTENCING COUNCIL

28 NOVEMBER 2022

MINUTES

Members present:	Bill Davis (Chairman) Tim Holroyde Rebecca Crane Rosa Dean Nick Ephgrave Diana Fawcett Elaine Freer Jo King Stephen Leake Juliet May Maura McGowan Beverley Thompson Richard Wright
Apologies:	Max Hill
Representatives:	Claire Fielder for the Lord Chancellor (Director, Youth Justice and Offender Policy) Lynette Woodrow for the Director of Public Prosecutions
Observer:	Rosie de Coverley of the Criminal Appeal Office
Members of Office in attendance:	Steve Wade Phil Hodgson Emma Marshall Ruth Pope Zeinab Shaikh Ollie Simpson

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 21 October 2022 were agreed subject to one minor amendment.

2. MATTERS ARISING

2.1 The Chairman informed the meeting that he had recently given an interview to Law in Action, the Radio 4 law magazine programme.

3. DISCUSSION ON EQUALITY AND DIVERSITY RESEARCH – PRESENTED BY EMMA MARSHALL, RUTH POPE AND PHIL HODGSON, OFFICE OF THE SENTENCING COUNCIL

3.1 The Council considered the recommendations in a report it had commissioned from the University of Hertfordshire into equality and diversity in the work of the Sentencing Council.

3.2 The Council agreed to publish the report in January 2023 and also to publish a brief response document setting out the actions the Council would be taking as a result of the report's findings and recommendations.

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

4.1 The Council discussed responses to the motoring consultation which ran between July and September. There was a discussion on the general approach to culpability, and the distinction between careless and dangerous driving in the proposed guidelines.

4.2 The Council agreed that, in light of responses received, further work was required to provide the courts with guidance on disqualification.

5. DISCUSSION ON ANIMAL CRUELTY – PRESENTED BY ZEINAB SHAIKH, OFFICE OF THE SENTENCING COUNCIL

5.1 This was the third meeting to review responses to the public consultation on the animal cruelty sentencing guidelines.

5.2 In this meeting, the Council revisited the proposed sentence levels for the animal cruelty guideline (covering section 4 to 8 offences), focusing on cases involving category 1 harm and high culpability.

5.3 The Council also explored how animal fighting offences would be represented in the guideline, looking particularly at the interaction between the nature of some of these offences and the proposed aggravating factors.

5.4 More broadly, the Council also considered equalities issues and other miscellaneous points that had been raised by respondents during the public consultation.

6. DISCUSSION ON UNDERAGE SALE OF KNIVES – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

6.1 The Council considered the responses to the consultation in respect of the guideline for sentencing individuals and agreed to make some changes to the culpability, aggravating and mitigating factors as a result.

6.2 The Council agreed to create a bespoke expanded explanation for previous convictions in guidelines for organisations.

6.3 The Council considered the consultation responses on sentence levels in both the guideline for individuals and the guideline for organisations and agreed the levels for the definitive guidelines taking into account the flexibility afforded by step 3 of the guidelines.

6.4 Subject to some other minor changes, the Council agreed to publish the definitive guidelines in February to come into force on 1 April 2023.

Blank page

Sentencing Council

SC(22)DEC02 December Action Log

ACTION AND ACTIVITY LOG – as at 9 DECEMBER 2022

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 23 September 2022					
1	**False Imprisonment and Kidnap offences**	Mandy to devise a combined false imprisonment and kidnap guideline to be used in a resentencing exercise by Judicial Council members to test the viability of such a guideline for both offences with one sentence table. Results of this exercise to be discussed at the next meeting for this guideline (March).	**Judicial members (minus Jo king and plus Richard Wright.) to take part in the resentencing exercise**	**ACTION ONGOING:** The majority of Judicial members have completed the resentencing exercise but there is still time for it to be completed by all taking part. Mandy then to bring the results to full Council in due course.	
2	**Witness intimidation**	Police to provide information about the types of warnings that may be issued that would be relevant to the witness intimidation guideline.	**Nick Ephgrave**		**ACTION COMPLETED:** Nick has sent information to Steve
SENTENCING COUNCIL MEETING 18 November 2022					
3	**Animal Cruelty**	SL to share information from District Judges' training materials on disqualifying offenders from keeping animals	**Stephen Leake**		

Blank page

Sentencing Council

Sentencing Council meeting:	**16 December 2022**
Paper number:	**SC(22)DEC03 – Child cruelty**
Lead Council member:	**N/A**
Lead official:	**Ollie Simpson** **ollie.simpson@sentencingcouncil.gov.uk**

1 ISSUE

1.1 Considering responses to the consultation on revised child cruelty guidelines that ran between 4 August and 27 October

2 RECOMMENDATIONS

2.1 That Council publish the revisions as consulted on with no changes (at **Annexes A and B**).

3 CONSIDERATION

3.1 The Police, Crime, Sentencing and Courts Act 2022 increased the maximum penalty for causing or allowing a child to die from 14 years custody to life imprisonment. It also increased the maximum penalty for causing or allowing a child to suffer serious physical harm and cruelty to a child from 10 years to 14 years. Following that, the Council consulted on revisions to the guidelines for these offences to reflect those increases.

3.2 We received 16 responses. Of those, eight were supportive without qualification, and most of the others broadly agreed with our proposals with some observations and suggestions.

3.3 The most substantial criticism came from the group Restore Justice who felt that we should have kept three categories of culpability and raised sentence levels across the board:

> "We disagree with the creation of 'very high culpability' category. We do not believe such a category was intended by the PCSC Act 2022 to capture the worst cases, but that the intention was to increase the statutory maximum sentence to life and for the custodial lengths to be reflected in the existing categories…
>
> "The top end of the highest custodial sentence range for causing or allowing a child to die in the highest harm & culpability category should be more than 18 years. This is because the cases that will fall into that category are extremely serious, often on par with that of murder

or manslaughter offences but charged as 'causing or allowing a child to die' offence, which then potentially creates inequality in the criminal justice system for sentencing of a child's killer to a lower custody than the offender would otherwise receive for killing of an adult for example...

"We believe that the statutory maximum as set out in the PCSC Act 2022 reflects the seriousness of such a crime but the proposed sentence levels do not, and that it was the intention of Parliament to increase the minimum tariffs for the offenders to serve in prison when a life sentence for that offence is imposed by the courts. The starting point for causing or allowing a child to die should be 30 years' custody and category range 28 years to 40 years, as the maximum statutory level is life imprisonment.

"In relation to the causing or allowing a child to suffer serious physical harm and for cruelty to a child the sentence levels are also low for the highest harm & culpability category. The starting point should be a minimum of 15 years custody, and the custodial range should go up to 12 to 20 years minimum, which would still be low in our view." – *Restore Justice*

3.4 The starting points and ranges proposed for causing or allowing a child to suffer serious physical harm and cruelty to a child would, however, be outside the statutory maximum. In terms of Parliament's intent, the West London Magistrates Bench helpfully collated the parliamentary statements linking the rise in maximum penalty to the case of Tony Hudgell, confirming that the rise was intended to capture only the very worst cases – for example:

> *"[24 June 2021 Debate on a new clause 56 to the PCSC Bill] …*
>
> *I respectfully contend that the current maximum sentence of 10 years does not adequately reflect the gravity of cases at the upper end of seriousness."*
>
> *[12 February 2019 Debate from Hansard] …The purpose of this Bill…is to ensure that individuals who commit the most serious acts of cruelty against children face appropriate punishment when convicted of this crime."*

3.5 Indeed, the response from the Ministry of Justice again linked the changes with the case of Tony Hudgell, welcoming them in "reflect[ing] Parliament's clear intent to address the sentencing levels for the most serious cases which fall under these offences".

3.6 A few respondents commented that the word "extreme" was too subjective, and the London Criminal Courts Solicitors' Association believed

"it would make more sense for the very high culpability bracket to be reserved for cases where a combination of high culpability factors is present as we cannot envisage an "extreme" case where no more than one high culpability factor would be present."

I believe sentencers are used to considering "extreme" cases in the context of manslaughter, modern slavery and other guidelines. In the context of this particular offending, it might also be the case that one or other perpetrator has simply "failed to take steps" in a particularly horrific case, and it should be open to the courts to place them in the highest culpability. Alternatively, it might cover a one-off event involving the use of incredibly brutal force.

3.7 Most respondents tacitly or explicitly agreed that we should retain "prolonged and/or multiple incidents of serious cruelty, including serious neglect" at high culpability rather than include it as a very high culpability factor. One anonymous respondent disagreed, and also thought sentence levels were too low:

"Prolonged and/or multiple incidents of serious cruelty, including serious neglect" should be in the very high culpability level. Even if the multiple incidents are a low level of abuse, the fact that this is done on a regular basis brings this into the highest category of culpability. The sentencing council members may not be able to relate to this situation, but low level abuse committed regularly over a period of weeks, months or even years is torture. It is one the most grievous forms of cruelty which can be done to a child. Objectively, this sickening behaviour, irrespective of the level of abuse, would be categorised as very high culpability by the majority of society…

The starting points should be increased for high culpability cases. Causing or allowing a child to die should have a starting point of 18 years, with a sentence range of 16 - 24 years.

Cruelty to a child should have 10 years as its starting point with a sentence range of 8 - 13 years imprisonment.

These are very serious offences and the highest level of culpability should have high sentences beyond the ones proposed in the consultation."

3.8 This response highlights the tension that we grappled with ahead of consultation. Considering the balance of responses in favour of our approach I do not propose to move "prolonged and/or multiple incidents of serious cruelty, including serious neglect" into the very high culpability box, and maintain the view that it is possible to envisage examples of that behaviour that fall below the very worst.

4 EQUALITIES

4.1 Several responses picked up on the potential issues for disparities between male and female offenders, although there was a balance between those observing that women (as carers) would make up a disproportionate number of offenders compared to other types of offending, and those who thought that men received more severe sentences for this offending than women.

4.2 No one had specific suggestions for changes to the guidelines on the basis of these issues. The West London Bench wanted to see sentencing data for males and females separated out in the statistical bulletin. This was available in the sentencing tables but we can highlight this in the consultation response document, with signposts to the updated data tables.

4.3 The Prison Reform Trust said “it remains to be seen whether or not the new guideline will have a disproportionate impact on women and the sentences they receive for these offences. The council should monitor the impact of the new very high culpability factor on the length of sentences handed down, to ensure that in practice it does not lead to general sentence inflation across the culpability levels for these offences”. Such post implementation monitoring will be done in the usual way.

Question 1: does the Council agree not to make amendments to the version on which we consulted?

5 IMPACT AND RISKS

5.1 The consultation stage resource assessment is at **Annex C**. We will circulate the publication stage version to Council shortly: given the lack of changes from the draft guideline, the findings will be the same as those set out in the draft.

5.2 Given that the vast majority of section 5 offenders already receive immediate custody, the revisions we have consulted on are not anticipated to change the proportion of offenders who receive immediate custodial sentences. It is likely that there may be a very small number of offenders at the highest level of culpability across both offences who will receive longer custodial sentences under the draft guideline.

5.3 For section 1 offences, there may be a very small impact on prison and probation resources as offenders at the highest level of culpability currently may receive longer sentences under the draft guideline, reflecting the increase in statutory maximum sentence. There is no indication that the guideline will lead to a change in sentencing outcomes for

these offences; the majority of offenders are likely to continue receiving a community order or suspended sentence order since the guideline remains largely unchanged.

5.4 There is a risk that when judges are given an extra culpability category alongside increased sentencing powers, they will be tempted automatically to place a bad case in the worst possible category. That would mean, for example, a case of causing/allowing serious physical harm that would have had a starting point of seven years' custody would now have a starting point of nine years, even though the facts are the same.

5.5 Arguably, an anomaly remains whereby the worst cases of GBH with intent committed against an adult will be sentenced more severely than cases prosecuted under child cruelty legislation where a child has been killed or left with serious permanent disabilities. At root, this is reflective of the different maximum penalties available for different offences and charging decisions will determine the penalty available. Revised sentencing levels will mitigate this to some extent.

5.6 The Prison Reform Trust were supportive of our approach, but the thrust of their response was to question why we did not take it for other cases where Parliament had raised the maximum penalty. The Justice Select Committee picked up on this point in its response, making the link with its inquiry on public understanding of sentencing:

> "…a number of witnesses have raised the fact that campaigns to raise the maximum penalty offence can give rise to some misunderstandings regarding how the changes to the legislation will affect the actual sentences handed down by the courts. As a result, we would be interested to gain a clearer understanding of how the Council decides whether an increase to the maximum penalty by Parliament should result in a change to all sentence levels or only to the sentences for the most serious cases. We appreciate that every offence will be different, but nonetheless it would be useful to know which factors might influence the Council's approach. In particular, it could help the Government to make a more accurate assessment of how a change to the maximum penalty might affect prison resources." - *Justice Select Committee*

This will be something to address in the consultation response.

5.7 Given this is a very discrete amendment to one set of guidelines, we propose to publish the definitive changes alongside this year's miscellaneous amendments in March, to come into force in April.

Blank page

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

Effective from: XXXXXXXXX

Causing or allowing a child to suffer serious physical harm

Indictable only
Maximum: 14 years' custody for offences committed after 28 June 2022; otherwise 10 years' custody
Offence range: Community order – 12 years' custody

Causing or allowing a child to die

Indictable only

Maximum: life imprisonment for offences committed after 28 June 2022; otherwise 14 years' custody
Offence range: 1 year's custody – 18 years' custody

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

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

For offences committed on or after 28 June 2022, causing or allowing a child to die 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.

This guideline applies only when the victim of the offence is aged 15 or under.

User guide for this offence

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.

Applicability

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
A Very high culpability **Very high culpability may be indicated by:** • the extreme character of one or more culpability B factors and /or • a combination of culpability B factors
B 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)
C 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 B factors present
- Other cases falling between B and D 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

D 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

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim. **Psychological, developmental or emotional harm** A finding that the psychological, developmental or emotional harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does **not** imply that the psychological/ developmental harm suffered by the victim is minor or trivial.

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

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.

Where a case does not fall squarely within a category, adjustment from the starting point may be required before adjustment for aggravating or mitigating features.

Harm	**Culpability**			
	A	**B**	**C**	D
Category 1	**Starting point** 14 years' custody	**Starting point** 9 years' custody	**Starting point** 5 years' custody	**Starting point** 2 years' custody
	Category range 12 – 18 years' custody	**Category range** 7 – 14 years' custody	**Category range** 3 – 8 years' custody	**Category range** 1 – 4 years' custody
Category 2	**Starting point** 9 years' custody	**Starting point** 7 years' custody	**Starting point** 3 years' custody	**Starting point** 1 year 6 months' custody
	Category range 7 – 12 years' custody	**Category range** 5 – 9 years' custody	**Category range** 1 year 6 months – 6 years' custody	**Category range** 6 months – 3 years' custody
Category 3	**Starting point** 7 years' custody	**Starting point** 3 years' custody	**Starting point** 1 year 6 months' custody	**Starting point** 9 months' custody
	Category range 5 – 9 years' custody	**Category range** 1 year 6 months – 6 years' custody	**Category range** 6 months –3 years' custody	**Category range** High level community order – 2 years' custody

Community orders

Custodial sentences

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

Other aggravating factors

- Failure to seek medical help (where not taken into account at step one)
- Prolonged suffering prior to death
- Commission of offence whilst under the influence of alcohol or drugs
- Deliberate concealment and/or covering up of the offence
- Blame wrongly placed on others
- Failure to respond to interventions or warnings about behaviour
- Threats to prevent reporting of the offence
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Offences taken into consideration
- Offence committed in the presence of another child

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Determination and demonstration of steps having been taken to address addiction or offending behaviour, including co-operation with agencies working for the welfare of the victim
- Sole or primary carer for dependent relatives **(see step five for further guidance on parental responsibilities)**
- Good character and/or exemplary conduct (where previous good character/exemplary conduct has been used to facilitate or conceal the offence, this should not normally constitute mitigation and such conduct may constitute aggravation)

- Serious medical condition requiring urgent, intensive or long-term treatment
- Mental disorder, learning disability or lack of maturity (where not taken into account at step one)
- Co-operation with the investigation

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 – Parental responsibilities of sole or primary carers

In the majority of child cruelty cases the offender will have parental responsibility for the victim.

When considering whether to impose custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children in the offender's care). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lower culpability cases or where the offender has otherwise been a loving and capable parent/carer.

Where custody is unavoidable consideration of the impact on the offender's children may be relevant to the length of the sentence imposed. For more serious offences where a substantial period of custody is appropriate, this consideration will carry less weight.

Step 6 – Dangerousness

The court should consider:

1) for offences of causing or allowing the death of a child committed on or after 28 June 2022, 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) for offences committed on or after 3 December 2012, whether having regard to sections 273 and 283 of the Sentencing Code it would be appropriate to impose a life sentence.

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

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

Step 7 – 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.

Blank page

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

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

Effective from: XXXXXXXXXXX

Triable either way
Maximum: 14 years' custody for offences committed on or after 28 June 2022; otherwise 10 years' custody
Offence range: Community order – 12 years' custody

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.

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.

Applicability

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

A Very high culpability

- Very high culpability may be indicated by:
- the extreme character of one or more culpability B factors and /or
- a combination of culpability B factors

B 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)

C 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 B factors present
- Other cases falling between B and D 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

D 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

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.
Psychological, developmental or emotional harm
A finding that the psychological, developmental or emotional harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does **not** imply that the psychological, developmental or emotional harm suffered by the victim is minor or trivial.

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

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.

Where a case does not fall squarely within a category, adjustment from the starting point may be required before adjustment for aggravating or mitigating features.

	Culpability			
Harm	**A**	**B**	**C**	**D**
Category 1	**Starting point** 9 years' custody **Category range** 7 – 12 years' custody	**Starting point** 6 years' custody **Category range** 4 – 8 years' custody	**Starting point** 3 years' custody **Category range** 2 – 6 years' custody	**Starting point** 1 year's custody **Category range** High level community order – 2 years 6 months' custody
Category 2	**Starting point** 6 years' custody **Category range** 4 – 8 years' custody	**Starting point** 3 years' custody **Category range** 2 – 6 years' custody	**Starting point** 1 year's custody **Category range** High level community order – 2 years 6 months' custody	**Starting point** High level community order **Category range** Medium level community order – 1 year's custody
Category 3	**Starting point** 3 years' custody **Category range** 2 – 6 years' custody	**Starting point** 1 year's custody **Category range** High level community order – 2 years 6 months' custody	**Starting point** High level community order **Category range** Medium level community order – 1 year's custody	**Starting point** Medium level community order **Category range** Low level community order – 6 months' custody

Community orders

Custodial sentences

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

Other aggravating factors

- Failure to seek medical help (where not taken into account at step one)
- Commission of offence whilst under the influence of alcohol or drugs
- Deliberate concealment and/or covering up of the offence
- Blame wrongly placed on others
- Failure to respond to interventions or warnings about behaviour
- Threats to prevent reporting of the offence
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Offences taken into consideration
- Offence committed in the presence of another child

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Determination and demonstration of steps having been taken to address addiction or offending behaviour, including co-operation with agencies working for the welfare of the victim
- Sole or primary carer for dependent relatives **(see step five for further guidance on parental responsibilities)**
- Good character and/or exemplary conduct

(where previous good character/exemplary conduct has been used to facilitate or conceal the offence, this should not normally constitute mitigation and such conduct may constitute aggravation)

- Serious medical condition requiring urgent, intensive or long-term treatment
- Mental disorder, learning disability

or
lack of maturity
(where not taken into account at step one)

- Co-operation with the investigation

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 – Parental responsibilities of sole or primary carers

In the majority of child cruelty cases the offender will have parental responsibility for the victim.

When considering whether to impose custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children in the offender's care). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lower culpability cases or where the offender has otherwise been a loving and capable parent/carer.

Where custody is unavoidable consideration of the impact on the offender's children may be relevant to the length of the sentence imposed. For more

serious offences where a substantial period of custody is appropriate, this consideration will carry less weight.

Step 6 – 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 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 – Magistrates' Court
- 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.

Blank page

Sentencing Council

Consultation Stage Resource Assessment

Child Cruelty 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.[1]

Rationale and objectives for new guideline

In February 2008, the Sentencing Guidelines Council (SGC) published *'Overarching Principles: Assaults on children and Cruelty to a child'*, covering the offence of cruelty to a child (section 1 of the Children and Young Persons Act 1933). This guideline did not cover the offence of causing or allowing a child to die (section 5 of the Domestic Violence and Crime Act 2004).

In July 2012, the offence of causing or allowing a child to die was expanded to include causing or allowing a child to suffer serious physical harm as part of the Domestic Violence, Crime and Victims (Amendment) Act 2012. The Council subsequently produced guidelines to cover this wider offence, along with revisions to the previous SGC guideline for cruelty to a child. These were published in September 2018, to come into effect in courts in England and Wales from 1 January 2019.

