Sentencing Council

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6 May 2022

Dear Members

Meeting of the Sentencing Council – 13 May 2022

The next Council meeting will be held in the **Queens Building, Judges Conference Room, 1st Floor Mezzanine at the Royal Courts of Justice.** This will be a hybrid meeting, so a Microsoft Teams invite is also included below. **The meeting is Friday 13 May 2022 and will from 9:45 to 15:30**.

As per last month, all legal restrictions relating to Covid came to end on 1 April 2022 and we plan to meet in line with our arrangements for last month. That is that we will use the room without distancing from each other but we will ensure adequate ventilation insofar as we can.

As before, if you have any concerns regarding these arrangements then we are continuing to retain the hybrid option so please do not feel that you need to attend in person if you would feel uncomfortable.

If you are not planning on attending in person please do let me know ASAP so Jessica and I can plan accordingly.

We will also continue to retain some additional safety measures:

- Only a core of council members and essential office staff depending on each agenda item are to attend in person. Any observers, whether external or members of the office are to attend virtually.
- Anyone who currently has Covid, or who recently had Covid within the last 7 days and is yet to be testing negative, is asked not to attend in person.
- Anyone with respiratory illness symptoms is similarly asked not to attend in person.
- Anyone who has had recent close contact with someone who has tested positive (within 72 hours of contact, or a test result) is asked not to attend in person.
- All in person attendees are encouraged to consider taking a lateral flow test if they can, although we recognise that this may not be possible now Government provision of tests has ceased for most people.
- The room will be kept as well-ventilated as possible.
- We ask that people bring their own lunch but we will provide tea / coffee and wrapped snacks at the table.

- Finally, I reiterate that if anyone feels uncomfortable attending on the above basis, they are free to attend remotely and provision for that will be made.

A **security pass is needed** to gain access to this meeting room. Members who do not know how to access this room can, after entry head straight to the Queen's Building where Jessica and Gareth will meet members at the lifts and escort them up to the meeting room. If you have any problems getting in or finding the Queen's Building, then please call the office number on 020 7071 5793.

The agenda items for the Council meeting are:

▪ Agenda	SC(22)MAY00
▪ Minutes of meeting held on 8 April	SC(22)APR01
▪ Action log	SC(22)MAY02
▪ Motoring offences	SC(22)MAY03
▪ Miscellaneous amendments	SC(22)MAY04
▪ Blackmail and Threats to disclose	SC(22)MAY05
▪ Terrorism	SC(22)MAY06
▪ Aggravated vehicle taking	SC(22)MAY07

Refreshments

Tea, coffee and water will be provided on the day but, due to the current existing RCJ safety guidance, a buffet style lunch will not be provided. Members are welcome either to bring lunch with them (the kitchen area next door contains a fridge) or to avail themselves of the local lunch options. The lunch break is 30 minutes.

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

13 May 2022
Royal Courts of Justice
1M Judges Conference Room
Queens Building

09:45 - 10:00	Minutes of the last meeting and matters arising (papers 1 & 2)
10:00 - 11:00	Motoring offences - presented by Ollie Simpson (paper 3)
11:00 - 11:15	Break
11:15 - 12:15	Miscellaneous amendments - presented by Ruth Pope (paper 4)
12:15 - 12:45	Blackmail and Threats to disclose - presented by Mandy Banks (paper 5)
12:45 - 13:15	Lunch
13:15 - 14:15	Terrorism - presented by Ruth Pope (paper 6)
14:15 - 14:30	Break
14:30 – 15:30	Aggravated Vehicle taking - presented by Zeinab Shaikh (paper 7)

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Sentencing Council

MEETING OF THE SENTENCING COUNCIL

8 APRIL 2022

MINUTES

Members present:	Tim Holroyde (Chairman) Rosina Cottage Rosa Dean Michael Fanning Diana Fawcett Jo King Juliet May Maura McGowan Alpa Parmar Beverley Thompson
Apologies:	Rebecca Crane Nick Ephgrave Adrian Fulford Max Hill
Representatives:	Hanna van den Berg for the Lord Chief Justice (Legal and Policy Advisor to the Head of Criminal Justice) Lynette Woodrow, for the DPP (Head of the Director of Legal Services Team) Claire Fielder for the Lord Chancellor (Director, Youth Justice and Offender Policy)
Observers:	Naomi Ryan, Criminal Appeal Office Debra Anthony, MoJ
Members of Office in attendance:	Steve Wade Ruth Pope Ollie Simpson

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 4 March 2022 were agreed.

2. MATTERS ARISING

2.1 The Chairman welcomed Jessie Stanbrook who was observing the meeting ahead of joining the office as a senior policy adviser.

3. DISCUSSION ON CHILD CRUELTY – PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL

3.1 The Council considered what amendments to make to the existing child cruelty guidelines as a result of the changes to the maximum penalties for these offences being made by the Police, Crime, Sentencing and Courts Bill. It was agreed to consult on revised sentence levels to take account of cases of extreme culpability.