Under the Police, Crime, Sentencing and Courts (PCSC) Act 2022, for offences committed on or after 28 June 2022, the statutory maxima have increased from 10 years' custody to 14 years' custody for both cruelty to a child and causing or allowing a child or vulnerable adult[2] to suffer serious physical harm, and from 14 years' custody to life imprisonment for causing or allowing a child or vulnerable adult[2] to die. The Council is now consulting on revised sentencing guidelines for these offences, to reflect these increases in the statutory maximum sentences: a Cruelty to a child guideline for sentencing child cruelty offences contrary to section 1(1) of the Children and Young Persons Act 1933, for use in all courts, and another guideline covering both causing or allowing a child to die and causing or allowing a child to suffer serious physical harm, contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004, for use in the Crown Court.

---

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

2 The increase in statutory maximum sentence covers offenders sentenced for causing or allowing a *child or vulnerable adult* to die or suffer serious physical harm, while the guideline is only applicable for offenders sentenced for causing or allowing a *child* to die or suffer serious physical harm. Analysis of Crown Court judges' sentencing remarks suggests the majority of cases involve child victims, rather than vulnerable adults.

The Council's aim in developing these guidelines is to provide sentencers with a clear approach to sentencing these offences which will ensure that sentences are proportionate to the offence committed and in relation to other offences. They should also promote a consistent approach to sentencing in relation to the increases in statutory maximum sentence.[3]

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:

- Causing or allowing a child to die or suffer serious physical harm, Domestic Violence, Crime and Victims Act 2004 (section 5); and
- Cruelty to a child, Children and Young Persons Act 1933 (section 1(1)).

These 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 guidelines will encourage consistency of sentencing, in relation to the increase in statutory maximum sentences, and also to ensure that, for all offences, sentences are proportionate to the severity of the offence committed and in relation to other offences, whilst incorporating the changes in legislation.

Knowledge of recent sentencing was required to understand how the draft guidelines may impact sentences. Sources of evidence have included the analysis of transcripts of Crown Court judges' sentencing remarks for offenders sentenced for child cruelty

[3] The Ministry of Justice impact assessment, drafted in conjunction with the Home Office, for the increase in statutory maximum sentence for these child cruelty offences can be found here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073333/MOJ_Criminal_Law_IA_2022_Final.pdf

offences, as well as sentencing data from the Court Proceedings Database.[4,5] Knowledge of the sentences and factors used in previous cases, in conjunction with Council members' experience of sentencing, has helped to inform the development of the guidelines.

Detailed sentencing statistics for the offences covered by the draft guidelines have been published on the Sentencing Council website at the following link: http://www.sentencingcouncil.org.uk/publications/?type=publications&s=&cat=statistical-bulletin&topic=&year.

Causing or allowing a child to die or suffer serious physical harm[6] (section 5)

This is a low volume offence. In the years since the existing guideline has been in force (2019 and 2020), around 30 offenders were sentenced for this offence, of which fewer than 10 were sentenced for causing or allowing a child to die. This offence is indictable only, and so all offenders are sentenced at the Crown Court.

For causing or allowing a child to die, all offenders were sentenced to immediate custody in 2019 and 2020. In the same years, for causing or allowing a child to suffer serious physical harm, 50 per cent of offenders received immediate custody, 44 per cent received a suspended sentence order and the remaining offenders were 'Otherwise dealt with'.[7]

For those receiving immediate custody in 2019 and 2020, the average (mean) custodial sentence length (ACSL) was 6 years 7 months for causing or allowing a child to die.[8] For causing or allowing a child to suffer serious physical harm, the ACSL over the same period was 3 years 9 months.[9]

---

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

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

[6] Users should be aware that the underlying data may contain volumes for offenders sentenced for this offence where the victim was a vulnerable adult, for which the guideline does not apply, but analysis of Crown Court judges' sentencing remarks suggests the majority of cases involve child victims, rather than vulnerable adults.

[7] The category 'Otherwise dealt with' covers miscellaneous disposals. Please note that due to a data issue currently under investigation, there are a number of cases which are incorrectly categorised in the Court Proceedings Database (CPD) as 'Otherwise dealt with'. Therefore, these volumes and proportions should be treated with caution.

[8] The statutory maximum sentence for this offence increased from 14 years' custody to life imprisonment under the PCSC Act 2022 in relation to offences committed on or after 28 June 2022. The latest full year of data available for analysis at the time of publication was from 2020, before this increase in statutory maximum sentence, so there are no cases exceeding 14 years' custody included in these figures.

[9] The statutory maximum sentence for this offence increased from 10 years' custody to 14 years' custody under the PCSC Act 2022 in relation to offences committed on or after 28 June 2022. The latest full year of data

Cruelty to a child (section 1)

This is a higher volume offence. In 2020, around 330 offenders were sentenced for cruelty to a child, of which the majority (61 per cent) were sentenced in the Crown Court. Most offenders received a community order (35 per cent), around a third (33 per cent) a suspended sentence order and one fifth (20 per cent) were sentenced to immediate custody. A further 9 per cent were recorded as 'Otherwise dealt with',[10] and 1 per cent of offenders received each of either a discharge or a fine respectively.

The statutory maximum sentence for cruelty to a child was 10 years' custody for the period covered by these statistics.[11] In 2020, the ACSL for those offenders sentenced to immediate custody was 2 years 2 months for this offence.

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 guidelines 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 revised 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. In addition, for low volume offences, there are limited data available. The assumptions thus have to be based on careful analysis of how current sentencing practice corresponds to the guideline ranges presented in the proposed revised guidelines, and an assessment of the effects of revising the guidelines by adding a new culpability level.

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

In developing sentence levels for the 'Very high culpability' level of the revised guidelines, data on current sentence levels have been considered, although this covers the period before the increase in statutory maximum sentence under the

---

available for analysis at the time of publication was from 2020, before this increase in statutory maximum sentence, so there are no cases exceeding 10 years' custody included in these figures.

[10] The category 'Otherwise dealt with' covers miscellaneous disposals which, for this offence, includes disposals such as hospital orders and compensation. Please note that due to a data issue currently under investigation, there are a number of cases which are incorrectly categorised in the Court Proceedings Database (CPD) as 'Otherwise dealt with'. Therefore, these volumes and proportions should be treated with caution.

[11] The statutory maximum sentence for this offence increased from 10 to 14 years' custody under the PCSC Act 2022 in relation to offences committed on or after 28 June 2022. The latest full year of data available for analysis at the time of publication was from 2020, before this increase in statutory maximum sentence, so there are no cases exceeding 10 years' custody included in these figures.

PCSC Act 2022. Existing guidance and case studies, as well as transcripts of judges' sentencing remarks, have also been reviewed.

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

It therefore remains difficult to estimate with any precision the impact the guidelines may have on prison and probation resources. Nevertheless, the consultation responses should hopefully provide more information on which to base the final resource assessment accompanying the definitive guidelines.

Resource impacts

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

Overall impacts

The expected impact of each guideline is provided in detail below.

Overall, the guidelines are intended to reflect the increase in statutory maxima through the addition of a further culpability level, above the existing 'High culpability' level in both guidelines. As such, the impact is intended to be isolated to those offenders already at the highest culpability of offending behaviour.

Causing or allowing a child to die or suffer serious physical harm (section 5)

The current section 5 guideline covers both ways of committing this offence and contains three levels of culpability and three levels of harm, leading to a 9-box sentencing table. The highest harm level is reserved for causing or allowing a child to die, with a range of starting points from 2 years' custody for C1 up to 9 years' custody for the highest category A1. For causing or allowing a child to suffer serious physical harm, the lowest starting point is 9 months' custody for category C3 and the highest is category A2 with a starting point of 7 years' custody.

Under the PCSC Act 2022, the statutory maximum sentence for this offence has increased, from 10 to 14 years' custody for causing or allowing a child to suffer serious physical harm and from 14 years' custody to life imprisonment for causing or allowing a child to die. An additional culpability level ('Very high culpability') has been inserted above the existing 'High culpability' level in the draft guideline, to reflect the new statutory maximum sentences set by Parliament. The revised draft guideline therefore has four levels of culpability but maintains three levels of harm, leading to a 12-box sentencing table, with a starting point for A1 of 14 years' custody and a range of 12 – 18 years. The rest of the sentencing table below the new culpability level A remains unchanged from the existing guideline, although the culpability levels have been renamed accordingly.

Analysis of a sample of Crown Court judges' sentencing remarks[12] has been undertaken to understand the possible effects of the guideline on sentencing practice. This offence is indictable only and, as such, all offenders are sentenced at the Crown Court. Therefore, we can assume the findings from this analysis are likely to be representative of all offending.

This transcript analysis indicated that there is likely to be negligible resource impacts relating to the addition of this new 'Very high culpability' level, as there are very few offenders currently falling into 'High culpability', across all levels of harm, for whom it would be appropriate. This is supported by analysis of the CPD data. In 2019 and 2020, for causing or allowing a child to suffer serious physical harm, only two offenders were sentenced to an immediate custodial sentence of 7 years or more, which is the starting point for the A2 offence category in the existing guideline. These might be the types of cases for which an offender could be placed in the new 'Very high culpability' category under the draft guideline, which has a starting point 5 years higher than the existing guideline. However, it is anticipated that only a subset of offenders currently assessed as 'High culpability' across all levels of harm would be suitable for the new 'Very high culpability' category.

Furthermore, over the same period, for causing or allowing a child to die, no offenders received a final sentence of 9 years or more, which is the starting point for the highest offence category A1 in the existing guideline and remains as such for the comparable B1 offence category of the draft guideline (the sentence ranges for both are also identical).

Given that almost all offenders already receive immediate custody, the draft guideline is not anticipated to change the proportion of offenders who receive immediate custodial sentences. It is likely that there may be a very small number of offenders at the highest level of culpability across both offences who will receive longer custodial sentences under the draft guideline. However, these increases in sentence levels are driven by the recent legislative changes, which have been reflected in the guidelines.

Cruelty to a child (section 1)

The existing guideline for sentencing offences of cruelty to a child contains three levels of culpability and three levels of harm leading to a 9-box sentencing table with a range in starting points from a medium level community order for offence category C3, up to a starting point of 6 years' custody for the highest category A1. The draft guideline mirrors the approach for causing or allowing a child to die or suffer serious physical harm, and inserts a new 'Very high culpability' level above the existing 'High culpability', with a range of starting points from 3 years' custody for the new category A3, up to a starting point of 9 years' custody for the new A1 offence category, thus creating a 12-box sentencing table. As with the Causing or allowing a child to die or suffer serious physical harm guideline, the starting points and ranges in the rest of the sentencing table remain unchanged.

[12] 22 transcripts of Crown Court sentencing remarks covering 35 offenders sentenced for causing or allowing a child to die or suffer serious physical harm were initially analysed in order to assess the impact these guidelines may have on prison and probation services. For the years when the existing guideline was in force, 2019 and 2020, the analysed transcripts covered 100% of offenders sentenced over this period. Of these, 8 cases where the offender fell into the highest culpability category were resentenced, to understand how the new culpability category might be used (5 for causing or allowing a child to die and 3 for causing or allowing a child to suffer serious physical harm).

Analysis of a sample of Crown Court judges' sentencing remarks[13] has been undertaken to understand the possible effects of the draft guideline on sentencing practice. The analysis suggested that under the revised guideline, there may be a very small impact on prison and probation resources as a subset of offenders who would be within the 'High culpability' level currently may receive longer sentences under the draft guideline if the new 'Very high culpability' category is appropriate instead, which has a starting point three years higher for harm levels 1 and 2 and two years higher for harm level 3, reflecting the increase in statutory maximum sentence. There is no indication that the guideline will lead to a change in sentencing outcomes for these offences; the majority of offenders are likely to continue receiving a community order or suspended sentence order since the guideline remains largely unchanged.

These findings are supported by CPD analysis. In 2019 and 2020, fewer than 1 per cent of offenders received an immediate custodial sentence of 6 years or more: the starting point for the highest offence category A1 under the existing guideline. Given that so few offenders are committing offences of cruelty to a child at the highest level of culpability currently, it is anticipated that the impact of this guideline on prison and probation resources is likely to be minimal, although any increases will be driven by the recent legislative changes which are now reflected in the guideline.

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 revised guidelines comes into effect.

This risk is mitigated by information that is gathered by the Council as part of the guideline development and consultation phase. This includes analysis of 43 transcripts of judges' sentencing remarks, which have provided a more detailed picture of current sentencing practice for these offences. This analysis has formed a large part of the evidence base on which the resource impacts for these guidelines have been estimated.

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 them as intended. For the draft guidelines, the sentencing ranges for the new 'Very high culpability' level have been decided on by considering case studies, sentencing data and Council members' experience of sentencing.

[13] A total of 21 transcripts of Crown Court sentencing remarks covering 28 offenders sentenced for cruelty to a child were initially analysed. Of these, 7 cases from 2019 and 2020, where the offender was in the highest culpability category under the existing guideline, were resentenced to assess the impact the revised guideline may have on prison and probation services.

Transcripts of sentencing remarks of relevant child cruelty cases have also been studied to gain a greater understanding of current sentencing practice and to understand how the guidelines may be implemented in practice.

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.

Sentencing Council

Sentencing Council meeting:	**16 December 2022**
Paper number:	**SC(22)DEC04 – Miscellaneous Amendments**
Lead Council member:	**Jo King**
Lead official:	**Ruth Pope**
	Ruth.pope@sentencingcouncil.gov.uk

1 ISSUE

1.1 This is the first of two meetings to discuss the responses to the miscellaneous amendments consultation which closed on 30 November. The amendments need to be finalised at the January meeting to enable any changes agreed upon to be published in March and made on 1 April 2023.

2 RECOMMENDATION

2.1 The Council is asked to consider suggested changes to the proposals as consulted on relating to disqualification from driving the minimum term steps in guidelines.

2.2 The Council is asked to agree to adopt proposals as consulted on relating to Football banning orders, criminal damage and unlawful act manslaughter.

3 CONSIDERATION

3.1 We received 24 responses to the consultation 18 from individuals and six from organisations. The majority were supportive of the proposals and some made helpful suggestions for changes. The more critical responses tended to focus on issues that were outside the scope of the consultation.

Disqualification from driving

3.2 We consulted on revisions to the wording on disqualification in the drug driving guidance and the excess alcohol, unfit through drink or drugs (drive/attempt to drive) and fail to provide specimen for analysis (drive/attempt to drive) guidelines. the proposals aimed to clarify the relevant dates (i.e. the date of the commission of the offence, date of conviction or date of the imposition of a disqualification) for each provision.

The proposed wording (additions shown in red):

- Must endorse and disqualify for at least 12 months
- Must disqualify for at least 2 years if offender has had two or more disqualifications for periods of 56 days or more **imposed** in the 3 years preceding the **commission** of the

current offence – refer to disqualification guidance and consult your legal adviser for further guidance
- Must disqualify for at least 3 years if offender has been **convicted** of a relevant offence in the 10 years preceding the **commission** of the current offence – consult your legal adviser for further guidance
- Extend disqualification if imposing immediate custody

3.3 All those who responded to this question agreed with the changes (though two raised general issues about sentencing for motoring offences). One magistrate suggested that 'relevant offence' (in the third bullet point) should contain a link to further information. The applicable information is in the 'obligatory disqualification guidance' which is linked to from the second bullet point. It seems sensible to add the same link to the third bullet point so it would read:

- Must disqualify for at least 3 years if offender has been **convicted** of a relevant offence in the 10 years preceding the **commission** of the current offence – refer to disqualification guidance and consult your legal adviser for further guidance

Question 1: Does the Council agree make the changes consulted on with the additional wording proposed at 3.3 above?

3.4 We consulted on changes to the obligatory disqualification guidance to clarify the relevant dates and to reflect legislative changes:

The proposed wording (changes shown in red)

1. Obligatory disqualification

Note: The following guidance applies to offences with a 12 month minimum disqualification.

Some offences carry obligatory disqualification for a minimum of 12 months (Road Traffic Offenders Act ("RTOA") 1988, s.34). The minimum period is automatically increased where there have been certain previous convictions and disqualifications.

An offender must be disqualified for at least two years if a disqualification of at least 56 days has been imposed on them in the three years preceding the commission of the offence (RTOA 1988, s.34(4)(b)). The following disqualifications are to be disregarded for the purposes of this provision:

- interim disqualification;
- disqualification where vehicle used for the purpose of crime;
- disqualification for stealing or taking a vehicle or going equipped to steal or take a vehicle.

An offender must be disqualified for at least three years if he or she is convicted of one of the following offences:

- driving or attempting to drive while unfit;
- driving or attempting to drive with excess alcohol;
- driving or attempting to drive with concentration of specified controlled drug above specified limit;
- failing to provide a specimen (drive/attempting to drive).

and has within the 10 years preceding the commission of the offence been convicted of any of those offences or causing death by careless driving when under the influence of drink or drugs (RTOA 1988, s.34(3)):

The individual offence guidelines indicate whether disqualification is mandatory for the offence and the applicable minimum period. **Consult your legal adviser for further guidance.**

3.5 Again, responses were supportive but with a few suggestions for changes. A judge suggested changing 'and' to 'or' as highlighted below:

> Some offences carry obligatory disqualification for a minimum of 12 months (Road Traffic Offenders Act ("RTOA") 1988, s.34). The minimum period is automatically increased where there have been certain previous convictions or disqualifications.

3.6 HM Council of District Judges (MC) pointed out an error in the proposed wording. It should read (revised wording highlighted):

> An offender must be disqualified for at least two years if more than one disqualification of at least 56 days has been imposed on them in the three years preceding the commission of the offence (RTOA 1988, s.34(4)(b)).

3.7 Section 34(4) of the Road Traffic Offenders Act 1988 states:

> (4) Subject to subsection (3) above and subsection (4ZA) below, subsection (1) above shall apply as if the reference to twelve months were a reference to two years—
> …
> (b) in relation to a person on whom more than one disqualification for a fixed period of 56 days or more has been imposed within the three years immediately preceding the commission of the offence.

3.8 The West London Magistrates Bench suggested that it would be helpful to give the statutory reference for the types of disqualification to be ignored. While this might be helpful, the level of detail required to make it comprehensive and accurate could overcomplicate the guidance. The relevant statutory provision reads:

> (4A) For the purposes of subsection (4)(b) above there shall be disregarded any disqualification imposed under section 26 of this Act or section 147 of the Powers of Criminal Courts (Sentencing) Act 2000 or section 164 of the Sentencing Code or section 223A or 436A of the Criminal Procedure (Scotland) Act 1975 (offences committed by using vehicles) and any disqualification imposed in respect of an

offence of stealing a motor vehicle, an offence under section 12 or 25 of the Theft Act 1968, an offence under section 178 of the Road Traffic Act 1988, or an attempt to commit such an offence.

Question 2: Does the Council agree to make the changes to the obligatory disqualification guidance set out at paragraphs 3.5 and 3.6 but not that suggested at 3.8?

3.9 We consulted on changes to the discretionary and 'totting up' disqualification guidance.

The proposed wording (changes shown in red)

'Totting-up' guidance:

Incurring 12 or more penalty points means a minimum period of disqualification must be imposed (a 'totting up disqualification') – s.35 Road Traffic Offenders Act (RTOA) 1988. Points are **not** to be taken into account for offences **committed** more than three years before the **commission** of the current offence – s.29 RTOA 1988.

[…]

The court should first consider the circumstances of the offence, and determine whether the offence should attract a discretionary period of disqualification. But the court must note the statutory obligation to disqualify those repeat offenders who would, were penalty points imposed, be liable to the mandatory "totting" disqualification and, unless the court is of the view that the offence should be marked by a period of discretionary disqualification in excess of the minimum totting up disqualification period, **the court should impose penalty points rather than discretionary disqualification** so that the minimum totting up disqualification period applies.

Discretionary disqualification guidance:

In some cases in which the court is considering discretionary disqualification, the offender may already have sufficient penalty points on his or her licence that he or she would be liable to a 'totting up' disqualification if further points were imposed. In these circumstances, unless the court is of the view that the offence should be marked by a period of discretionary disqualification in excess of the minimum totting up disqualification period, the court should impose penalty points rather than discretionary disqualification so that the minimum totting up disqualification period applies *(*see 'totting up'*)*.

3.10 Several respondents welcomed these changes. One individual suggested adding in guidance on the approach to be taken to new drivers, to discourage the practice of imposing a short disqualification rather than six points so that the offender does not have to retake the driving test. There is some merit in this suggestion but as it is something that we have not consulted on, it would be better to add it to the list of things to consider for next year's consultation.

3.11 A judge suggested replacing ‘he or she’ with ‘they and ‘his or her’ with ‘their’. This ties in with a suggestion we have had for being more consistent and inclusive in the use of personal pronouns in guidelines. Some proposals will be brought to the January meeting on this point.

3.12 A magistrate (whose original suggestion had led to the changes consulted on) suggested that it would be clearer if the wording focussed on the need to prefer points over discretionary disqualification which she suggested gets lost in the explanation consulted on. She suggested combining the wording to read:

> In some cases in which the court is considering discretionary disqualification, the offender may already have sufficient penalty points on his or her licence that he or she would be liable to a ‘totting up’ disqualification if further points were imposed. In these circumstances, the court should impose penalty points rather than discretionary disqualification so that the minimum totting up disqualification period applies (see ‘totting up’).The court should first consider the circumstances of the offence, and determine whether the offence should attract a discretionary period of disqualification. Unless the court is of the view that the offence should be marked by a period of discretionary disqualification in excess of the minimum totting up disqualification period, the court should impose penalty points rather than discretionary disqualification so that the minimum totting up disqualification period applies.

3.13 It is not entirely clear whether this wording is proposed for just for the discretionary disqualification guidance or for the totting guidance as well. The proposal would (as the magistrate accepts) make the explanation lengthy and this may make it less effective. Bearing in mind the level of support from other respondents, the recommendation is to retain the wording consulted on.

Question 3: Does the Council agree to make the changes consulted on to the totting and discretionary disqualification guidance?

Football banning orders

3.14 We consulted on changes to the football banning orders guidance.

The proposed wording (changes shown in red)

- public order offences – Public Order Act 1986, Parts 3 and 3A, and s.4, 4A or 5 – committed: (a) during a period relevant to a football match (see below) at any premises while the offender was at, or was entering or leaving or trying to enter or leave, the premises; (b) on a journey to or from a football match and the court makes a declaration

that the offence related to football matches; or (c) during a period relevant to a football match (see below) and the court makes a declaration that the offence related to that match;

- any offence under section 31 of the Crime and Disorder Act 1998 (racially or religiously aggravated public order offences) where the court makes a declaration that the offence related to a football match, to a football organisation or to a person whom the accused knew or believed to have a prescribed connection with a football organisation,
- any offence under section 1 of the Malicious Communications Act 1988 (offence of sending any letter, electronic communication or article with intent to cause distress or anxiety) where the court has stated that the offence is aggravated by hostility of any of the types mentioned in section 66(1) of the Sentencing Code (racial hostility etc), and where the court makes a declaration that the offence related to a football match, to a football organisation or to a person whom the accused knew or believed to have a prescribed connection with a football organisation,
- any offence under section 127(1) of the Communications Act 2003 (improper use of public telecommunications network) where the court has stated that the offence is aggravated by hostility of any of the types mentioned in section 66(1) of the Sentencing Code (racial hostility etc), and where the court makes a declaration that the offence related to a football match, to a football organisation or to a person whom the accused knew or believed to have a prescribed connection with a football organisation.

3.15 All of those who commented agreed with the proposals.

Question 4: Does the Council agree to make the changes consulted on for football banning orders?

Criminal Damage

3.16 We consulted on changes to the headers of the criminal damage guidelines to direct courts to the appropriate guideline when sentencing cases where the value does not exceed £5,000 but the case may be tried in the Crown Court and/or the maximum penalty for the offence is not limited to three months' imprisonment because it relates to a memorial.

The proposed wording (changes shown in red)

Criminal damage (other than by fire) value exceeding £5,000/ Racially or religiously aggravated criminal damage

Crime and Disorder Act 1998, s.30, Criminal Damage Act 1971, s.1(1)

Effective from: 01 October 2019

Criminal damage (other than by fire) value exceeding £5,000, Criminal Damage Act 1971, s.1(1)

Triable either way
Maximum: 10 years' custody
Offence range: Discharge – 4 years' custody

Note: Where an offence of criminal damage:

a) is **added** to the indictment at the Crown Court **(having not been charged before)**

or

b) it is an offence committed by destroying or damaging a memorial as defined by s22(11A) - (11D) of the Magistrates' Courts Act 1980 committed on or after 28 June 2022

the statutory maximum sentence is 10 years' custody regardless of the value of the damage. In such cases where the value does not exceed £5,000 regard should also be had to the not exceeding £5,000 guideline.

Racially or religiously aggravated criminal damage, Crime and Disorder Act 1998, s.30

Triable either way
Maximum: 14 years' custody

Criminal damage (other than by fire) value not exceeding £5,000/ Racially or religiously aggravated criminal damage

Crime and Disorder Act 1998, s.30, Criminal Damage Act 1971, s.1(1)

Effective from: 01 October 2019

Criminal damage (other than by fire) value not exceeding £5,000, Criminal Damage Act 1971, s.1 (1)

Triable only summarily (except as noted below)

Maximum: Level 4 fine and/or 3 months' custody
Offence range: Discharge – 3 months' custody

Note: Where an offence of criminal damage:

a) is **added** to the indictment at the Crown Court ***(having not been charged before)***

or

b) it is an offence committed by destroying or damaging a memorial as defined by s22(11A) - (11D) of the Magistrates' Courts Act 1980 committed on or after 28 June 2022

the statutory maximum sentence is 10 years' custody regardless of the value of the damage. In such cases where the value does not exceed £5,000, the exceeding £5,000 guideline should be used but regard should also be had to this guideline.

Racially or religiously aggravated criminal damage, Crime and Disorder Act 1998, s.30

Triable either way
Maximum: 14 years' custody

3.17 Most respondents who commented agreed with the proposals. Of those who expressed different views, these related to matters outside of the scope of the consultation (one complained about the legislation and two commented on sentencing for criminal damage more generally). One magistrate said that he did not find the drafting particularly clear but was unable to suggest an alternative.

Question 5: Does the Council agree make the changes consulted on to the criminal damage guidelines?

Minimum sentences

3.18 We consulted on changes to reflect the change to the statutory test for the threshold for passing a sentence below the minimum term for relevant offenders for certain offences from 'unjust in all the circumstances' to 'exceptional circumstances' for offences committed on or after 28 June 2022. The guidelines affected are:

- Bladed articles and offensive weapons – possession
- Bladed articles and offensive weapons – threats
- Bladed articles and offensive weapons (possession and threats) – children and young people
- Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it to another
- Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug
- Domestic burglary
- Aggravated burglary

3.19 The consultation noted that any changes would need to accommodate both tests (at least in the short term). For clarity and to avoid the guideline becoming to cluttered the proposal was to have some general information and then too put the different tests in drop down boxes. The proposed changes are illustrated in a revised version of the possession of a bladed article/offensive weapon guideline which can be viewed on-line here.

3.20 The proposals were very similar for most of the guidelines and the comments made by respondents were often the same for each guideline. Therefore, it is helpful to consider some cross-cutting suggestions.

3.21 A judge suggested some further exposition of the term exceptional. Another judge suggested changing the wording slightly. These suggestions are illustrated below:

> **Principles**
>
> The circumstances must truly be exceptional. Circumstances are exceptional if the imposition of the minimum term would result in an arbitrary and disproportionate sentence.
>
> It is important that courts adhere to the statutory requirement and do not too readily accept that the ~~exceptional~~ circumstances are exceptional. A factor is unlikely to be regarded as exceptional if it would apply to a significant number of cases.
>
> 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 seriousness of the previous

offence(s) and the period of time that has elapsed between offences will be a relevant consideration.

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

3.22 The Criminal Sub-Committee of HM Council of Circuit Judges suggested slightly different wording:

> It is important that courts adhere to the statutory requirement and do not too readily treat or accept ~~exceptional~~ circumstances as being exceptional.

3.23 They also suggested adding in a section similar to that proposed in the unlawful act manslaughter guideline:

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

3.24 The CPS suggested adding a reference to the Totality guideline as this 'may require sentencers to consider imposing a higher overall sentence than the minimum term'. They also suggested (for the six month minimum terms) noting that suspending a minimum term, though lawful, will rarely be appropriate as in the majority of cases suspension would undermine the punitive and deterrent effect of the minimum sentencing provisions, to reflect the judgment in R v Uddin [2022] EWCA Crim 751.

3.25 It is not clear that a reference to totality is necessary as part of this step – it will be considered at step 6. At the July meeting the Council considered consulting on adding a reference to the availability of suspended sentences for the weapons and bladed article offences but concluded that if there were to be any such reference it should be in the Imposition guideline.

3.26 A reference to resolving factual disputes with a Newton hearing could apply whether the test is 'exceptional circumstances' or 'unjust in all the circumstances' so could be included in the general text above the drop down boxes but might sit more logically in the dropdown sections. For example:

> **Exceptional circumstances (offence committed on or after 28 June 2022)**
>
> In considering whether there are exceptional circumstances that would justify not imposing the minimum term the court must have regard to:
>
> - the particular circumstances which relate to any of the offences **and**
> - the particular circumstances of the offender.

either of which may give rise to exceptional circumstances.

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.

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

…

Unjust in all of the circumstances (offence committed before 28 June 2022)

In considering whether a statutory minimum sentence would be 'unjust in all of the circumstances' the court must have regard to the particular circumstances of the offence and the offender.

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

If the circumstances of the offence, the previous offence or the offender make it unjust to impose the statutory minimum sentence then the court **must impose either a shorter custodial sentence than the statutory minimum provides or an alternative sentence**.

3.27 The remaining points raised in relation to the various minimum term steps will be discussed at the January meeting.

Question 6: Does the Council wish to adopt any of the suggested changes to wording suggested at 3.21 and 3.22?

Question 7: Does the Council agree not to add a reference to totality or to suspending sentences at the minimum term step?

Question 8: Does the Council wish to add a reference to Newton hearings to the minimum term step and, if so, should the wording suggested at 3.26 be adopted?

Life sentence for manslaughter of an emergency worker

3.28 The Council consulted on an additional step 3 in the Unlawful act manslaughter guideline to provide guidance for where the victim is an emergency worker acting in that capacity and the court must impose a life sentence unless there are exceptional circumstances.

3.29 The proposed wording was:

Step 3 – Required sentence and exceptional circumstances

The following paragraphs apply to adult offenders – there is a separate dropdown section for those aged under 18 at the date of conviction below

Required sentence

1. Where the offence was committed against an emergency worker acting in the exercise of functions as such a worker, the court must impose a life sentence unless the court is

of the opinion that there are exceptional circumstances which (a) relate to the offence or the offender, and (b) justify not doing so (sections 274A and 285A of the Sentencing Code).

Applicability

2. The required sentence provisions apply when a person is convicted of unlawful act manslaughter committed on or after 28 June 2022, the offender was aged 16 or over at the offence date and the offence was committed against an emergency worker acting in the exercise of functions as such a worker.

3. The circumstances in which an offence is to be taken as committed against a person acting in the exercise of their functions as an emergency worker include circumstances where the offence takes place at a time when the person is not at work but is carrying out functions which, if done in work time, would have been in the exercise of their functions as an emergency worker.

4. An emergency worker has the meaning given by section 68 of the Sentencing Code.

5. Where the required sentence provisions apply a guilty plea reduction applies in the normal way (see step 5 – Reduction for guilty pleas).

6. Where the required sentence provisions apply and a life sentence is imposed, the notional determinate sentence should be used as the basis for the setting of a minimum term to be served.

7. Where the required sentence provisions apply, this should be stated expressly.

Exceptional circumstances

8. In considering whether there are exceptional circumstances that would justify not imposing the statutory minimum sentence, 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.

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

10. 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

11. Circumstances are exceptional if the imposition of the required sentence would result in an arbitrary and disproportionate sentence.

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

Where exceptional circumstances are found

13. If there are exceptional circumstances that justify not imposing the required sentence then the court should impose the sentence arrived at by normal application of this guideline.

Sentencing offenders aged under 18 at the date of conviction

1. Where the offender is aged 16 or 17 at the date of conviction, the required sentence provisions apply only if the offender is aged 16 or over when the offence was committed

and the offence was committed against an emergency worker acting in the exercise of functions as such a worker (section 258A of the Sentencing Code).

2. Subject to the required sentence provisions, where the offender is aged under 18 at the date of conviction the court should determine the sentence in accordance with the Sentencing Children and Young People guideline, particularly paragraphs 6.42-6.49 on custodial sentences.
3. This guidance states at paragraph 6.46: "When considering the relevant adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age."
4. The considerations above on exceptional circumstances relating to the offence or offender apply equally when sentencing offenders aged 16 or 17 at the date of the conviction.

3.30 All who responded agreed with the proposals apart from one individual who wanted more whole life orders. No changes to the consultation version are proposed.

Question 9: Does the Council agree to adopt the proposed additions to the Unlawful act manslaughter guideline?

4 EQUALITIES

4.1 No significant issues relating to equality or diversity were identified by respondents.

5 IMPACT AND RISKS

5.1 The consultation noted that the impact of majority of the proposals on prison or probation resources will be relatively minor. The most significant changes are those necessitated by legislative changes.

5.2 Respondents agreed with that analysis. The narrative resource assessment which accompanied the consultation will be updated and discussed at the January meeting.

Sentencing Council

Sentencing Council meeting:	**16 December 2022**
Paper number:	**SC(22)DEC05 – Motoring offences**
Lead Council member:	**Rebecca Crane**
Lead official:	**Ollie Simpson** **ollie.simpson@sentencingcouncil.gov.uk**

1 ISSUE

1.1 This is our second meeting looking at responses to the motoring consultation that ran between July and September. This paper focuses on culpability factors for:

- dangerous driving offences (causing death by dangerous driving; causing serious injury by dangerous driving; dangerous driving)
- careless driving offences (causing death by careless driving; causing death by careless driving whilst under the influence of drink or drugs; causing serious injury by careless driving)
- causing injury by wanton or furious driving (which draws on culpability elements for the above two groups)

A summary of the road testing findings is attached at **Annex A**.

1.2 The response now received from the Justice Select Committee is attached at **Annex B** for Council's consideration.

2 RECOMMENDATIONS

2.1 That Council makes amendments to the culpability factors, as set out below, including that:

- the wording on drink/drug driving be standardised across guidelines;
- engaging in a brief but avoidable distraction be removed from culpability B, but "very brief avoidable distraction" be added at culpability C;
- the mitigating factors relating to a medical condition and the effect of medication be combined and the wording standardised;

- the aggravating factor “failed to stop and/or assist or seek assistance at the scene” be changed to “failed to stop and/or obstructed or hindered attempts to assist at the scene”; and
- the mitigating factor “impeccable driving record” be changed to “clean driving record”.

3 CONSIDERATION

Justice Select Committee response

3.1 Since our November meeting we have received a response from the Justice Select Committee (see **Annex B**). They question why we have not simply added a ”very high” level of culpability and reserved sentences above the previous maximum for these offences (akin to our approach to the child cruelty revisions).

3.2 We discussed the option of four culpability categories at our last meeting and concluded we should stick with three. There are good reasons why we might increase sentence levels across all degrees of offending: in brief, because these levels were last considered 15 years ago and society’s attitude towards bad driving and its consequences has moved on – the majority of consultation responses would appear to back this up by endorsing our proposals. We are also dealing with a range of offences which need to be kept in proportion to one another.

3.3 Parliament’s intention – to the extent it is decisive – does not seem entirely clear cut. The Explanatory Notes say:

“Increasing the maximum penalty to life imprisonment for these offences will provide the courts with enhanced powers to sentence appropriately for the most serious cases.” (paragraph 79)

In other contexts, the Government has said the aim “is to make sure that the penalties available to the courts for such offences are proportionate and reflect the seriousness of the offences committed” and have stressed the comparison with manslaughter.

3.4 Nonetheless, we may wish to discuss whether we should rethink in light of the Committee’s response, particularly noting the potential impact on the prison population.

Question 1: what is Council’s initial view on the Justice Select Committee’s response?

Culpability – dangerous driving

3.5 There were many comments and suggestions on culpability elements for dangerous driving offences, not all of which can be discussed in full. I have included a selection of responses on the culpability elements for dangerous driving, careless driving and wanton or furious driving at **Annex C** which I have considered, but do not propose taking any action on. Council members are welcome to raise these, though, if any appear useful to pursue. Brake and Nicole and Chris Taylor in particular have provided comprehensive proposals for reworking the culpability elements.

3.6 A large number of respondents agreed with our proposed culpability table. However, there were several suggestions for change. We have already discussed a widely held view that several of the medium culpability elements belonged in high, and concluded that they were broadly pitched correctly, and that we should explain that there is a spectrum of culpability, even within a descriptor such as "dangerous". Here is the culpability table for dangerous offences, with my proposed amendments in red over the version we consulted on. As a quick win I have removed "high", "medium" and "lesser" as category headings:

CULPABILITY The court should determine culpability by reference only to the factors below, which comprise the principal factual elements of the offence. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting before making an overall assessment and determining the appropriate offence category. A combination of factors in any category may justify upwards adjustment from the starting point before consideration of aggravating/mitigating factors.	
A- ~~High culpability~~	• Deliberate decision to ignore the rules of the road and disregard for the risk of danger to others *[particularly vulnerable road users?]*. • Prolonged, persistent and deliberate course of dangerous driving • *[Prolonged use of mobile phone or other electronic device?]* • ~~Consumption of substantial amounts of alcohol or drugs leading to gross high level of impairment~~ Driving highly impaired by consumption of alcohol or drugs • Offence committed in course of evading police ~~pursuit~~ • Racing or competitive driving against another vehicle • Persistent disregard of warnings of others • Lack of attention to driving for a substantial period of time • Speed ~~greatly~~ significantly in excess of speed limit or highly inappropriate for the prevailing road or weather

	conditions • *[Driving created a risk of harm to vulnerable road users?]*
B- ~~Medium culpability~~	• ~~Brief but obviously highly dangerous manoeuvre~~ • ~~Engaging in a brief but avoidable distraction~~ • *[Brief use of mobile phone or other electronic device?]* • Driving knowing that the vehicle has a dangerous defect or is dangerously loaded • Driving at a speed that is inappropriate for the prevailing road or weather conditions (where not culpability A) • ~~Driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs~~ Driving impaired by consumption of alcohol or drugs (where not culpability A) • ~~Disregarding advice relating to driving when taking medication or as a result of a known medical condition which significantly impaired the offender's driving skills~~ Driving significantly impaired as a result of a known medical condition, and/or disregarding advice relating to the effects of a medical condition or medication • Driving when ~~knowingly~~ deprived of adequate sleep or rest • Disregarding warnings of others (where not culpability A) • The offender's culpability falls between the factors as described in ~~high~~ A and C ~~lesser culpability~~
C- ~~Lesser culpability~~	• Standard of driving was just over threshold for dangerous driving • Momentary lapse of concentration or very brief avoidable distraction.

3.7 Some respondents wanted to see "Brief but obviously highly dangerous manoeuvre" placed in high culpability. Others, such as Cycling UK, thought it should be low. There was confusion in road testing about whether something counted as a brief but dangerous manoeuvre, a brief but avoidable distraction, or a momentary lapse and this led to inconsistency in several scenarios about whether offences were categorised as B or C.

3.8 One possibility could be to add a category C equivalent: "brief but dangerous manoeuvre" (or even "brief dangerous manoeuvre"), which highlights the "obviously highly dangerous" element as being deserving of the middle category. Another option (recommended) would be to delete it altogether and rely on "The offender's culpability falls

between the factors as described in culpability A and culpability C" to capture offending which is more than just a momentary lapse, but not prolonged, persistent dangerous driving.

3.9 Similarly with "brief but avoidable distraction". Nicole and Chris Taylor (parents of an RTC victim) thought that this didn't belong in dangerous driving at all but was rather an example of careless driving. HM Council of Circuit Judges thought this should be in low culpability. We could add the following to culpability C: "momentary lapse or very brief but avoidable distraction". This would mean anything falling between a "very brief distraction" and "Lack of attention to driving for a substantial period of time" would belong in the middle category.

Question 2: do you want to delete the factor "brief but obviously highly dangerous manoeuvre"?

Question 3: do you want to move "brief but avoidable distraction" to culpability C, to become "momentary lapse or very brief but avoidable distraction"?

3.10 Following last month's meeting, we amended the wording for the high culpability element relating to drink/drugs to be "Consumption of ~~substantial amounts of~~ alcohol or drugs leading to gross impairment". HM Council of District Judges suggested replacing "gross" with "high level of" which is line with the guideline for failing to provide a specimen, and represents a lower bar.

3.11 We have different formulations across the guidelines:

- Consumption of alcohol or drugs leading to gross/high level of impairment (high culpability)
- Driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs (medium culpability)
- Driving impaired by consumption of alcohol or drugs (wanton or furious driving)

3.12 One could argue that each has a subtly different meaning but I believe those differences are marginal and there is a case for consistency across guidelines. The third appears to me the most efficient and so I suggest rewording all the alcohol/drug factors accordingly.

3.13 I reiterate that there were calls – including from bereaved widower Chris Barrow and many others – for alcohol/drug consumption automatically to be a high culpability factor. This would certainly reflect the growing intolerance of drink and drug drivers in society. Further, we should logically make a distinction in sentence levels between careless driving under the

influence (in our separate s3A guideline) and dangerous driving when it happens under the influence.

3.14 That said, I have not found a satisfactory way to do this. We could distinguish between levels of alcohol in the blood as we do in the s3A guideline, but that may or may not be directly linked with the impairment, which may or may not be linked with the incident which caused the death. Ultimately, Parliament has set the two offences at the same level and on balance I think distinguishing in this guideline between "impaired" and "highly impaired" is the least worst solution.

Question 4: are you content to leave a culpability B element renamed "Driving impaired by consumption of alcohol or drugs", with a culpability A equivalent "Driving highly impaired by consumption of alcohol or drugs" (as opposed to "grossly" impaired)?

3.15 Several respondents were worried about vulnerable road users now being "relegated" to step two. Cycling UK suggested splitting "Deliberate decision to ignore the rules of the road and disregard for the risk of danger to others" into "Deliberate decision to ignore the rules of the road in ways that cause obviously foreseeable danger" and "Deliberately driving in a manner which endangered other road users, particularly vulnerable road users such as pedestrians, cyclists or equestrians".