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

4.1 The Council discussed changes to the guideline to address some technical issues regarding changes to release provisions and to embed statutory references and the key points from any relevant case law in the text. The Council also considered adding further guidance for sentencing offences committed prior to other offences for which an offender has already been sentenced. The Council concluded that this would be useful guidance and that further consideration should be given as to how best to integrate it into the guideline.

4.2 The Council discussed an academic paper which proposed a different process for sentencing multiple offences based on the assessment of harm and culpability. The Council was not persuaded that the approach was workable but did agree that the assessment of harm and culpability is fundamental to the sentencing process and that reference should be made to it in the Totality guideline.

4.3 The Council decided to set up a working group to come up with proposals on the outstanding issues which will be discussed by the full Council in the summer.

5. DISCUSSION ON BUSINESS PLAN AND RISK REGISTER – PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL

5.1 The Council considered the draft of the Business Plan for 2022-23, making textual revisions. It was thought that some elements of the plan could be provided by way of links from the document as a way of making the key parts of the document more accessible.

5.2 The Council also considered its risk register and held a discussion about risk. It was agreed to make risk an annual agenda item, whilst

delegating ongoing consideration of the risk register to the Governance sub-group.

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6. DISCUSSION ON TERRORISM – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

6.1 The Council considered responses to the consultation which ran from October 2021 to January 2022 on revisions brought in by the Counter Terrorism and Sentencing Act 2021. Discussions were also informed by research that had been carried out with sentencers on the proposed changes.

6.2 The Council agreed revisions to the Preparation of terrorist acts and Explosive substances (terrorism only) guidelines related to the introduction of ‘serious terrorism sentences’. The Council also discussed amendments to the sentence levels for Membership of a proscribed organisation and Support of a Proscribed organisation guidelines and agreed some changes.

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SC(22)MAY02 May Action Log

ACTION AND ACTIVITY LOG – as at 5 May 2022

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 8 April 2022					
1	**Totality**	Working group to meet to discuss outstanding issues	**Tim, Maura, Jo and Rebecca**	Group to meet on 16 May	.

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Sentencing Council

Sentencing Council meeting:	**13 May 2022**
Paper number:	**SC(22)MAY03 – Motoring offences**
Lead Council member:	**Rebecca Crane**
Lead official:	**Ollie Simpson** **ollie.simpson@sentencingcouncil.gov.uk**

1 ISSUE

1.1 Sign off on draft motoring guidelines for consultation.

2 RECOMMENDATIONS

2.1 That Council:

- agree the approach to guidance on driving disqualifications set out below and at **Annex A**;
- consider the provisional findings of the consultation stage resource assessment at (see paragraphs 4.1 to 4.5), noting the significant anticipated impact on prison places; and
- sign off on the draft guidelines at **Annexes B to M** for consultation.

3 CONSIDERATION

Disqualification

3.1 Council discussed how to approach guidance on disqualification at the March meeting. The current Dangerous Driving guideline, like other motoring guidelines used in the magistrates courts, provides disqualification ranges for low and medium seriousness offences (12 to 15 months for low, 15 – 24 months for medium; high seriousness offences are to be committed to the Crown Court). Ranges are also proposed in the drug driving guidelines on which we are consulting, following the lead of the excess alcohol driving guidelines. However, causing death and serious injury guidelines do not currently include any particular guidance on lengths of disqualification.

3.2 The working group has considered what sort of guidance on disqualification could be provided for these guidelines.

3.3 Disqualification serves several of the statutory purposes of sentencing: in earlier years, the focus was on prevention rather than punishment but the case law, statute and guidelines have evolved to include punishment and deterrence. Some of the principles are set out clearly in the case of Islam [2019] EWCA Crim 1494. Notably, the Court of Appeal concluded that "*it remains the position that there is no formula by which a court can measure the right length of a disqualification: it is a judicial decision which should produce a result, tailored to the offender and to the offence*."

3.4 With that in mind, the working group rejected the idea of providing guideline disqualification ranges within the sentencing table. The necessity for and duration of a disqualification is very fact-sensitive, and will depend on a range of factors which may be particular to the offender: their driving record, the extent to which they acknowledge their error, their immaturity or advanced years, the extent to which not driving prevents rehabilitation or truly represents a punishment etc.

3.5 The new raised minimum disqualification periods of five years for death by dangerous and death by careless under the influence also constrain judicial discretion, particularly if we wanted to base guidance on specific levels on current practice. The relationship between a custodial sentence and disqualification can be complex, in that a shorter period in custody might mean the disqualification constitutes more of the punitive part of the sentence. Equally a longer custodial sentence would serve much of the preventative purpose which a disqualification is intended to provide.

3.6 However, the working group did conclude that fairly detailed general guidance on disqualification would be helpful for sentencers, given the complexity of the law in this area. In particular, there is scope for confusion around the interaction of a disqualification with custodial sentences, being imposed for the same offence as the disqualification, another offence or both.

3.7 The text at **Annex A** brings together guidance borrowed from a variety of sources. It draws on our current magistrates' explanatory materials on driving disqualifications, as well as relevant case law, most prominently R v Needham [2016] EWCA Crim 455. The flowchart on how to determine disqualification periods when imposing sentences for two or more offences is adapted from paragraph 31 of *Needham*.