3.16 This is a neat way to get vulnerable road users mentioned at step one, but the first element on its own may capture too much dangerous driving. If we want to mention vulnerable road users we could simply add "particularly vulnerable road users" to the bullet as it is drafted. Alternatively, we could add a new high culpability bullet of "Driving created a risk of harm to vulnerable road users, but again this could capture even relatively low examples of dangerous driving. On balance, I recommend not making any change here.

3.17 I have suggested a form of wording at both high and medium culpability for the use of phones and other electronic devices, as some consultees wanted to see this problem explicitly reflected. On balance I do not believe it is necessary as "Lack of attention to driving for a substantial period of time" and "brief but avoidable distraction" should capture this and other behaviours in a broader way.

Question 5: are you content not to reference i) vulnerable road users or ii) mobiles/electronic devices under culpability on the basis that they are captured in other ways?

3.18 HM Council of Circuit Judges thought that the high culpability factor "disregarding warnings of others", which had been an aggravating factor under the existing guidelines,

could be split across both medium and high culpability, with a high factor of "persistent disregard of warnings of others" and a medium factor of simply "disregarding warnings of others". I believe this is a fair approach, which allows for more flexibility in the extent to which the offender was given the chance to change behaviour.

Question 6: do you agree to move "disregarding warnings of others" to culpability B, with a culpability A equivalent of "persistent disregard of warnings of others"?

3.19 On more detailed drafting points, I have removed the reference to "police pursuits" to become "Offence committed in course of evading police". I considered whether this could capture too wide a range of circumstances (for example simply hiding in a back street), but the driving would still need to be counted as dangerous to have secured a conviction so I believe this wording is acceptable.

3.20 Some members of the public had thoughtful suggestions for the element "Speed greatly in excess of speed limit". Justin Clayton thought "greatly" was too high a bar and suggested "significantly". James Townsend and Ian Hill thought this could be expanded to say "…or highly inappropriate for the prevailing road or weather conditions" to capture the situation where someone has driven far too fast (eg) outside a school or in icy conditions, even if not driving at high speeds. This would provide a more exact counterpart to the medium culpability factor "Driving at a speed that is inappropriate for the prevailing road or weather conditions".

3.21 Dr Adam Snow and Brake suggested that the word "knowingly" was unnecessary in "Driving when knowingly deprived of adequate sleep or rest", as someone is either deprived of sleep or they are not, and requiring an assessment of the offender's knowledge would complicate matters unnecessarily.

3.22 See paras 3.27 to 3.29 below for a discussion on medication and medical conditions.

Question 7: do you agree to:

- **refer to "offence committed in the course of evading police" as opposed to "police pursuits";**
- **amend the existing culpability A speed element to become: "Speed significantly in excess of speed limit or highly inappropriate for the prevailing road or weather conditions"; and**
- **remove the word "knowingly" from "Driving when knowingly deprived of adequate sleep or rest"?**

3.23 There were various comments about terms being too subjective in relation to “gross impairment”, “greatly in excess of the speed limit” and “substantial period of time” etc. These often suggested specific figures in terms of (say) alcohol consumption or cut-offs for what would count as “greatly” excessive speed. I believe we can justify these more general terms on the basis of allowing the courts flexibility to fit the facts of the case. There is a particular risk in motoring offences of creating perverse cliff-edges in relation to speeds and levels of intoxication.

Culpability – careless driving

3.24 Here is the culpability table for careless driving, with my proposed changes in red:

CULPABILITY The court should determine culpability by reference only to the factors below, which comprise the principal factual elements of the offence. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting before making an overall assessment and determining the appropriate offence category. A combination of factors in any category may justify upwards adjustment from the starting point before consideration of aggravating/mitigating factors.	
A ~~High culpability~~	• Standard of driving was just below threshold for dangerous driving and/or includes extreme example of a ~~medium~~ culpability B factor
B ~~Medium culpability~~	• Unsafe manoeuvre or positioning • Engaging in a brief but avoidable distraction • Driving at a speed that is inappropriate for the prevailing road or weather conditions • Driving while ability to drive is impaired as a result of consumption of alcohol or drugs (where not amounting to a separate charge) • Driving vehicle which is unsafe or where driver’s visibility or controls are obstructed ~~• Driving in disregard of advice relating to the effects of medical condition or medication~~ ~~• Driving whilst ability to drive impaired as a result of a known medical condition~~ Driving impaired as a result of a known medical condition, and/or disregarding advice relating to the effects of a medical condition or medication • Driving when deprived of adequate sleep or rest • The offender’s culpability falls between the factors as described in A and C ~~high and lesser culpability~~
C ~~Lesser culpability~~	• Standard of driving was just over threshold for careless driving • Momentary lapse of concentration

3.25 There were general observations on the culpability elements for causing death by careless driving, repeating the point that several deliberate actions such as drinking, driving an unsafe vehicle, or ignoring medication side effects should be in high culpability. Others, such as Action Vision Zero, thought that there was too much overlap between the dangerous and careless culpability tables, which we touched on at our last meeting.

3.26 Professor Sally Kyd and Dr Adam Snow questioned in particular why there was a reference to drink/drugs in the causing death by careless driving guideline, when that would presumably be captured by a s3A offence. I believe it may be reasonable to add "(where not amounting to a separate charge)" as there may be situations where someone was under the legal limit but still impaired, or for whatever reason a section 3A offence could not be made out. An alternative would be to remove the element altogether.

Question 8: do you agree to add the words "(where not amounting to a separate charge)" to cover cases where impairment is in the mix, but a charge of causing death by careless driving under the influence has not been brought?

3.27 The law firm Kennedy's thought that the two elements "Driving in disregard of advice relating to the effects of medical condition or medication" and "Driving whilst ability to drive impaired as a result of a known medical condition" were interlinked and risked double counting. There was a deliberate decision pre-consultation to split out the medical culpability factor for careless driving, although we have not done the same for dangerous driving.

3.28 (Looking again at the wording of the dangerous driving element the phrase "Disregarding advice relating to driving when taking medication or as a result of a known medical condition which significantly impaired the offender's driving skills" could be phrased better, although no one picked up on this in consultation.)

3.29 I cannot see a good reason for the elements being split in one guideline but not the other, and am persuaded that they should come under one element with as consistent wording as possible between careless and dangerous. I propose:

> "Driving [significantly] impaired as a result of a known medical condition, and/or disregarding advice relating to the effects of a medical condition or medication"

with "significantly" being added for the dangerous driving guidelines.

Question 9: do you agree to merge the medical condition/medication elements into one, and amend the wording for all guidelines using the wording above?

3.30 I have considered whether to move “engaging in a brief but avoidable” distraction from B to C culpability and attaching it to “momentary lapse”, for consistency with what I propose to do for dangerous driving (see para 3.9 above). However, I believe it is more likely to be an example of a typical piece of careless driving, with only the most momentary, virtually inexplicable lapses reserved for category C. I therefore propose it remains at culpability B.

Question 10: are you content that “engaging in a brief but avoidable distraction” remains at culpability B in careless driving cases?

Culpability - wanton or furious driving

3.31 Here is the culpability table for causing injury by wanton or furious driving with my proposed amendments in red:

CULPABILITY The court should determine culpability by reference only to the factors below, which comprise the principal factual elements of the offence. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting before making an overall assessment and determining the appropriate offence category. A combination of factors in any category may justify upwards adjustment from the starting point before consideration of aggravating/mitigating factors. References to driving below include driving or riding any kind of vehicle or carriage, including bicycles and scooters.	
A ~~– High culpability~~	• Deliberate decision to ignore the rules of the road and/or disregard for the risk of danger to others. • Prolonged, persistent and deliberate course of driving likely to cause a danger to others • Driving ~~grossly~~ highly impaired by consumption of alcohol or drugs • Offence committed in course of evading police ~~pursuit~~ • Racing or competitive driving against another vehicle • Persistent disregard~~ing~~ of warnings of others • Lack of attention to driving for a substantial period of time • Speed ~~greatly~~ significantly in excess of speed limit or highly inappropriate for the prevailing road or weather conditions • Extreme example of a ~~medium~~ culpability B factor
B ~~– Medium culpability~~	• Unsafe manoeuvre or positioning • Engaging in a brief but avoidable distraction • Inappropriate speed for the prevailing conditions (where not culpability A)

	• Driving impaired by consumption of alcohol or drugs (where not culpability A) • Visibility or controls obstructed • ~~Driving impaired as a result of a known medical condition~~ • ~~Disregarding advice relating to the effects of medical condition or medication~~ Driving impaired as a result of a known medical condition, and/or disregarding advice relating to the effects of a medical condition or medication • Driving when deprived of adequate sleep or rest
C ~~– Lower culpability~~	• All other cases

3.32 Professor Kyd suggested that we should not have a guideline for this offence given it is rarely prosecuted and is somewhat unusual. Action Vision Zero believed that the highest level of culpability should be reserved for motorised vehicles as opposed to bicycles. I believe that it remains worthwhile producing a guideline for the rare occasions it is prosecuted, production of a guideline was welcomed by others, and given the relatively low statutory maximum penalty it would be wrong to exclude from the highest culpability the rare cyclists who cause serious injury or even death.

3.33 Liz Blake JP wanted clarification about whether the reference to "scooters" applied to motorised scooters. It should have become clear by the time a conviction has been secured about what vehicles the offence applies to. Indeed, it may be helpful to keep the matter broadly open to allow for as broad a range as possible of vehicle types.

3.34 Many of the comments covered above in relation to careless and dangerous apply to the culpability table for causing injury by wanton or furious driving. I propose for consistency that we reflect here the dangerous driving wordings set out above in culpability A:

- Driving highly impaired by consumption of alcohol or drugs
- Offence committed in course of evading police
- Persistent disregard of warnings of others
- Speed significantly in excess of speed limit or highly inappropriate for the prevailing road or weather conditions

3.35 For culpability B, I propose we reflect the careless driving wording and include as one element: "Driving impaired as a result of a known medical condition, and/or disregarding advice relating to the effects of a medical condition or medication".

3.36 Some respondents thought there should not be a third culpability category, and others thought that rather than simply saying “all other cases” it should reflect the wording of dangerous and careless guidelines by saying “momentary lapse of concentration” and, as proposed by HM Council of District Judges “just over the threshold for careless driving”.

3.37 There is a case for providing assistance to the courts by including “momentary lapse” but there is a risk that we invent a standard for wanton or furious driving that doesn’t exist by comparing it to careless driving. Given the broad range of off-road and on-road circumstances that could conceivably come under this offending (a farmer reversing his tractor without any expectation of someone being there, an unlucky quad biker etc), I am minded to leave category C as it stands.

Question 11: do you agree to make changes to the wanton and furious culpability table to bring the wording into line with that agreed for careless and dangerous guidelines?

Question 12: are there any other points on culpability (including those at annex C) that Council members would like to consider further?

Aggravating and mitigating factors

3.38 Across the standard-of-driving offences, aggravating and mitigating factors are fairly consistent so we can deal with them as one. There were comments received on virtually all the factors, and a full discussion on each point would be impossible: I have annotated the step two factors at **Annex D** with the more common and cogent suggestions received on which I do not propose to take any action.

3.39 A great number of consultees considered some of the standard mitigating factors to be inappropriate. Some said that “Serious medical condition requiring urgent, intensive or long-term treatment” should be an aggravating factor if it contributed to the collision. Similarly “mental disorder or learning disability” was argued to be justification to impose a lengthy disqualification.

3.40 Some said that “age and/or lack of maturity” was irrelevant given someone has (presumably) reached the age that they can drive. The same logic applied to “Offence due to inexperience rather than irresponsibility (where offender qualified to drive)” and I believe there is a stronger argument here that either someone is qualified to drive or they are not. That said, these are simply mitigating factors not a defence so I am minded to keep these and be clear in the consultation response about the distinction between mitigation in relation to the offending and personal mitigating factors.

3.41 Several were sceptical about “Efforts made to assist or seek assistance for victim(s)” and “Remorse”. These were considered to be, respectively, the least that people should do and an act put on for the judge. Action Vision Zero suggested remorse was double-counting an early guilty plea. Eastgate Cycles Cycling Club suggested that lack of remorse should be an aggravating factor.

3.42 On the other hand, HM Council of Circuit Judges shared our concern about the aggravating counterpart “Failed to stop and/or assist or seek assistance at the scene”, that offenders may be in shock and not able to help. They thought we should raise the bar to be “obstructing or hindering attempts to assist at the scene”. Kennedy’s thought this would unfairly capture HGV drivers who may not be aware that they have hit someone, and Action Vision Zero pointed out that failure to stop is a separate offence.

3.43 I am persuaded by HM Council of Circuit Judges that it is unfair to offenders who have just been involved in what may be a major incident to penalise them for not assisting, but I believe the courts can apply a common-sense approach to failure to stop. If we wished to counterbalance this we could remove the mitigating factor of providing assistance, noting that it is open to the courts to apply mitigating factors not listed. However, I think such assistance at the scene is worthy of mitigation.

Question 13: do you want to change the aggravating factor to “Failed to stop and/or obstructed or hindered attempts to assist at the scene”?

3.44 One road tester and several respondents asked why motorcyclists were not included in the list of vulnerable road users, as they are in the Highway Code. HM Council of Circuit Judges also suggested including “people working in the road”. Whilst the list was not intended to be exhaustive, as it has been raised I see no harm in adding “motorcyclists”, but add “etc” to the end of the sentence to allow the courts to use some discretion beyond the definitions in the Highway Code.

Question 14: do you want to add “motorcyclists” to the list of vulnerable road users, but add “etc” so that sentencers know this could apply to others?

3.45 Two respondents, the West London Magistrates Bench and the Prison Reform Trust, wanted clarification that “Passengers, including children” referred to those travelling in the offender’s car. This is undoubtedly the case as it cannot be right to aggravate for something beyond the offender’s knowledge or control (aside from reflecting the actual increased harm of more victims). So I propose amending the factor to “Passengers in the offender’s vehicle, including children” to put the matter beyond doubt.

Question 15: do you want to amend the factor to "Passengers in the offender's car, including children"

3.46 In road testing, some sentencers questioned why driving an LGV, HGV or PSV or driving for commercial purposes should be an aggravating factor. Kennedy's also thought that these factors would be double counted unfairly for professional drivers. However, I think these factors can be justified by the increased danger posed by large vehicles, and it is the case that driving for commercial purposes and driving a large vehicle are separate matters. The courts can apply common sense in determining the extent to which they interrelate for an individual.

3.47 On this subject, London Buswatch provided comprehensive evidence about how some of the elements in the guidelines could penalise PSV drivers whose bad driving might be due to their working conditions and aspects of their contracts that prioritise speed over safety. They suggest that, whilst these guidelines may be appropriate for private drivers, they should not apply to bus drivers and the like, and that employers' culpability should be accounted for in the guidelines. I am unaware of employers being prosecuted for the bad driving of their employees, but this would appear to be a broader issue than our guidelines can deal with.

3.48 Road testers and some consultation responses also questioned why the victim being a close friend or relative was relevant as a mitigating factor. This can be defended on the grounds that part of the punishment for such an offender will be the harm they have caused to themselves and those around them.

3.49 In road testing and consultation responses, people queried the meaning of "impeccable driving record" as a mitigating factor. HM Council of District Judges asked whether it might (for example) apply to points received 20 years ago. Kennedy's thought it would penalise those who drive for a living and are more likely to receive some kind of endorsement on their licence. Others thought it just rewarded those who had been lucky not to get caught. The Magistrates Association thought "impeccable" was too subjective a term.

3.50 I think there would be merit in changing the wording and agree with the MA that "clean" would be best understood by most sentencers.

Question 16: do you agree to change the mitigating factor "impeccable driving record" to "clean driving record"?

4 IMPACT AND RISKS

4.1 As set out in the draft resource assessment published alongside the consultation, the revised guidelines as consulted on may result in a requirement for additional prison places running into the hundreds. The new causing death by dangerous driving guideline could result in a requirement for up to around 260 additional prison places, with around 20 additional prison places for causing death by careless driving when under the influence of drink or drugs, and around 80 additional prison places for causing serious injury by dangerous driving.

4.2 These assessments are far different to the assessment the Government made at the point of introducing the legislation that a "high" scenario for raising the penalty for causing death by dangerous driving would involve 30 more prison places. That assessment appears to be based on the assumption that only the worst cases would see an increase in sentencing severity. By contrast, as the Justice Select Committee highlight, we are proposing to increase sentencing levels across most categories. This is an especially live consideration bearing in mind current prison capacity issues.

4.3 This paper proposes a few amendments to culpability factors, but it is not anticipated that these will have a significant impact on our resource estimates. Had all drink/drug drive cases been placed in culpability A, that may have had a more significant impact. Placing very brief distraction in culpability C may have the effect of drawing some more cases into that category which could bring estimates down, but this is impossible to quantify with certainty.

4.4 Should Council wish to reduce the sentence levels for lesser culpability careless driving cases (for discussion in the new year), that may have some impact on the resource assessment. Subject to what Council decides at this meeting, and in subsequent meetings we will work to refine our estimates of the impacts.

4.5 In terms of handling, there will be some disappointment that factors such as drink/drug driving and driving whilst deprived of sleep have not been placed into high culpability. As discussed at our last meeting, the consultation response document can explain that even serious offending behaviour can (and needs to be) graded in a spectrum.

4.6 We should provide a reply to the Justice Select Committee setting out our rationale for why we are seeking to provide increases across the board (if that remains the preferred approach). On the question of whether a life sentence could be imposed for causing death by dangerous driving and causing death by careless driving under the influence, I propose we answer factually, pointing the Committee to the relevant case law (*Saunders* [2013] EWCA Crim 1027).

Blank page

Motoring offences road testing report

Introduction

The Sentencing Council is developing guidelines for 12 motoring offences. The draft guidelines for these offences were consulted upon in Summer to Autumn 2022 and during this period the Council road tested a selection of the guidelines, to assess how they work in practice. The five offences for which guidelines were tested were selected based on the following criteria:

- the highest volume offences, because this is where the greatest impact of the new guideline is likely to be felt
- where there is least evidence available
- where there are specific issues to assess

The offences selected were:

- Causing death by dangerous driving, Road Traffic Act 1988 (section 1)
- Causing death by careless or inconsiderate driving, Road Traffic Act 1988 (section 2B)
- Causing serious injury by dangerous driving, Road Traffic Act 1988 (section 1A)
- Dangerous driving, Road Traffic Act 1988 (section 2)
- Driving or attempting to drive with a specified drug above the specified limit, Road Traffic Act 1988 (section 5A)

Current sentencing practice

Until now the sentencing support available for sentencing the motoring offences for which guidelines are being consulted upon has been mixed. Table 1 summarises whether or not guidelines or guidance currently exist for the five offences selected for road testing.

Table 1: Existing guidelines and guidance by date of issue for each motoring offence

Offence	**Existing guidelines or guidance**
Causing death by dangerous driving, Road Traffic Act 1988 (section 1)	Sentencing Guideline Council (SGC) August 2008
Causing death by careless or inconsiderate driving, Road Traffic Act 1988 (section 2B)	SGC August 2008
Causing serious injury by dangerous driving, Road Traffic Act 1988 (section 1A)	None
Dangerous driving, Road Traffic Act 1988 (section 2)	Magistrates' Court Sentencing Guidelines (MCSG) May 2008
Driving or attempting to drive with a specified drug above the specified limit, Road Traffic Act 1988 (section 5A)	Sentencing Council general guidance

The evidence from the road-testing interviews will supplement information gathered from the consultation responses to understand how the guidelines are used in practice, determine whether the guideline supports consistency of sentencing and whether the sentences given are proportionate to the severity of the offence committed and in relation to other offences.

This paper summarises the evidence gathered during road testing.

Methodology

Small-scale qualitative road testing for each of the five selected offences took place via Microsoft Teams in August 2022 with a sample of sentencers from the Council's research pool. The sample was designed to ensure the recruitment of a balance of sentencers from magistrates' courts and the Crown Court.

For each offence it was important to understand not only how the draft guidelines are understood and applied, but also how sentencing may change compared to existing practice to inform the resource assessment. There was also specific interest in understanding how sentencers used the disqualification guidance where applicable[1] and whether the wording leading into the culpability factors could be improved.

Each interviewee sentenced two scenarios (see Annex) for one type of offence using existing practice and the draft guideline. The number of interviews undertaken for each offence and the types of sentencers with whom they were carried out are summarised in Table 2.

Table 2: Number of interviews by offence and court

Offence	**Number of interviews**	
	Magistrates	Crown Court Judges
Causing death by dangerous driving, Road Traffic Act 1988 (section 1)	N/R[2]	7
Causing death by careless or inconsiderate driving, Road Traffic Act 1988 (section 2B)	5	5
Causing serious injury by dangerous driving, Road Traffic Act 1988 (section 1A)	5	5
Dangerous driving, Road Traffic Act 1988 (section 2)	5	5
Driving or attempting to drive with a specified drug above the specified limit, Road Traffic Act 1988 (section 5A)	7	N/R
Total	**22**	**22**

It is recognised that the number of interviews conducted for each offence by sentencer is slightly lower than would normally be expected for road testing. This reflects a decision to take an iterative approach to determining the number of interviews undertaken based on monitoring the level of variation in views of interviewees during fieldwork.[3] It was concluded

[1] Disqualification guidance was not applicable for driving or attempting to drive with a specified drug above a specified limit.

[2] N/R - Not relevant, offence cannot be tried in this court

[3] The responses to interviews were monitored to observe whether interviewees were consistently making the same points or whether there were diverse opinions. Where there is little diversity in views around a topic the saturation point for views is reached fairly quickly and conducting additional interviews is unlikely to produce much in the way of new evidence. However, if there is a high level of diversity in the initial responses conducting more interviews is recommended to ascertain the full range of views/responses and support meaningful analysis.

that the number of interviews specified above provided a full enough range of views on which to base meaningful analysis.

Key findings

Causing death by dangerous driving

- Judges generally found the revised guideline clear and easy to interpret
- Using the revised guideline, there was generally good consistency between judges for **culpability** categorisation
- Judges had no difficulty identifying the relevant **aggravating and mitigating factors** applicable to the scenarios using the revised guideline
- Some judges expressed concerns about the **aggravating factors** of driving for commercial purposes and to a lesser extent, driving an HGV. They queried why these should be viewed differently to a private motorist committing the same offence, or that they were relevant factors but not aggravating in the same way as, for example, a vehicle being poorly maintained
- All judges made an **upwards adjustment for multiple deaths** under scenario A, in line with the guideline
- With two exceptions, judges applied the one-third credit for an early **guilty plea** as anticipated
- Almost all the judges imposed higher **final sentences** using the revised guideline compared to the existing guideline. This was the case across both scenarios
- Across both scenarios **final sentences** had some variation, which was largely driven by the choice of culpability categorisation. Final sentences were broadly consistent and within range of the anticipated final sentences, with one exception for scenario A
- Judges held broadly positive views on the **final sentences** reached under the revised guideline. However, while several were “satisfied” with the final sentences, one felt they were too high. Some judges commented that death by dangerous driving cases were “extremely difficult” to judge and made identifying culpability challenging
- Five of the seven judges did not notice the change in the minimum term for **disqualification** in the revised guideline and because of this imposed incorrect disqualification sentences across both scenarios, which they corrected after reviewing the guidance during the interview
- Judges felt the **sentencing table** starting points and ranges were appropriate, although one commented that they felt very few cases would fall under lesser culpability

Causing death by careless or inconsiderate driving

- Sentencers generally found the revised guideline “helpful” and “very straightforward”
- Using the revised guideline, there was some variation in **culpability** categorisation across scenario A and B, reflecting the expectation that culpability could fall within either medium or lesser categories
- Judges and magistrates had no difficulty identifying the relevant **aggravating and mitigating factors** for scenario A and B using the revised guideline, but there was quite a lot of variation in phrasing for the impeccable driving record factor
- Sentencers referred to impeccable, ‘clean’ and ‘good’ licences or records interchangeably. Several sentencers asked what the difference between a clean driving record and an impeccable one was, with one judge saying that the guideline phrasing “confuses” rather than assists

- Some sentencers questioned the **aggravating factor** of driving for commercial purposes and why such drivers should be seen as having greater responsibility. Two queried the purpose of separating children out from other passengers
- **Final sentences** were higher across both scenarios for judges and magistrates using the revised guideline than for the existing guideline
- Judges and magistrates held mixed views on the **final sentences** reached under the revised guideline. Some found the sentences "uncomfortable" or "a bit on the harsher side", others felt they were "fair" and "appropriate".
- Most judges and magistrates did not refer to the **disqualification** guidance, with some citing familiarity with the guidance and others commenting that they had failed to notice it
- Mostly, judges and magistrates felt the **sentencing table** was "straightforward" and used "reasonable" ranges. One judge felt that having custodial starting points better reflected the loss of life, and several felt the higher table ranges reflected a move to more punitive sentences. One magistrate felt the table was asking them to "push boundaries" to avoid sending cases to Crown Court

Causing serious injury by dangerous driving

- As expected, there was some variation in the **culpability** categorisations (within B and C) selected by judges and magistrates in three of the four scenarios, while there was full agreement on the fourth
- For the two scenarios sentenced by the magistrates and scenario A sentenced by the judges, there was a good level of consistency in the **harm** categories selected However, there was more variability in the harm categories selected by judges sentencing scenario B: three selected harm category 1 and two judges category 2, with debate centring on whether the injuries caused would have a lifelong impact.
- Some of the judges and magistrates expressed concerns about there only being two categories for harm, saying that there was "quite a leap" between the two categories and that category one is only for "the really dire situation"
- Neither judges nor magistrates experienced any difficulty identifying the relevant **aggravating and mitigating factors** for the scenarios, although a few made suggestions for minor wording changes to the factors
- The **final sentences** imposed by the judges were primarily driven by the culpability and harm categorisations. The final sentences imposed by magistrates for scenario B were fairly similar, however those imposed for scenario A were more varied, ranging between 18 weeks and 1 year. This variation could not be explained entirely by the categorisations selected or the aggravating and mitigating factors identified
- For scenario A, the judges imposed sentences that were similar to those that would have been handed down under existing practice. However, for scenario B, judges' sentences were more varied. Only three of the five magistrates interviewed stated what their final sentences would be for the magistrates' scenarios A and B under existing practice and these were quite different to the final sentences imposed using the draft guideline. On balance, the sentences were more severe under the draft guideline
- The majority of judges were content with the sentences imposed using the draft guideline. However, the majority of magistrates felt the sentences handed down under the draft guideline were too severe for the scenarios tested
- Most of the judges and magistrates imposed the minimum 2-year **disqualification period**. For judges there was no difference between the driving disqualification periods imposed under existing practice and the draft guideline. However, the

majority of driving disqualification periods imposed by magistrates increased when using the draft guideline
- Overall, the judges were content with the **sentencing table**, but the magistrates were less happy. In particular, some sentencers (judges and magistrates) thought community orders should be included at the lower end of the table
- None of the judges and only two of the magistrates looked at the **disqualification guidance** while sentencing the scenarios. For two judges and one magistrate this may have been because they were using printed draft guidelines, but some suggestions were made that signposting to the guidance could be improved
- Overall, the guideline was welcomed as an improvement on existing practice and sentencers found it clear and easy to interpret

Dangerous driving

- Most sentencers found the guideline "clear" and "familiar"
- Using the revised guideline, there was generally good consistency in **culpability and harm categorisation** for scenario B, but it was a more varied picture for both judges and magistrates for scenario A
- Judges and magistrates had no difficulty identifying relevant **aggravating and mitigating factors** across all scenarios using the revised guideline
- Some sentencers were concerned about several of the listed **aggravating factors,** questioning why the victim being a close friend or relative of the offender was relevant as mitigation and what a genuine emergency would constitute
- Judges and magistrates sentenced different scenarios. There was little difference in the **final sentences** imposed by judges using existing practice and the draft guideline across both of their scenarios. In contrast, the final sentences imposed by magistrates were higher using the revised guideline compared to the existing guideline across their scenarios
- Judges and magistrates held mixed views on the **final sentences** reached under the revised guideline. Several judges felt they were similar to what they imposed using the existing guideline or practice. There were both judges and magistrates who felt that the sentences under the revised guideline were "tougher", "harsh" and "too high"
- Across all scenarios, none of the judges or magistrates had looked at the **disqualification** guidance when sentencing
- Judges' and magistrates' views on the **sentencing table** were varied. Magistrates generally felt it ensured consistency. Several judges commented on the maximum sentence of 2 years, with one suggesting it would be better if it was 5 years to allow for more "nuanced" sentences. Some sentencers felt that many cases would fall under high culpability due to cases often involving a deliberate decision to ignore the rules of the road

Driving or attempting to drive with a specified drug under a specified limit

- Overall, magistrates found the draft guideline clear and easy to interpret
- There was a degree of variation in the culpability categorisation of scenario A**,** but less so for scenario B. This occurred primarily from magistrates' judgment of the applicability of the culpability factor, evidence of another specified drug or of alcohol in the body. Magistrates asked for clarification of the phrasing "evidence of" and questioned whether the drug need be identified as being over the specified limit. Due to the variation in the categorisation of culpability, final sentences for scenario A ranged more than was expected

- No further difficulties were outlined for **culpability,** however magistrates did note that they felt the factors for culpability and harm were quite restrictive. On **harm**, magistrates sought clarification on the factor obvious signs of impairment, specifically regarding who the impairment should be obvious to
- A large amount of variation occurred in the application of credit for the guilty plea for both scenarios but primarily scenario A. This was due partly to the community orders imposed. Some magistrates reduced the fine band, whereas some reduced the level of the community order or length of specific attachments e.g. unpaid work. Across the two scenarios, two magistrates reduced the period of disqualification, whilst others applied it to the main aspect of the sentence e.g. fine or community order
- **Aggravating and mitigating factors** were applied consistently for both scenarios. One magistrate applied a factor ('location') which did not appear in the draft guideline. A point of subjectivity was raised for the factor very short distance driven. Magistrates suggested a small number of additions
- Participants noted information on the minimum disqualification period and applied this correctly. There was slight variation between the disqualification periods imposed using the current guidance in comparison to the draft guideline as well as between final sentences
- On the whole, magistrates were happy with the proposed **sentencing table** and thought it reflected current practice. A small number of amendments were suggested

Annex: Scenarios

Causing death by dangerous driving

Scenario A

The offender, a 60-year-old man, was driving an HGV which was heavily loaded along the motorway. He was an experienced, professional driver with no previous convictions and a clean driving record.

He was driving at around 50 miles per hour, not unreasonable for the overall conditions, and had been travelling at a sensible distance behind the Peugeot 208 in front, driven by two of the victims (a married couple). However, the traffic in front began to slow and for some reason which was not established, though certainly not mobile phone use, the offender's attention was not on the road for an estimated 10 seconds.

This led to a collision with the Peugeot which killed the two victims as they were pushed into the van in front of them. Only at this point did the offender apply the brakes, but it also meant his HGV crashed past the Peugeot and also collided directly with the van in front. Its driver was treated at the scene but later died of his injuries in hospital.

The offender remained in the cab of his HGV at the scene, apparently unable to move and later in police interviews spoke of "being shell-shocked". At first, in interviews he said that the vehicles in front had braked too quickly, but in subsequent interviews and in a letter to you he has expressed heartfelt remorse. He entered a guilty plea at the earliest opportunity.

The victim impact statements of all victims' families speak of the heartbreak and loss, especially at not being able to say goodbye to their parents and grandparents. The offender himself has a weak heart and a bad back (though these did not contribute in any way to the incident, and he was considered fit to drive).

Scenario B

The offender, a 47-year-old male, was driving with his brother as a passenger in his Volvo along a single-lane A road. The speed limit was 60 miles an hour and the offender was driving within that limit. It was a sunny day and the traffic was relatively busy.

The offender was in traffic behind a slow-moving caravan. Three cars in front of him overtook, and after a short period of time the offender pulled out to overtake. But immediately coming towards him on the other carriageway was the victim, riding a motorcycle. The witness, driving behind the offender did see the motorcyclist beforehand, but the offender later said he did not see him at all. In line with this, he took no action to swerve out of his path – it was a head on collision. The motorcyclist was thrown onto the windscreen of the offender's car and onto the road.

The offender was in shock but called the emergency services to the scene. The victim, who had no known relatives, was dead on arrival at the local hospital. The offender gave a full and frank account to police, has expressed his profound regret at what happened, and admitted his guilt at the earliest opportunity.

The offender has a clean driving record and no previous convictions. There were no defects found to the vehicle, the offender's eyesight was found to be in good condition, and there was no suggestion that anything else had affected his line of sight. The prosecution therefore urges

that this demonstrated a serious lapse of concentration, particularly bearing in mind that others had seen the victim approaching.

Causing death by careless or inconsiderate driving

Scenario A

The offender was a 67-year-old woman who was driving home from volunteering at the local library. The victim was a 62-year-old man, with a wife and grown-up daughter who had just got married and was pregnant with his first grandchild.

The victim was cycling his usual one-mile journey home from work. As with the offender this was a familiar route; his bike was in good working order and he was described as an experienced cyclist. He wore a high visibility jacket.

The car in front of the offender overtook the victim on his bicycle without issue. However, when the offender began to overtake, for some reason the car veered suddenly to the left – an action that neither the offender nor witnesses could explain. This meant the front bumper collided with the rear wheel of the victim's bicycle causing it to buckle and him to be thrown into the air and over onto the road. The offender waited at the scene, badly shaken whilst a passer-by called an ambulance.

He was conscious and taken to the local hospital. X-rays revealed significant and concerning damage to his back, but whilst waiting for an operation the following day he developed asymptomatic deep vein thrombosis which caused a pulmonary embolism resulting in a heart attack. This resulted in his death before his family had time to be called.

The victim's wife of 35 years describes having lost "the love of her life, her soul-mate" and his daughter describes her immense sadness at how her daughter will never meet her grandad. The offender (who has no previous convictions and a clean driving record) did not plead guilty and did not express any profound remorse at the trial, although she understands how sad this is for the victim's family. It remains unclear precisely why she veered to the left: the prosecution urge that it was a lapse of concentration, exacerbated by a degree of tiredness at the end of a long day.

Scenario B

Offender is 48 and a family man with a clean licence and no criminal record. One day he was driving his Audi and trying to merge into a busy ring road. He was facing behind him to the right looking for a gap in the traffic and judging when it would be possible to pull out.

The offender did not look ahead of him and drove at a very low speed into an elderly pedestrian crossing to a traffic island with shopping bags (this was not a pedestrian crossing). She was pushed to the ground. The offender stayed at the scene and was described by witnesses as being shocked and upset and provided assistance to the victim until the ambulance came. The victim suffered a complex pelvic fracture; there was an accumulation of blood in the stomach, and her body reacted by multiple organ failure, which led to the loss of her life.

The loss of the victim has been described as an "utter tragedy" by her family. The offender has expressed sincere remorse and described the negative impact it has had on him and his family. He pleaded guilty at the earliest opportunity.

Causing serious injury by dangerous driving

Judges

Scenario A (judges)

The offender, a 33-year-old woman, was driving home from work as a nurse on roads with which she was familiar. There is no suggestion that she was tired or distracted. She found herself behind a slow-moving petrol tanker. She drove behind it, well below the 40 mph speed limit for 10 minutes and then pulled out in an attempt to overtake.

At that point however, there was a sweeping bend ahead and the road started going downhill. This meant that the tanker started moving faster than the offender had anticipated, and her Corsa was unable to accelerate quickly enough. The victim's car came from the opposite direction and there was a head on collision which resulted in the victim's car's engine being forced off its mountings and pushed inside the car's interior. The offender injured herself and in a state of shock stayed in her car, and a passing motorist stopped, provided immediate assistance to the victim and called an ambulance.

The victim, 23, a student studying to be a teacher, suffered two broken femurs, complex fractures of both feet, a fractured knee and a fractured elbow. These, together with other associated injuries, resulted in ten-hour surgery and three months in a full plaster cast. Throughout this time, the victim was at first confined to a bed for several weeks, then required a wheelchair and had to undergo physiotherapy.

In her victim personal statement, she wrote about the loss of dignity and embarrassment from having to be bathed over those months as well as the isolation she felt, and the feeling of being a burden on others. She could not finish the second year of her studies and is fearful she may not enjoy future sporting activities (skiing and rowing), and whether she will be able to (for example) kneel down to speak with small children in a classroom.

The offender has a clean criminal record and a clean driving record. She suffered a broken leg in the incident, which involved being in a cast and using crutches for two months. Although she did not seek to blame others, she contested that this was dangerous driving, did not express particular remorse, and was convicted after a trial. You have received several positive character references.

Scenario B (judges)

On a winter's evening, around 10:00pm, the offender, a 26 year old man, was driving along a country lane coming back from his job as a lifeguard. The victim, aged 78, was walking his dog along the road when the offender drove past him. The victim shouted at him that he had driven far too close and waved his arms at him whilst flashing his torch. The offender stopped about 30 feet down the road and reversed back towards the victim. He misjudged the distance – this was exacerbated by the lack of street lighting and his rear window being misted up. Although reversing at a relatively low speed, he struck the victim who fell into a ditch by the side of the road.

At first it was suggested that the offender had deliberately set out to hit the victim. However, the police accepted that he simply intended to come back to talk with the victim - whether to remonstrate or ask what the matter was can never be known, but the offender expressed remorse and regret for what he admitted was "a very silly piece of driving". He has a clean criminal and driving record.

The victim suffered fractures to the lower leg bones of his right leg. He spent about a week in hospital having these fixated using a metal pin. Whilst he has made a good physical recovery, he describes having been reluctant to go walking with his dog in that area as he had before. He found it hard to sleep and suffered from what he called anxiety attacks and flashbacks. The pin remains in his leg, and he finds it painful to stand for any lengthy period of time. He says it has affected his physical fitness and his ability to take part in social activities.

The offender has repeatedly expressed remorse for what happened and pleaded guilty at the earliest opportunity. He has no previous convictions and a clean driving record. He has caring responsibilities (not sole) for a young son and several supportive letters have been sent in, including from his employer, about what a good role model for young people and others he is in his job and sports volunteering work.

Magistrates

Scenario A (magistrates)

The offender, a 47 year old male, was driving with his brother as a passenger in his Volvo along a single-lane A road. The speed limit was 60 miles an hour and the offender was driving well within that limit. It was a sunny day and the traffic was relatively busy.

The offender was in traffic behind a slow moving caravan. Three cars in front of him overtook, then a motorcycle overtook both the offender and the caravan at speed which, the offender said, gave him a false sense of security that the road ahead was clear. The offender pulled out to overtake, but immediately coming towards him on the other carriageway was the victim, driving his car at the speed limit. The offender saw him too late and tried to swerve out of his path back into his lane. The other driver also tried to avoid a collision by swerving, narrowly missing the offender's car. He drove his car up into the verge and came to an abrupt halt.

The offender was in shock, but called the emergency services to the scene. The offender has a clean driving record and no previous convictions. He gave a full and frank account to police, has expressed his profound regret at what happened, and admitted his guilt at the earliest opportunity. There were no defects found to the vehicle, the offender's eyesight was found to be in good condition. His brother says that he was focussed fully on the road and had undertaken several similar "textbook" manoeuvres earlier in their journey.

The victim had a fracture to the sternum, four fractures to his toes, and a lot of bruising. Although he did not provide a victim impact statement, he is said to be recovering well and is undertaking physiotherapy.

Scenario B (magistrates)

The offender was a 52 year old woman who was driving home from work. The victim was cycling his usual one mile journey home from work. As with the offender this was a familiar route; his bike was in good working order and he was described as an experienced cyclist. He wore a high visibility jacket.

The car in front of the offender overtook the victim on his bicycle without issue. However, at the point when the offender began to overtake, her phone began to ring: she glanced down and reached across to the passenger seat to turn it off, meaning she momentarily steered her car to the left. This meant she overtook very close to the cyclist and cut him up. He had to steer onto the bank and fell off his bicycle. This was estimated to take place over no more than three seconds. The offender stopped and got out to check on the cyclist; she applied basic first aid to a cut, and immediately called an ambulance

The victim had four fractures to his toes, a chipped tooth and a lot of bruising. He is said to be recovering well and undertaking physiotherapy.

The offender (who has no previous convictions and a clean driving record) is very sorry about what happened and pleaded guilty at the earliest opportunity. She is the primary carer for two teenagers.

Dangerous driving

Judges

Scenario A (judges)

The offender, a 32-year-old male, had had an argument with his partner and was driving too fast at around 9pm when he was pulled over by police. He stopped but was uncooperative and would not wind down his window or talk with the officer. They called for support.

The offender reversed his car which smashed into the parked police car, narrowly missing one of the officers, and then drove off. Avoiding the other officer in the road and another car in front of him, the offender mounted the pavement and drove over a short garden fence, knocking over some wheelie bins. He then returned to the road and drove off at some speed – the police officers estimated it was at least 50 mph in a 30-mph zone.

The Police attempted to follow but lost the offender after the next street. It is not known how long he fled, or at what speed. His car was found one mile away.

The offender pleaded guilty at the earliest opportunity. He has some previous (non-driving related) convictions, all older than three years ago, but received a caution for a criminal damage matter last year. He has a partner, and two young children who depend financially on his work as a crane driver.

Scenario B (judges)

The offender was caught on CCTV on his 350cc motorbike riding around a housing estate (with a helmet), performing dangerous turns and a succession of wheelies. It was the middle of a sunny Saturday afternoon and there were various pedestrians, including children, walking around the estate, as well as other motorcyclists. He had fake numberplates on the bike. Witnesses suggest that the offender was tacitly encouraging other motorcyclists to copy his manoeuvres. In all, the footage suggests he was driving in this manner for 20 – 25 minutes.

The offender is 28, and has previous convictions, dating back seven years for dangerous driving and driving with excess alcohol. He was disqualified at that point and needed to take an extended retest, which he has not done, and is therefore also driving without a licence for the purposes of the present offence. Nonetheless the motorbike was purchased at some point the past year.

The offender pleaded guilty at the earliest opportunity. He has a supportive partner who has written a letter highlighting his new job and saying he is determined to turn his life around.

Magistrates

Scenario A (magistrates)

The defendant, a 20-year-old male, was driving along a dual carriageway at 11:30pm when he pulled up behind the scene of a very recent head-on collision. The police had closed that lane whilst they and the ambulance dealt with the serious injuries which had occurred involving three people.

The offender had just secured a job as a security guard and was desperate to get to his shift on time: reversing and making a circuitous trip would have made him more than 30 minutes late. He slowly crossed the central reservation and made his way for 100 yards driving the wrong way along the other carriageway before re-joining the correct carriageway, after the crash site. As one would expect for this time of night, it was clear there were no vehicles coming in the opposite direction.

The police witnessed this and noted his numberplate, tracking him down the following day. He admitted what he had done, accepted that the driving was dangerous and explained that he could not afford to lose his job. He pleaded guilty at the earliest opportunity and has said he is very sorry for 'doing such a stupid thing'. He has no previous convictions and a clean driving record (he has only been driving for a year). His employers have provided a glowing reference.

Scenario B (magistrates)

The offender is a 49-year-old male who was driving his mini on the M5. Dashcam footage was handed to the police by another motorist who was driving along the same stretch of road, in response to a road safety campaign.

The footage shows the offender overtaking the other motorist in the fast lane and then veering abruptly into the middle lane. One minute later, the offender repeats the manoeuvre overtaking the same car again which causes the filming motorist to veer slightly into the other lane to avoid him. The offender then drives off. The motorway at this point is not busy.

The offender said that he had been provoked by the other driver after he had made rude hand gestures to him and beeped his horn repeatedly: he claimed that in fact the other driver had earlier cut him up in a far worse manner, although there is no evidence of this.

The offender has no previous convictions and a clean driving licence. He is on medication for a weak heart and the Defence point out that he was suffering personal difficulties at the time of the incident as his father had recently passed away. He pleaded guilty at the earliest opportunity, but it is clear he still feels hard done by.

Driving or attempting to drive with a specified drug above the specified limit

Scenario A

The offender is 38. He was riding his motorcycle along a main road on the half mile journey between his work and home at rush hour. He was driving behind a trailer when he attempted to overtake. A car emerged from a junction and knocked him off his bike causing him serious injuries. The car drove off and has never been traced.

When the police arrived the offender admitted he had had a drink earlier in the day and smoked a small bit of weed. He did not test over the limit for alcohol at the roadside but positive for drugs. At the police station a drugs test revealed he had 114 microgrammes of Benzoylecgonine (a cocaine derivative) in his bloodstream. This appears to have been the result of drug taking three days previously. The specified limit is 50 microgrammes. He was not over the limit for the cannabis he admitted taking.

The offender was convicted of driving with excess alcohol in 2010 and of possession of a class A drug in 2016. The defence point out that he has suffered a great deal from his injuries (a broken back and pelvis). He has lost his job as a warehouse operative and been unemployed since the incident. He pleaded guilty at the earliest opportunity and has said he did not think the cocaine would still be in his system after three days.

Scenario B

The police stopped the offender (aged 53) as he drove his car along the front of a busy seaside town. The offender admitted it was not his car and that he was unlicenced. A roadside drugs test was conducted which was positive. At the police station, a blood test found a reading of 650 microgrammes of Benzoylecgonine (a cocaine derivative). The prosecution reminds you that the specified limit is 50 microgrammes.

The driver has previous convictions for failing to provide a specimen for analysis (2008), driving with excess alcohol (2013) and driving with a specified drug over the specified limit (2017). He was disqualified on each occasion.

The defence point out there was no evidence of substandard driving, and that the offender now rarely drives following his last disqualification in 2017, ordinarily using a push bike. He admits fully that getting in the car on this occasion was a silly mistake. He is currently homeless and staying where he can with friends. He was trying to drive his friend’s car (with permission) across town on this occasion where he had secured casual labouring work. He pleaded guilty at the earliest opportunity.

Blank page

Justice Committee

The Rt Hon Lord Justice William Davis

Chairman, Sentencing Council

By email only

30 November 2022

Dear William,

Thank you for giving the Justice Committee the opportunity to respond to the Sentencing Council's consultation on motoring offences. We are grateful to the Council for sharing the other responses to the consultation with us in advance of our submission.

We support the Council's decision to update the guidelines, particularly to reflect the increased statutory maximum penalty for the offences of (i) causing death by dangerous driving and (ii) causing death by careless driving when under the influence of drink or drugs, from 14 years to life imprisonment. However, we note that the increase in the maximum penalties for these two offences appears to have had an inflationary effect on the starting points and category ranges beyond the most serious cases and have had an effect on sentencing levels for other motoring offences. It was Parliament's intention to increase the penalties for the most serious cases by raising the maximum, but it is not necessarily the case that this should increase the penalties for cases that fall into the medium and lesser categories. We note that the Council took a different approach to revising the Child Cruelty Guidelines in creating a new very high culpability category to give effect to the revised maximum penalties enacted by Parliament. We would be interested to understand why the Council decided against that approach for these guidelines. We note with interest the responses to the consultation which propose the introduction of a very high culpability category for the

Justice Committee
House of Commons
Palace of Westminster
Westminster
SW1A 0AA

justicecom@parliament.uk
+44 (0)20 7219 8196
Social: @CommonsJustice
parliament.uk

offence of causing death by dangerous driving and believes the suggestion merits further consideration by the Council.

The resources assessment produced by the Council suggests a greater impact on prison resources than the impact assessment for the Police, Crime, Sentencing and Courts Bill had originally outlined. For example, regarding the increase in the maximum penalty for the offence of causing death by dangerous driving to life imprisonment, the impact assessment suggests that in a high scenario it is anticipated that a steady state will be reached in 2031/32 with an additional 30 prison places required. However the resource assessment anticipates for this offence that a further 260 prison places per year will be required as a result of the guideline being updated. It would be useful to know if the Council could explain why Government's impact assessment and the Council's resource assessment have arrived at different views on the number of prison places required.

We are concerned that the increase in the maximum will lead to more short-term prison sentences for the medium and lesser culpability categories. We were also interested by several respondents' suggestion of there being a greater focus on the use of disqualification periods as opposed to short custodial sentences in appropriate cases and also the suggestions for there to be further guidance provided regarding recommended lengths of disqualification periods. We believe that both of these matters require further consideration by the Council, and we look forward to reading the Council's response on these points.

We note that it is not clear from the face of the guidelines how the possibility of a life sentence for the offences of causing death by dangerous driving and causing death by careless driving under the influence has been incorporated into the relevant guidelines. We note that step 5 of the draft guideline asks the court to consider

Justice Committee
House of Commons
Palace of Westminster
Westminster
SW1A 0AA

justicecom@parliament.uk
+44 (0)20 7219 8196
Social: @CommonsJustice
parliament.uk

whether it would be appropriate to impose an extended sentence. The Police, Crime, Sentencing and Courts Act 2022 did not add the offences of causing death by dangerous driving and causing death by careless driving under the influence to Schedule 19 of the Sentencing Code, which lists the offences where a life sentence must be imposed if it meets the conditions included in section 285, including 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 specified offences". We are concerned that this lack of a trigger could result in some difficulties for sentencers. We understand that the court retains the residual discretion to impose a discretionary life sentence, but we would welcome any clarification the Council could provide on this point.

Yours sincerely,

Sir Robert Neill MP

Chair

Justice Committee

Justice Committee
House of Commons
Palace of Westminster
Westminster
SW1A 0AA

justicecom@parliament.uk
+44 (0)20 7219 8196
Social: @CommonsJustice
parliament.uk

Blank page

Annex C

Further comments on culpability factors

Dangerous driving

“The failure to stop should be set at the highest level. In the death of my son, the factor that [the offender] had been drinking, but by leaving the scene and delaying his surrender he made sure he could not be convicted as a drink driver and reduce his sentence.” - *James Regan*

“Evidence of aggression i.e. road rage should also be a high culpability factor and certainly warrants the offence sitting within Dangerous driving rather than careless driving.” – *Eastgate Cycle Cycling Club*

“There is a huge gap between 'prolonged, persistent and deliberate' and 'brief, dangerous manoeuvre'. I think it needs to be prolonged, or persistent or deliberate not all 3 for [high culpability]” – *Dr Lilian Hobbs JP*

“There was a discussion amongst the Committee regarding situations where multiple medium culpability factors may be present. The committee’s view was that where there are a number of culpability B factors present “*multiple medium culpability factors present*” should be added to the Culpability A factors list.” – *HM Council of District Judges*

“Brake is advised by leading road safety academic research and understands the breadth of driver behavioural crash causation. Considering the proposed list from this evidenced perspective, and its use within law application, it has:

- omissions of categories of actions by drivers that create significant risk and danger
- inconsistency of terminology in different categories
- vagueness, to a degree of meaning loss

From a safety perspective, we offer **the below list** of culpability factors that we think should be considered as ‘very high’ and ‘high’, which may or may not be useable in entirety in sentencing advice. We recognise that the nature of the laws behind the proposed guidelines may affect the practicality of all aspects of this list being adopted. However, it is important that the SC understands the breadth and danger of driver behavioural causation factors and considers their applicability and inclusion.

Footnotes are also provided for reference.

Culpability factors that we think should be considered as ‘very high’ and ‘high’, with those most likely to be ‘very high’ listed first:

• Multiple, prolonged, repeated, or otherwise particularly extreme culpability factors that were, or ought to have been, obvious to the offender as dangerous, from the below culpability factors

• Racing or competitive driving against another vehicle, or offence committed in course of police pursuit

• Disregarding warnings of others or automated warnings by the vehicle relating to one or more culpability factors from the high and medium culpability lists

• Driving at a speed that was above the speed limit and that would have been obvious to a careful and competent driver was too fast for safety, considering factors such as the road design, road condition, weather conditions and the vehicle[1]

• Deliberately carrying out an obviously high-risk manoeuvre or driving behaviour, a particular example being **overtaking on the wrong side of the road** where it is not possible, within the speed limit, to know the road ahead will remain clear[2]

• Driving with alcohol levels **above the legal limit** or having consumed **illegal** drugs[3]

• **Knowingly driving with a medical condition** that makes it dangerous to drive (inclusive of uncorrected poor eyesight below the standard required to hold a driving licence)[4]

• Driving when **deprived of sleep**, either a) before driving; or b) due to driving with disregard for rules and guidance on taking breaks[5]

• Driving when **using a hand-held device[6] or other distraction** from driving for a length of time that would have been obvious to a careful and competent driver would have prevented ability to brake and stop in time to avoid a crash[7]

---

[1] Speed is a presiding contributing factor to the outcome of crashes and this factor in particular needs clarity with a focus on the danger of speed over the limit and for the conditions. The slower we drive, the more chance we have to avoid hitting; and if we do hit, the lower the chance of death or serious injury. The SGC wording 'speed greatly in excess of speed limit' is open to far too much interpretation. Interpretation of the danger of speed requires an understanding of physics to be interpreted correctly. Braking distance depends on how fast a vehicle is travelling before the brakes are applied, and is proportional to the square of the initial speed. This means that even small increases in speed mean significantly longer braking distances. Braking distances can be much longer for larger and heavier vehicles, and in wet or icy conditions. Thinking distances can be affected by visibility, including in bright conditions.

[2] This is a particularly deliberate, obviously dangerous act, that is a notable causation of fatal and serious injury crashes, and worthy of distinct mention and high culpability.

[3] It is appropriate to have a zero tolerance of alcohol and illegal drugs when driving. Proving impairment should not be required.

[4] There should be no distinction between the gravity of culpability between illegal drugs and medical problems that are known to impair in ways that are obvious to the driver, inclusive of failure to correct eyesight using glasses a driver knows they should wear.

[5] Commercial drivers have rules they are required to follow.

[6] This is now illegal in entirety, so deserving of its own point.

[7] 'A substantial period of time' is neither clear nor appropriate in this factor. A vehicle can travel a significant distance in a very short amount of time, and the higher the speed, the further this is. Also, attention is a significant requirement at all speeds, e.g., in urban environments with high densities of Vulnerable Road Users.

• Driving a vehicle with a **dangerous mechanical defect,** due to failure to carry out checks listed in the Highway Code or have the vehicle inspected in line with legal requirements. Driving with visibility or controls obstructed[8]

• Driving a vehicle with a **dangerous load**

• **Reversing or otherwise slow manoeuvring** a vehicle dangerously[9]

• Failure to **secure children** in a vehicle correctly in legally-required child restraints

• Evidence of any other **deliberate decision** to ignore the rules of the road, such as running a red light purposefully

• Evidence of any other disregard for the risk of danger to others"

- *Brake*

"Whilst we agree with most of the culpability factors, for the reasons highlighted on pages 1 and 2, we believe the following to be careless rather than dangerous driving:

- brief but avoidable distractions
- driving at speed that is inappropriate for prevailing road or weather conditions
- momentary lapses of concentration

the following to be dangerous rather than careless driving:

- driving whilst ability is impaired as a result of alcohol or drugs
- driving in disregard of advice relating to the effects of medical condition or medication
- driving when deprived of adequate sleep or rest

the following should also be considered as dangerous driving

- driving at excessive speed, especially when inappropriate for road or weather conditions
- using a mobile device (irrespective of duration)
- long conversations on hands held phones
- carrying passengers not wearing a safety belt"

- *Nicole and Chris Taylor (Parents of RTC victim)*

"State how many of the factors need to be met for the offender to be placed in a particular category. Any more than one should increase the culpability.

Judges need tangible guidelines to help ensure consistency and to stop overzealous defence barristers exaggerating the actions of the offender.

[8] Vehicle maintenance is a driver responsibility and must be given the same culpability levels as other legal requirements.
[9] Vehicle reversing must be undertaken in safety. It is a particular risk for larger vehicles, and should be avoided wherever possible.

The police say you must follow the evidence. Most factors stated can be measured for example the amount of alcohol in the blood stream but for those factors that are intangible more guidance needs to be given. Extra guidance reduces interpretation, increases consistency, and provides clarification to victim's families as to why the offender is placed in a particular category." – *Chris Barrow (Widower of RTC victim)*

Careless driving

"Yes I think size and weight of vehicle needs addressing though. People who drive massive vehicles on our country's roads can cause death just by the size of the vehicle. I see Germany are taking this in to account in sentences." – *Matthew Hart*

I believe every listed culpability factor should qualify for the dangerous driving standard. Driving under influence amounting to "careless" is an insult to sense of right and wrong. Likewise every incident of DbCD which happened while a Highway Code violation can be shown. No causative connection necessary. Careless standard could only apply when the driver "did nothing wrong" but did not anticipate a risk factor which should have been know to an educated driver." – *Anton Isopousso*

"As with Death by Dangerous Driving, the culpability factors should include any prior history of aggression towards vulnerable road users. Where extreme evidence exists then this should create a presumption towards aggression being a significant factor and either evaluate the offence to Death by Dangerous Driving or, moving to high culpability here." – *Chris Hesketh*

"The Committee struggled to identify examples of cases where an extreme example of a medium culpability factor would not result in an offence involving dangerous driving. If such an approach is to be taken, some members considered that "highly significant/substantial" would be more appropriate than "extreme".

As with our response to question 2 we considered that where the standard of driving involved "multiple" examples of medium culpability factors, this could warrant the case being positioned as high culpability.

A medium culpability factor is "Engaging in a brief but avoidable distraction". A lesser culpability factor is "Momentary lapse of concentration". The references in both to a very short period of time may confuse the sentencer. We think that the focus of the medium culpability factor is on the engagement in an avoidable distraction and that the brief length of time over which this occurs is intended to distinguish a medium from a high culpability case; but we wonder whether this could be made clearer." – *HM Council of District Judges*

“Our one concern is the expression “includes extreme example of a medium culpability factor” within the categorisation of high culpability. It is difficult to envisage an “extreme example” of – for example unsafe manoeuvring or consumption of alcohol or drugs – that would not also amount to dangerous driving, or at the very least fall just short of dangerous driving in which case we wonder whether the wording adds very much to the categorisation that has gone before – ie “standard of driving was just below threshold for dangerous driving …”. If some enhanced qualification is to be given to medium culpability factors to raise them into the higher bracket then perhaps wording such as “a particularly serious example of ….” would be sufficient?” – *Council of HM Circuit Judges*

“We consider that in its current form and in the absence of clarification and/or explanation, the first listed factor (Unsafe manoeuvre or road position) is too wide. The fifth listed factor (Driving vehicle which is unsafe or where driver’s visibility or controls are obstructed) refers to the vehicle being unsafe. Clarification is required as to whether this is an objective test.” – *Kennedy’s*

<u>Causing injury by wanton or furious driving</u>

“Generally yes. But as the offense covers cyclists then I would suggest being explicit that "racing against the clock" (eg chasing a Strava segment personal best or leader board place) is a high culpability factor (or at least medium). I state this as a cyclist who does on occasion try and improve my personal best Strava segments.” – *Justin Antony Clayton*

“Yes, though there is no need to be strict with road worthiness when it comes to active transportation. Eg a 10kg bicycle with only one brake is not the same as a car with a worn breaking surface. Anticipated levels of risk and consequence should weigh more than pseudo “mot” for small relatively harmless bikes, scooters, mobility devices etc” – *Anton Isopousso*

“Whilst there is no definition for wanton and furious it would appear more aligned to dangerous driving than careless driving. Assuming there was a clear distinction between culpability factors for dangerous and careless driving, as outlined in our answer to Question 1. The high and medium culpability factors are best aligned to the high and medium factors for dangerous driving with the low culpability factors being aligned to the high and medium culpability factors for careless driving.” – *Nicole and Chris Taylor*

“We think where driving/riding on the pavement should be specified in the culpability levels. . We also believe the higher level of culpability should be reserved for driving of four wheeled motor vehicles which pose so much greater risk due to their speed and weight than do cyclists or e-scooters.” – *Action Vision Zero*

Blank page

Annex D

Further comments on aggravating and mitigating factors

Aggravating factors:

- Victim was a vulnerable road user, including pedestrians, cyclists, horse riders
- Disregarding warnings of others
- Driving for commercial purposes
- Driving an LGV, HGV or PSV etc

  Add Private Hire Vehicles (Dr Adam Snow) – they have an extra duty of care to passengers
- Other driving offences committed at the same time as the careless driving

  Bring out driving whilst disqualified here in particular (Highbury Corner Magistrates)
- Blame wrongly placed on others
- Failed to stop and/or assist or seek assistance at the scene

  Passengers, including children
- Vehicle poorly maintained

  Be clear this is not cosmetic issues but poor maintenance not amounting to MOT failures – heating/defrosting problems, badly working windscreen wipers (CPS)
- Serious injury to one or more victims, in addition to the death(s) (see step 5 on totality when sentencing for more than one offence)
- Offence committed on licence or while subject to court order(s)

  This is irrelevant to driving and shouldn't be considered (Prison Reform Trust)

Suggestions for additional aggravating factors:

- *[In dangerous driving] include "more than one vehicle damaged" (West London Bench)*
- *Never passed test or disqualified (Lilian Hobbs JP)*
- *Lack of insurance (Amanda Seims)*
- *Vehicle itself uninsured as an agg factor in death by driving whilst unlicensed/uninsured and evidence of previous knowledge that vehicle was uninsured (eg police warning) (MIB)*
- *Victim is emergency worker/police officer (Alistair Borland)*
- *Add "uncooperative, including no comment interviews (Chris Barrow)*

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Impeccable driving record
- Actions of the victim or a third party contributed significantly to collision or death

  This might be used for victim blaming (John Courouble)

  Rewrite to "Actions of another driver contributed significantly to collision or death" (Brake)

- Offence due to inexperience rather than irresponsibility (where offender qualified to drive)

  Include counterpart of advanced age (Nigel Woof JP)
- Genuine emergency

  This means one life prioritized over another (Brake)

  Provide examples: childbirth, escaping road rage, on route to hospital with serious injury? (Prison Reform Trust); also raised in road testing
- Efforts made to assist or seek assistance for victim(s)
- Remorse
- The victim was a close friend or relative
- 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

  Then they should have been particularly careful (multiple respondents)

Further points on mitigating factors:

- *Good character/exemplary conduct arises in some guidelines, but not others. Clarification required for what falls within this factor, especially noting the potential for disparities (Prison Reform Trust)*

Sentencing Council

Sentencing Council meeting:	**16 December 2022**
Paper number:	**SC(22)DEC06 – Imposition**
	Jo King
Lead official:	**Jessie Stanbrook**
	jessie.stanbrook@sentencingcouncil.gov.uk

1. ISSUE

1.1 This is the second substantive paper on the overarching guideline: Imposition of community and custodial sentences. The recommendations below cover proposed new sections: deferred sentencing, the five purposes of sentencing, and points of principle on issues affecting specific cohorts of offenders. Consideration of the remaining in-scope sections will be presented at the February/March Council Meeting; namely: *suspended sentence orders, electronic monitoring and the sentencing flow chart.* Similar to the last Imposition paper, most proposals for specific text for the guideline are a draft suggestion hoped to generate debate and feedback, rather than text to be agreed today.

2. RECOMMENDATION

That the Council considers and agrees the new inclusion of references to:

I. Deferred sentencing

II. the five purposes of sentencing, including information on rehabilitation preventing crime more generally

III. points of principle on issues affecting specific cohorts of offenders

I. Deferred sentences

2.1 Deferred sentences allow a sentencer to defer a sentencing decision for up to six months, with the option to attach specific requirements or conditions for the offender to fulfil/abide by in that period. The Sentencing Act 2020 sets out the purpose of a 'deferment order', namely that it is to enable a court, in dealing with the offender, to have regard to -

(a) the offender's conduct after conviction (including, where appropriate, the offender's making reparation for the offence), or

(b) any change in the offender's circumstances.

2.2 This is commonly done, and is seen as especially suitable, either for offenders who will have a significant change in circumstances between the date of offending and the (potential) date of sentence (which may mean that their risk of re-offending will or can be

reduced), or for offenders on the custody threshold. As our Council member, Dr Elaine Freer, in her 20022 'Review of Practice' for the Sentencing Academy, states: "*a deferment allows the court to assess whether the defendant is committed to a change in lifestyle to move away from criminality*" (page 5). To be clear, deferred sentencing is not the same as a deferred prosecution agreement, nor is it the same as an adjournment, which does not have a specific limit nor conditions attached (other than any bail conditions).

2.3 There is currently no reference to deferred sentences in any of the sentencing guidelines, but some limited guidance is set out in explanatory materials to the MCSG (**Annex A**). This page is not referred to or linked in any guideline and can only be found through the search function or through the explanatory materials page. This guidance emphasises that deferred sentences will only be appropriate in "*very limited circumstances*".

2.4 Scotland also has the legislative power to defer sentencing "*for a period and on such conditions as the court may determine*" (The Criminal Procedure (Scotland) Act 1995). The Scottish Sentencing Council notes on their website that "a *judge can postpone a sentence, usually for good behaviour, to a later date. If offenders stay out of trouble during that time, the judge will normally give a less severe sentence than if they get into trouble*." The Scottish government published a high-level guide to the purpose, policy rationale and operation of structured deferred sentences (SDS) in February 2021, which involves a structured intervention managed by justice social work services. Of this, they note that deferring sentence can help prevent offenders becoming further drawn into the justice system and that it provides an "*opportunity for individuals to stabilise their circumstances and assess their motivation and ability to comply with a period of statutory supervision, again potentially reducing the risk of future breach and providing an alternative to short periods of custody*." In 2020-21, offenders were admonished (i.e. given a warning) in 42 per cent of the 450 SDSs, which alludes to SDSs being given for lower level offending.

2.5 In England and Wales, data on the volume and efficacy of deferred sentencing are very limited, and there is no published research examining their outcomes. It is not possible to isolate and count deferred sentences occurring in the Crown Court. The known volume of deferred sentences in magistrates' courts was around 550 in 2020 and around 450 in 2021, and has been declining since 2011, however, it is not known whether this is accurate.

Requirements

2.6 The Sentencing Act 2020 sets out that the court may impose requirements during a deferment "*as to the offender's conduct*" and specifies examples that these may include requirements as to the residence of the offender, or restorative justice (RJ) requirements. The Act does not limit when a deferment order may be available, but sets out that the

offender must consent, undertake to comply with any requirements, that the order is in the interests of justice and, if the requirement includes RJ, that the participants consent.

2.7 There is no mention of deferred sentencing in the Criminal Procedure Rules or Criminal Practice Directions, nor the Better Case Management (BCM) Handbook. The Equal Treatment Bench Book (ETBB) mentions deferred sentencing, and specifies offender needs that may be addressed during a deferral period, namely addiction or mental health.

2.8 The Adult Court Bench Book and the pronouncement card sets out text on 'deferment of sentence' for magistrates' courts. The example requirements given in the Adult Court Bench Book are "*a requirement as to residence (for the whole or part of the deferment period) and to make appropriate reparation*" (page 17). The Crown Court Compendium (Part II: Sentencing) also sets out text on deferred sentencing for Crown Courts, with examples of requirements including "*residence in a particular place and the making of reparation"* and that the court *"may also impose conditions of residence and co-operation with the person appointed to supervise…"* It states "*the circumstances in which such an order will be appropriate are relatively rare"* (pages 2-8). Roberts, Freer and Bild in 'The Use of Deferred Sentencing in England and Wales (A Review of Law, Guidance and Research)' gave drug or alcohol treatment as examples of commonly imposed requirements (p. iv).

2.9 The explanatory materials on deferred sentencing states that the deferment conditions could be "*specific requirements as set out in the provisions for community sentences, restorative justice activities (Sentencing Code, s.3) or requirements that are drawn more widely*." If the Council considered it beneficial to align with other court guidance and what is common in practice, this list could be amended.

2.10 The court has the same sentencing options after deferment as it would have done had it passed sentence on the day that it made the deferment order (Section 11, Sentencing Act 2020) and will state both the sentence an offender will receive if deferral conditions are complied with (i.e. a less severe sentence), and the sentence they would receive if deferral conditions are not complied with (i.e. a more severe sentence). Where the defendant has complied with the conditions, they have a legitimate expectation of receiving the lesser sentence (Attorney General's References Nos 36 and 38 of 1998 (R v Dean L and Jones) [1999] 2 Cr App R(S) 7).

Sentence length

2.11 Case law has refined the application of deferred sentences over the years. The Court of Appeal confirmed in Attorney-General's Reference 101 of 2006 (R v P) [2006] EWCA Crim 3335 that it is inappropriate to defer a sentence if an immediate custodial sentence is inevitable regardless of the conditions of the deferment. In Davis [2020] EWCA Crim 1701,

the court stated "*deferral is really there for cases where a community order is at least a realistic possibility if the judge were to pass sentence on that day.'* We can therefore assume that deferred sentences are most appropriate for those on the 'cusp' of custody, or between a community sentence and another disposal (whether more or less punitive), and that it is it is inappropriate to defer sentences if an immediate custodial sentence is inevitable. This principle is also backed up by the Crown Court Compendium (Part II).

2.12 Deferring sentence has in the past been used to 'test' an offender's suitability for suspension of a custodial sentence. A deferred sentence may be a good trial for sentencers unsure about whether a suspended sentence will be duly complied with by the offender, without having to go through breach and resentence, particularly if that offender's circumstances may be volatile or changing. Should the offender be on the cusp of custody, this limited period of time may prove whether they are suitable for a suspended sentence. This deferment period may also be a suitable 'test' for the offender's suitability for a particular requirement which could then be attached to a suspended sentence order.

2.13 As such, Council could decide to specify that deferred sentences are appropriate for sentences which have a realistic possibility of a sentence up to 24 months custody (i.e. are possible to be suspended). The more severe sentence, if conditions of deferment are not complied with, could be over this threshold, but the less severe sentence, if conditions of deferment are complied with, could then be a suspended sentence order.

<u>Benefits of referencing deferred sentencing in the imposition guideline</u>

2.14 The Ministry of Justice's Sentencing White Paper 'A Smarter Approach to Sentencing' in September 2020 included a section on Deferred Sentencing, which set out the commitment of the government to encourage courts to use existing legislation on deferred sentencing and services such as Liaison and Diversion to divert vulnerable offenders away from the justice system. The White Paper referenced women, in particular, whom "*are likely to benefit from referral to a woman's centre*" and noted, in reference to the commitment to increase the use of deferred sentencing, that:

> *The majority of women sentenced to custody receive sentences of less than 12 months, often for persistent low-level offences, and there is a higher prevalence of reported needs among women in custody, including around substance misuse, trauma and mental health. (page 52).*

2.15 Julian Roberts in his article 'A fresh look at deferred sentencing' agreed with the notion that a wide range of offenders (including vulnerable female offenders) may benefit from the opportunity to demonstrate sufficient progress towards desistance to justify a noncustodial sentence, but outlined that frequent deferring of sentences may have the

potential to create disparities (page 4). Julian Roberts together with Elaine Freer and Jonathan Bild wrote about the need to revisit the current guidance in their combined paper, questioning the intention of guidance, rather than the information in a guideline (a question/issue relevant more widely than just deferred sentencing).

Proposal

2.16 The first question is whether the Council would be comfortable with a small increase in the numbers of deferred sentences. If Council were content with this, Freer, Bild and Roberts set out in their July paper: "*One way of attracting further attention to the deferral provision would be to issue a guideline for courts contemplating deferral. In the alternate, the Council could introduce reference to deferral into its imposition guideline which provides guidance on the use of the principal disposals*."

2.17 In the July meeting, members of the Council cautioned that it was essential to agree on the purpose and scope of deferred sentencing. The purpose of the recommendation put forward below, therefore, is to ensure all sentencers are aware of this option, particularly in relation to defendants who may benefit from a deferral of sentencing. A possible impact of this may be that the number of deferred sentences for appropriate defendants increase.

2.18 In the last meeting, Council agreed to an updated chronological structure of the guideline, starting with a new section on thresholds, then a section on pre-sentence reports, moving onto imposition of community orders. It is proposed therefore that the imposition guideline begins with a short reference to deferred sentencing, either before or after the (new) section on thresholds. This is proposed as the consideration of a deferral would happen prior to a consideration of sentencing options, however another option is for this to go elsewhere in the guideline. In either case, this could read:

Note: Deferred Sentences

The court may consider whether it would be appropriate, beneficial and in the interests of justice for sentencing to be deferred for up to six months and may attach conditions to that deferment. If the offender complies with these conditions, a different sentence will be justified at the end of the deferment period. As such, deferred sentencing may be appropriate for sentences which have a realistic possibility of a sentence of up to 24 months custody.

If deferring the sentence is a consideration, please see the Deferred Sentencing Guideline/expanded explanation here (link).

2.19 Should the council agree to the inclusion of reference to deferred sentences in the Imposition Guideline, there is a presumption that the number of deferred sentences will increase. Probation consider this to be a positive increase, noting cases in which

requirements have been identified post-sentence as not being suitable for the offender, and have as such been breached and/or had to go back to the court to be resentenced. The Probation central court team consider a deferment period, particularly when requirements overseen by probation are imposed (such as a Rehabilitation Activity Requirement (RAR)), a useful 'trial' to understand whether a particular offender will engage with the type of sentence and its requirements ultimately imposed.

Question 1: Does the Council wish to make reference to deferred sentencing in the imposition guideline?

Question 2: Does the Council have any feedback on where this would be most appropriate to be in the guideline?

Question 3: Does the Council wish to make any amendments to the text at para 2.18?

Question 4: Does the Council wish to link this reference to further information on deferred sentencing, either the explanatory material on deferred sentencing, or to a new guideline on deferred sentencing?

2.20 Should Council agree to the link to the explanatory materials in the imposition guideline, it would be beneficial to review this text. Julian Roberts in his 2021 article states "It *is unclear why the Sentencing Council took such a restricted view of the ambit of deferred sentencing*", noting in particular the line "*Deferred sentences will be appropriate only in very limited circumstances*".

2.21 Recent academic commentary has suggested that courts might benefit from greater guidance on deferred sentencing regarding the kinds of offenders for whom deferral is appropriate (such as specific profiles of individuals or factors indicating when deferring may be appropriate or inappropriate) or guidance that addresses key procedural aspects of the decision, such as the kind of requirements pertinent to deferral, or advice regarding the question of how to amend a sentence if an offender duly complies with a deferment period and its requirements or conditions. The Sentencing Guidelines Council guideline used to read "*if the offender complies with the requirements, a different sentence will be justified at the end of the deferment period'… this could be a community sentence instead of a custodial sentence, or a fine instead of a community sentence'*, so this information may be logical for inclusion again. It may also be worth the guidance being updated re case law, such as when a sentence is deferred, the defendant is no longer on bail (Mizan [2020] EWCA Crim 1553).

2.22 There are therefore a number of specifications that could be made either in the proposed text within the imposition guideline, or in an amendment of the guidance (or new guideline for deferred sentencing). This could be, for example, determining specific requirements or conditions that may be most pertinent when deferring sentence, bringing together the various court documents and legislation, such as the below:

> [Existing line in the explanatory materials] The court may impose any conditions during the period of deferment that it considers appropriate. **The type of requirement/s imposed during a period of deferment should be dependent on the offender's individual needs and circumstances. Requirements may include residence requirements, restorative justice (RJ) requirements, drug or alcohol addiction or mental health treatment requirements or a requirement to make appropriate reparation.**

2.23 Freer, Bild and Roberts make the case for deferred sentences being particularly important for young adults, noting the "*growing consensus in many jurisdictions that when sentencing young adults, courts should make an additional effort to restrict the use of custody as a sanction*." They note that deferred sentencing "*offers an additional means of sparing a young adult imprisonment and also encouraging (and rewarding) their attempts to address the causes of their offending during the period of deferment…[and] a sensible and responsive mechanism that enables the young person to show that they can follow a law-abiding life*", referencing the high proportion of young adults in custody (page 20).

2.24 The different treatment of young adults (18-25 years) was discussed as part of the Equality and Diversity paper in the October Meeting, concluding that this cohort should continue to be considered as part of the expanded explanations evaluation as to whether a separate overarching guideline is necessary, and be considered as part of the imposition project. Highlighting the benefit of deferred sentencing in particular for young adults may be one way in which this cohort is better dealt with in the imposition guideline.

2.25 While different cohorts of offenders are being considered in reference to encouraging PSRs for particular cohorts, should Council wish to include reference to deferred sentencing and for that reference to include specific cohorts, both female offenders and young adults (due to comments listed above, e.g. whose personal and professional lives have a higher possibility of changing rapidly) would be a welcome addition by commentators.

2.26 Therefore, another specification could be a line similar to the below:

> Deferring sentencing may be particularly appropriate for young adults (18-25 years of page) and female offenders.

2.27 Judicial continuity is worth mentioning in this discussion. Some Council members may have a similar view of the purpose of guideline as in the discussion on PSRs in the last

meeting: that the guidelines should state what should happen rather than take into account operational complexities. However, it is worth noting some of the practical realities of the court, in particular the magistrates court, in relation to deferred sentencing. While it is not in legislation, a deferred sentence almost always returns to the same sentencer after the deferment period. Whether this is practicable in magistrates' courts is a matter for discussion, and should Council agree to include reference to deferred sentencing at the beginning of the imposition guideline, further discussion in a later meeting can consider how practical considerations in the magistrates' court should be reflected.

Question 5: Does the Council wish to update the paragraph in the imposition guideline or the current explanatory material on deferred sentencing with any of the above considerations, or indeed develop a guideline on deferred sentencing?

II. The five purposes of sentencing, including information on rehabilitation preventing crime more generally

Purposes of Sentencing

2.28 Currently, the five purposes of sentencing are not listed in the imposition guideline, though the first line of the guideline under 'General Principles' section references them (without direct mention of the reduction of crime/deterrence or the protection of the public):

> *Community orders can fulfil all of the purposes of sentencing. In particular, they can have the effect of restricting the offender's liberty while providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities.*

2.29 In the same section, there is a specific reference to the purpose of punishment, though specifically in reference to the imposition of particular requirements rather than overall sentence, reflecting section 208 of the Sentencing Code:

> *Save in exceptional circumstances at least one requirement must be imposed for the purpose of punishment and/or a fine imposed in addition to the community order. It is a matter for the court to decide which requirements amount to a punishment in each case.*

2.30 The purpose of punishment is also referenced in the Community order levels section, though again in reference to the imposition of requirements rather than overall sentence:

> *At least one requirement MUST be imposed for the purpose of punishment and/or a fine imposed in addition to the community order unless there are exceptional circumstances which relate to the offence or the offender that would make it unjust in all the circumstances to do so.*

2.31 The overarching general guideline however does currently list the five purposes of sentencing in Step 1 (Reaching a provisional sentence). This text can be seen below:

> *The court should consider which of the five purposes of sentencing (below) it is seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence.*
>
> - *The punishment of offenders*
> - *The reduction of crime (including its reduction by deterrence)*
> - *The reform and rehabilitation of offenders*
> - *The protection of the public*
> - *The making of reparation by offenders to persons affected by their offences*

2.32 Academic commentary and criminal justice organisations have previously called for greater direction from the Council about the purposes of sentencing. Transform Justice, for example, set out in a 2020 paper (The Sentencing Council and criminal justice: leading role or bit part player?) by Rob Allan, that:

> *"The Council's guideline on overarching principles rightly points out that courts need to consider which of the five statutory purposes they are seeking to achieve through the sentence that is imposed,* ***but offers no guidance about how courts should set about choosing the purpose in a particular case. Prioritising reform, rehabilitation and reparation will in most cases lead to a more effective sentence than simply choosing punishment."*** *(page 11)*

2.33 In the same paper they say:

> *"In the majority of cases the reduction of crime and protection of the public are best achieved through reform and rehabilitation rather than punishment." (page 10)*

2.34 In response to the Council's consultation: What next for the Sentencing Council? In September 2020, the Prison Reform Trust set out a similar view; that rehabilitation is important for reoffending, making reference to guideline development:

> *"The CJA 2003 states that the process of sentencing involves a balance of five purposes, only two of which (the reduction of crime (including its reduction by deterrence) and the reform and rehabilitation of offenders) are relevant to reoffending. However, the Council should be transparent about what purposes it chooses to prioritise and the evidence, including on reoffending, that goes into informing its deliberations." (page 12).*

2.35 We can assume that the general guideline applies mostly where no offence specific guideline exists, and that in reality sentencers do not always open the general guideline when they sentence. Initial data from the first phase survey of the user testing project alludes to this being the case (with a key theme in the reasoning being 'familiarity' with the guideline). This does however need to be triangulated by the ongoing second qualitative phase of the user testing project. We can assume that the imposition guideline is more generally, widely and practically considered and applied, as it is designed to be read alongside offence specific guidelines, rather than standalone.

2.36 It was argued by Anthony Bottoms in his 2017 paper 'A Report on Research to Advise on how the Sentencing Council can best Exercise its Statutory Functions' that inclusion of the purposes of sentencing in offence specific guidelines would improve public awareness. This was noted before there were individual web pages in a dedicated area of the website however, so public awareness may be better addressed through the public facing website pages. They could however be referenced in imposition.

2.37 The terminology used in section 57 of the Sentencing Code is that the "court must have regard to the following purposes of sentencing". The line in the general guideline does not exactly align with the legislation, as it asks courts to consider which of the five purposes of sentencing it is seeking to achieve, rather than having regard to them generally. It would be helpful to have a Council discussion on whether it is correct to ask sentencers to consider which purpose/s of sentencing that the sentence (and/or package of requirements) is expected to fulfil. Given their overlap, in the majority of cases, sentencers should and will be aiming to achieving multiple, or all, of the five. It can also be assumed that the majority of sentencers are already aware of the requirement to have regard to the purposes of sentencing and what these are.

2.38 The text proposed below for the imposition guideline is therefore more aligned with that in the Sentencing Code, as below. Council may wish to consider an amendment to this text in the general guideline at a later date.

The court must have regard to the five purposes of sentencing when determining sentence. These are, in no particular order:

- The punishment of offenders
- The reduction of crime (including its reduction by deterrence)
- The reform and rehabilitation of offenders
- The protection of the public
- The making of reparation by offenders to persons affected by their offences

Question 6: Does the Council wish to include the five purposes of sentencing in the imposition guideline?

Question 7: Does the Council wish to make any amendments to the proposed text?

2.39 As was suggested by members in the discussion on Effectiveness, the inclusion of these purposes may provide an opportunity for the Council to say something about these purposes, over and above simply listing them. It was suggested by several members of the Council in the conversation on effectiveness in the October meeting that this inclusion may offer the opportunity for Council to reflect the findings in the Effectiveness review, by referencing rehabilitation and its role in reducing reoffending and preventing crime.

2.40 There is a wealth of research in this area, and while the Guideline mentions rehabilitation in questioning whether it is unavoidable that a sentence of imprisonment be imposed, it is not set out what impact rehabilitation may have on preventing crime. The findings of the Effectiveness literature review presented to Council in the October meeting highlighted, in short, that short custodial sentences are less effective than other disposals at reducing reoffending, increasing length of sentences is not effective for reducing reoffending for offenders with addiction or mental health issues, sentences served in the community may be more effective at promoting positive outcomes, and more.

2.41 The imposition guideline could mention *effectiveness* in two different ambits: effectiveness of the overall sentence type discussed above, and/or effectiveness of individual requirements according to the individual offender's circumstances. Discussion on the latter will be reserved for a future meeting when the list of requirements is considered. For the former, no academic body or individual have so far suggested *how* the Council might refer to effectiveness, and therefore, there are a number of options for how to proceed.

2.42 One option is that should the Purposes of sentencing are agreed to be added to the guideline, a line underneath the list of purposes could urge courts to consider the research on the relative effectiveness of different sentencing options on reducing reoffending. This could look like something like the below:

> The purpose 'reform and rehabilitation of offenders' in particular can contribute towards the other purposes 'protection of the public' and the 'reduction of crime'. Research shows that in some circumstances, sentences prioritising rehabilitation may be more effective at reducing the risk of reoffending compared to that of a short custodial sentence.

2.43 If the Council wanted to say more, or was minded to be more specific on what the effectiveness research concludes, a new Explanatory Materials page (or similar) could be developed that would be linked in this section (for example, titled something like: 'Effectiveness of Sentencing Options in Reducing Reoffending'). If Council wishes to develop

a separate page, this could be drawn up for consideration at a later date. The text in the imposition guideline could read something like the below:

> Sentencers should consider the research on the relative effectiveness (*link to explanatory materials*) of potential sentencing options on reducing reoffending when considering a suitable sentence.

2.44 Another option is for the Council to say more about each individual purpose, not just reform and rehabilitation as suggested in the last discussion on Effectiveness. A line on each of the purposes can be drawn up at a later date with the support of a working group.

Question 8: Does the Council wish to either a) include a line underneath the purposes of sentencing on the effectiveness of rehabilitation; b) say more via a link to a new Explanatory materials on the topic (to be developed), or c) say more about each of the purpose of sentencing (to be developed)?

Extra step or "step back"

2.45 Bottoms in his 2017 article states that guidelines are mainly 'censure based', (punishment is imposed in order to censure inappropriate behaviour), and that it *"is recommended that, while maintaining the primary focus on censure, appropriate attention is also given to consequentialist purposes [deterrence and rehabilitation]."* He sets out in some detail considerations around how the Council should reflect rehabilitation issues (research on the relative efficiencies of short custodial sentences v community disposals), concluding in suggesting an extra step in offence-specific guidelines as to whether custody is unavoidable – mirroring similar questions already set out in the imposition guideline.

2.46 An "extra step" has been discussed by Council for different reasons over the last few years. In the 'What Next for the Sentencing Council?' consultation in relation to highlighting to sentencers the purposes of sentencing, it was suggested that there could be a "step back" step after aggravation and mitigation to consider whether the sentence arrived at would serve the purposes of sentencing and/or would be "effective" for the offender. Something similar exists in the health and safety guidelines.

2.47 Most recently, an 'extra step' was discussed in relation to the Equality and Diversity paper and the Effectiveness literature review in the October and November meetings. The former suggested that an extra step could allow sentencers to "*review the sentence they have arrived at with mitigating factors and the offender's personal circumstances in mind*", due to a finding that upward factors had a stronger affect that downward factors and that mitigating factors might not have a sufficient impact on sentencing outcomes because they are considered only at Step 2.

2.48 With this in mind, it is proposed that in addition to the new section on Purposes of Sentencing, a line or 'step' is added asking sentencers to 'step back'. This was suggested by some members in the October meeting. This could be after the Imposition of Community Orders section and again after the Imposition of Custodial orders section. This could read something like the below. It would be grateful to have Council's feedback on what elements of this line are necessary and what elements are not.

Review of the Proposed Sentence
The court should 'step back', and review whether the sentence it has preliminarily arrived at fulfils at least one of the purposes of sentencing, and where relevant, rehabilitation in particular, which research shows may be more effective at reducing the risk of reoffending compared to that of a short custodial sentence.

Question 9: Does the Council agree to include some text referring to reviewing the proposed sentence with rehabilitation in mind? What feedback does the Council have on the above draft text?

III. Points of principle on issues affecting specific cohorts of offenders

Equal Treatment Bench book (ETBB)

2.49 The imposition guideline does not currently include any specific information on, or points of principle about, sentencing specific cohorts of people. It was considered necessary in the scoping discussion of this guideline to review this. There are a number of proposals for Council to consider and these are all shown in the same paragraph at the end of this section.

2.50 At the October meeting, Council agreed to include reference to specific cohorts in the PSR section for whom PSRs may be particularly important. While the specific cohorts and the terminology have not yet been agreed, the example cohorts and framing were based on what cohorts are already suggested that a PSR would be particularly important in the expanded explanations for the purpose of bringing these cohorts together. After applying feedback, the draft list (to be considered at a later date) for the PSR section is below:

A pre-sentence report may be particularly important if the offender is:

- *female*
- *a young adult (18-25 years)*
- *a primary carer (see expanded explanation on primary carers which outlines impact of custodial sentences on dependants)*
- *from a minority ethnic background*
- *from a cultural background (whether social class, ethnicity or other) unfamiliar to the judge*
- *has disclosed they are transgender*

- *has any drug or alcohol addiction issues*
- *has a learning disability or mental disorder*
- *Or: the court considers there to be a risk that the offender may have been the victim of domestic abuse, trafficking, modern slavery, or been subject to coercion, intimidation or exploitation.*

2.51 Out of the list above, points of principle for sentencing may be most appropriate for **female offenders, young adults, primary carers** and **offenders from a minority ethnic background**. Arguably, PSRs are a more pertinent consideration for specific cohorts of people than a particular sentencing approach is. For example, 'points of principle' for offenders with drug or alcohol issues would be difficult to develop, but it is clear how this cohort of people would benefit from a PSR assessing suitability for treatment requirements. In any case, most of these cohorts of offenders would be 'caught' by the reference and link to the ETBB at the top of every guideline:

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

2.52 The first proposal for Council to consider is reiterating this line within the Imposition Guideline, by adding the line "*The Equal Treatment Bench Book (link) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system.*" This can be seen at the end of this section with all the proposed changes below and Council may wish to consider the whole paragraph at once.

Current overarching guidelines

2.53 As Council is aware, there is currently an overarching guideline on one of the above-mentioned cohorts: offenders with mental disorders, developmental disorders or neurological impairments. There is, however, no reference or direct link to this in the Imposition Guideline. The overarching guidelines can only be found via the Overarching Guidelines header from the menu on the left or in certain droppables.

2.54 Initial results from the unpublished survey in phase 1 of the user testing project indicated that just under 46 per cent respondents said that they 'accessed and applied' the sentencing offenders with mental disorders guideline in most or every case where it was relevant to the case. These results are still being analysed and need to be triangulated with the phase 2 qualitative research, it can be concluded that it would at least not be unhelpful to direct sentencers to these within the imposition guideline.

2.55 It is recommended, therefore, that the imposition guideline both refers and provides a direct link to this overarching guideline to ensure these can be easily navigated to when sentencing offenders with mental disorders, developmental disorders or neurological impairments. This would be within a paragraph that refers to sentencing different cohorts of people, which can be seen at the end of this section.

2.56 The Council could also decide to refer and link to other overarching guidelines, such as the Domestic Abuse guideline, but this is considered not relevant to points of principle on issues affecting sentencing particular cohorts (as the domestic abuse guideline is of particular relevance for offences committed in a domestic context).

Female offenders

2.57 The Expanded Explanations, across various categories, give sentencing considerations for some cohorts of offenders; specifically: **young adults, carers, old/infirm offenders, neurodiverse offenders, physical disabled offenders**. It is notable that there is no reference in any of the expanded explanations specifically on **female offenders**, only related references such as 'sole or primary carers'. In November 2021, the Council made a commitment in its response to the ten-year consultation to "*Consider whether separate guidance is needed for female offenders or young adults by conducting an evaluation of the relevant expanded explanations"* after responses to the consultation most frequently called for a guideline or guidance for sentencing female offenders.

2.58 Since this commitment was made, the Justice Select Committee in their report 'Women in Prison' in July 2022 directly recommended the Sentencing Council consider whether an overarching guideline or guidance for sentencing female offenders is required, and it has been called for by various organisations over the years.

2.59 It is worth the Council focusing their attention to the section of the Sentencing Council's Effectiveness literature review that comprehensively sets out the myriad of issues for sentencing female offenders, which can be seen at **Annex B**. Further, the Effectiveness review set out reoffending data: females are least likely to reoffend when cautioned (12.1 per cent) and most likely to reoffend when given custody (56.1 per cent).

2.60 While the expanded explanation review is starting in the new year, it is recommended that before this concludes, the Council already considers some lines referring specifically to sentencing female offenders in the same paragraph as the issues outlined above. An example of this, together with the above proposals, is provided below and it would be useful to hear Council's views on this draft text below.

2.61 If the expanded explanation review concludes before the Imposition guideline consultation, and concludes that the Council should develop a separate overarching guideline for female offenders (or indeed for young adults), this can then be added as a direct link in the below text in a similar way to the mental disorders' guideline reference, replacing the few suggested lines with a link to this new overarching guideline.

> The effectiveness of a sentence will be based on the individual offender. The Equal Treatment Bench Book (*link*) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. The Council has issued overarching guidelines for consideration in the sentencing of offenders with mental disorders, developmental disorders or neurological impairments *(link).* Courts should review this guideline if it applies to the case. In addition, courts should be aware that research suggests that female offenders have different criminogenic needs and an immediate custodial sentence may be less effective if it fails to address these needs. There are fewer female prisons than male prisons which may mean that female offenders are at a greater risk of being housed further away from their families and communities. Research also suggests that female offenders are at a greater risk of being homeless and unemployed than men after release. Courts should take this into consideration.

Question 10: Does Council wish to make reference to the Equal Treatment Bench Book within the guideline?

Question 11: Does Council wish to provide a direct link to the overarching guideline on *sentencing offenders with mental disorders* within this guideline?

Question 12: Does the Council wish to provide a link to any other overarching guideline, such as the Domestic Abuse guideline?

Question 13: Does Council wish to include points of principle for sentencing female offenders within this guideline?

Question 14: Does the Council wish to include points of principle for sentencing any other cohort of offenders?

3. EQUALITIES

3.1 There are several equality issues throughout this paper. These will be kept in close consideration and be outlined in more detail at a later date.

4. IMPACT AND RISKS

There are a number of risks of differing degrees throughout this paper. These will be considered in more detail at a later date. It is not possible to quantify impact of these decisions yet but this will also be considered in more detail at a later date.

Annex A

Current Deferred Sentences Explanatory Materials

Deferred Sentences

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.

Always consult your legal adviser if you are considering deferring a sentence.

The court is empowered to defer passing sentence for up to six months (Sentencing Code, s.5). The court may impose any conditions during the period of deferment that it considers appropriate. These could be specific requirements as set out in the provisions for community sentences, restorative justice activities (Sentencing Code, s.3) or requirements that are drawn more widely. The purpose of deferment is to enable the court to have regard to the offender's conduct after conviction or any change in his or her circumstances, including the extent to which the offender has complied with any requirements imposed by the court.

The following conditions must be satisfied before sentence can be deferred (Sentencing Code, s.5):

1. the offender must consent (and in the case of restorative justice activities the other participants must consent);
2. the offender must undertake to comply with requirements imposed by the court; and
3. the court must be satisfied that deferment is in the interests of justice.

Deferred sentences will be appropriate only in very limited circumstances.

- deferred sentences are likely to be relevant predominantly in a small group of cases close to either the community or custodial sentence threshold where, should the offender be prepared to adapt his behaviour in a way clearly specified by the sentencer, the court may be prepared to impose a lesser sentence;
- sentencers should impose specific and measurable conditions that do not involve a serious restriction on liberty;
- the court should give a clear indication of the type of sentence it would have imposed if it had decided not to defer;
- the court should also ensure that the offender understands the consequences of failure to comply with the court's wishes during the deferment period.

If the offender fails to comply with any requirement imposed in connection with the deferment, or commits another offence, he or she can be brought back to court before the end of the deferment period and the court can proceed to sentence.

Blank page

Annex B

The Effectiveness of Sentencing Options on Reoffending, Sentencing Council, page 56-57

7.4 Females and the impacts of disposals

Research has suggested females have different criminogenic needs. This may have implications for the effectiveness of sentencing and what works to reduce reoffending. Notably, in 2007, the influential Corston Report called particular attention to the plight of vulnerable women caught up in a criminal justice system that was largely designed for men. Accordingly, imprisonment may be a less effective sentence for women if it fails to address their needs.

Additionally, women may experience prison more harshly due to their histories of trauma and feeling greater discord at being distant (both farther away geographically than males due to fewer women's prisons and physically in a personal relationship perspective) from family and children. This different experience may also mean that custodial sentences have different effects based on gender. Concerningly, the negative effects of imprisonment may be amplified for females. Indeed, officials are concerned with the high rate of women committing self-harm in English prisons, with almost 12,000 self-harm incidents recorded in the fiscal year ended 2021. It is also relevant to the general lack of female-oriented treatment programming such that any such services typically offered to females were originally designed for men, despite there being treatment-relevant differences between the genders. A further difference is of relevance, as indicated in an MoJ report. In the two years ending in fiscal 2021, MoJ found that women were more likely than men upon release from custody to be either homeless or rough sleeping and less than half as likely as men to be employed.

Blank page

Sentencing Council

External communication evaluation

November 2022

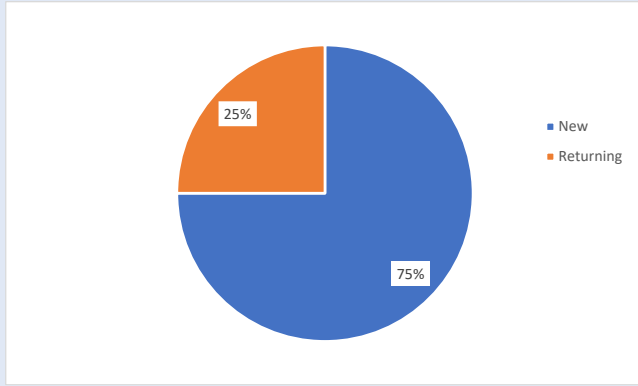
Sentencing Council

sentencingcouncil.gov.uk

Visits to www.sentencingcouncil.gov.uk

	This month	Last month
Users*	244,628	236,828
Sessions per user	1.89	1.84
Pages per session	2.58	2.54
Ave time on site	04:22	04:13
Bounce rate**	55.10%	56.26%

Visitors: new and returning



Announcements

7th	Sentencing seminar: current issues in sentencing policy and research

Top referring sites

cps.gov.uk
Yahoo.com
judiciary.sharepoint.com (Judicial Intranet)
Judiciary.uk
Defence-barrister.co.uk

*Users: Number of people who have visited the website at least once within the date range
**Bounce rate: Percentage of people who land on a page on the website, then leave

Sentencing Council

sentencingcouncil.gov.uk

Most visited pages	Pageviews	Unique Pageviews
Magistrates' court guidelines search page	202,759	91,900
Crown Court guidelines homepage	47,965	32,056
Website homepage	41,857	33,158
Magistrates' court homepage	33,676	23,465
/fine-calculator/	27,784	18,991
/offences/magistrates-court/item/common-assault-racially-or-religiously-aggravated-common-assault-common-assault-on-emergency-worker/	25,846	21,860
Common offence illustrations	18,425	11,068
/offences/magistrates-court/item/excess-alcohol-driveattempt-to-drive-revised-2017/	17,492	14,383
/offences/magistrates-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/	16,708	14,952
Common offence illustrations /assault/	14,929	13,435

Most visited guidelines

Magistrates	Common assault / Racially or religiously aggravated common assault/ Common assault on emergency worker
Crown Court	Causing grievous bodily harm with intent to do grievous bodily harm / Wounding with intent to do GBH
Other pages	Outlines: Assault Blog post: What's the difference between theft, robbery and burglary?

Top search terms used

Sentencing guidelines
Breach suspended sentence guidelines
Magistrates' Court sentencing guidelines
Breach of dispersal notice

* Outlines: offence descriptions on the public-facing pages of the website: www.sentencingcouncil.org.uk/outlines/

Sentencing Council

YouTube

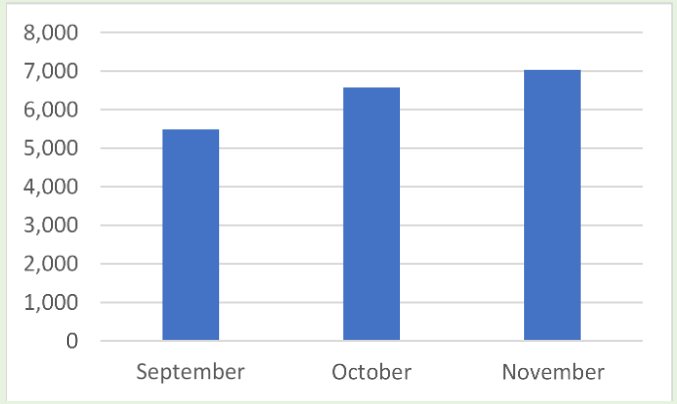
Subscribers

+16 = 1,209

Most watched video

How offenders are sentenced in England and Wales

Video views per month



Watch time average

02:19

Impressions*

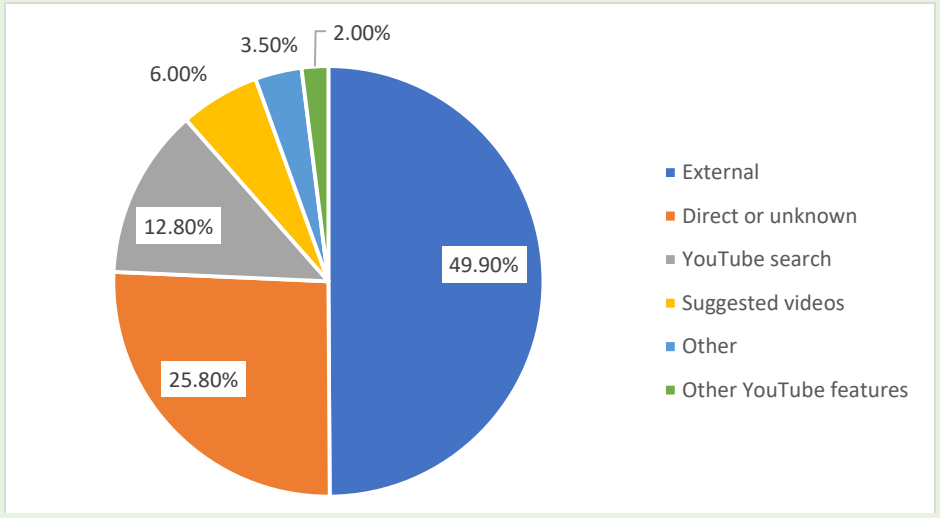
24,227

* Impressions: Number of times our video thumbnails are shown to viewers on YouTube

Sentencing Council

YouTube

How viewers find our videos



YouTube search: terms used

1	Sentencing guidelines UK
2	Work of magistrates in England and Wales
3	Magistrate
4	Magistrates court UK
5	Crown court sentencing UK

- External: Traffic from websites and apps embedding or linking to our videos on YouTube (60% www.sentencingcouncil.org.uk)
- Direct or unknown: using direct link or bookmark to our YouTube channel or unknown
- Suggested videos: suggested to users viewing other videos on YouTube

Sentencing Council

Subscription email bulletin

Subscribers

+233 = 5,049

All bulletins

Sent	2
Delivered	95.4%
Opened	30.9%
Engagement rate*	4.2%

Most clicked-through links

1. Sentencing seminar: current issues in sentencing policy and research
2. Minutes of Council meeting – October 2022
3. Totality – draft resource assessment
4. Sentencing Council website homepage

Highest engagement*

Sentencing seminar: current issues in sentencing policy and research

- Engagement rate: % of recipients clicking through at least one link in the bulletin(s)
- Highest engagement: topic of most “clicked through” bulletin

Sentencing Council

Twitter

Followers

-9 = 6,026

Highlights

	Tweets	Impressions	Mentions	Profile visits
This month	4	8,235	52	741
Last month	2	2,216	19	512

Top tweet

Sentencing policy, practice and research – join the Council, City Law School and Sentencing Academy on 13 January 2023 to hear about our work, discuss current issues in policy and practice and learn from experts about recent research. Free seminar:

Impressions: 2,191	Total engagements: 49

Top mention

Interested in sentencing policy, practice and research in England & Wales? Join us on 13 January 2023 for this free full day event held in conjunction with @SentencingCCL and @CityLawSchool

Sentencing Academy

- Impressions: number of times a tweet has been seen
- Mentions: mentions of the Council in other people's tweets
- Profile visits: number of times people have clicked through our tweets to see the Council's twitter profile
- Engagements: number of time someone has liked, retweeted, opened or clicked a link in a tweet or viewed our profile

Sentencing Council

Other engagement

- Young Citizens – review of revised materials for inclusion in Young Citizens national mock trial schools competition
- National Justice Museum – visit to mock trial school event and review of sentencing-related schools materials
- Four Corners Conference – engagement with Scotland Sentencing Council communication team
- Magistrates' Association – engagement with new Head of Marketing and Communications

Sentencing Council

Sentencing Council Meeting Dates 2024

The meetings will start at 9:45 and end at 16:30, these times may change depending on workload etc.

Friday 26 January 2024 – RCJ Queen's Building 2M Conference Room

Friday 1 March 2024 – RCJ Queen's Building 2M Conference Room

Friday 12 April 2024 – RCJ Queen's Building 2M Conference Room

Friday 17 May 2024 – RCJ Queen's Building 2M Conference Room

Friday 21 June 2024 – RCJ Queen's Building 2M Conference Room

Friday 26 July 2024 – RCJ Queen's Building QB1M Judges' Conference Room

Friday 20 September 2024 – RCJ Queen's Building QB1M Judges' Conference Room

Friday 18 October 2024 – RCJ Queen's Building 2M Conference Room

Friday 22 November 2024 – RCJ Queen's Building 2M Conference Room

Friday 20 December 2024 – RCJ Queen's Building 2M Conference Room

Blank page