3.8 This guidance would be inserted as a dropdown in the section of these guidelines at the stage related to ancillary orders. Information about the statutory minimum disqualification period for the offence in question (including repeat offences) would also be included at the

top of the guideline, alongside information about the maximum penalty. For consistency, this would mean removing the current ranges from the (simple) dangerous driving guideline, although it will remain in other magistrates' motoring guidelines.

3.9 Note that the draft at **Annex A** includes information about minimums in cases of repeat offences in the drop-down guidance (section B). This may be helpful general guidance, although it has the potential for confusion as it may not apply to the offence in question. For example, the minimum for causing death by dangerous driving is now five years, regardless of whether the offender has had two or more convictions in the past three years.

3.10 Similarly, the PCSC Act has just made causing death by careless driving under the influence of drink or drugs somewhat of a standalone from the normal repeat rules. For a first time offence it has a minimum of five years; if it is a repeat conviction within 10 years for the exact same offence it is six years. However, if the offender has a previous conviction for another drink/drugs offence the "first time" five year minimum applies (rather than the three year minimum which would apply for most drink/drugs offences).

3.11 There may be an argument either for:

i) excluding information about repeat offending from this general drop-down guidance and leaving whatever rules apply for the offence in question prominently at the front of the guideline; or

ii) tailoring this part of the guidance for the individual offence – so, for example omitting anything about drink/drugs repeat offences where that is not relevant. We would need to be clear that the rule being explained is for this specific offence and is not applicable to all offences.

Question 1: does Council agree to include this guidance at the ancillary orders step of the guidelines on which we are consulting?

Question 2: does Council want to include information about repeat offences/disqualifications in the guidance (tailored, if necessary), or only have this information set out at the front of the guideline?

3.12 There is a question about whether to include the guidance more widely in other guidelines, bearing in mind that under section 163 of the Sentencing Code a disqualification could be imposed for any offence.

3.13 As above, this might need careful thought about the extent to which information on disqualification rules for repeat offending were relevant to the offence in question, and the

statutory references used (i.e. whether the rules on interaction with custody are governed by the Road Traffic Offenders Act 1988 or the Sentencing Code).

3.14 I recommend that we consult first on the guidance as it applies to the offences/guidelines on which we are consulting as part of the motoring package, and consider later whether to include the guidance more widely. It may be a candidate for inclusion in a round of miscellaneous amendments, or as part of wider consideration about encouraging more use of ancillary orders where they are appropriate.

Question 3: does Council agree to consult first on this guidance for inclusion in the motoring guidelines, reserving the possibility to include it later at the ancillary orders step of other guidelines?

3.15 The current drafts of the 12 guidelines on which we are consulting are annexed:

- causing death by dangerous driving (s1, Road Traffic Act 1988) **Annex B**;
- causing death by careless driving whilst under the influence of drink or drugs (s3A) **Annex C**;
- causing death by careless driving (s2B) **Annex D**;
- causing serious injury by dangerous driving (s1A) **Annex E**;
- causing serious injury by careless driving (s2C) **Annex F**;
- dangerous driving (s2) **Annex G**;
- causing death by driving whilst disqualified (s3ZC) **Annex H**;
- causing death by driving whilst unlicensed or uninsured (s3ZB) **Annex I**;
- causing serious injury by driving whilst disqualified (s3ZD) **Annex J**;
- causing injury by wanton or furious driving (s35, Offences Against the Person Act 1861) **Annex K**;
- driving or attempting to drive with a specified drug above the specified limit (s5A) **Annex L**; and
- being in charge of a motor vehicle with a specified drug above the specified limit (s5A) **Annex M**.

We have taken the decision to consult on aggravated vehicle taking separately, and the drug driving guidelines (Annexes L and M) are those prepared in 2017 but held back at that point pending further research on drug driving limits.

3.16 Culpability factors are shared between different groups of offences relating to the standard of driving, or to the status of the driver (for example being disqualified), regardless of the harm, injury or death which has resulted. The culpability factors – indeed all the factors – for the drug driving offences are intended to mirror those of the equivalent unfit through drink or drugs guidelines which were revised in 2017, with some alterations to reflect the different ways in which intoxication is measured between drink and drugs.

3.17 For the causing death offences there is only one level of harm, although there is some guidance provided where more than one death has occurred:

"Where more than one death is caused, it will be appropriate to make an upwards adjustment from the starting point within or above the relevant category range before consideration of other aggravating features. In the most serious cases, the interests of justice may require a total sentence in excess of the offence range for a single offence."

3.18 For serious injury offences we have agreed two levels of harm, with the top level being:

- Particularly grave and/or life-threatening injury caused;
- Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment;
- Offence results in a permanent, irreversible injury or condition which has a substantial and long term effect on the victim's ability to carry out normal day to day activities or on their ability to work.

and the lower level being all other cases. The section 35 offence of wanton or furious driving needs three levels of harm to reflect the broader range of harm that may be encountered with that offence.

3.19 Simple dangerous driving has two levels of harm (higher being offence results in injury to others, circumstances of offence created a high risk of serious harm to others, and damage caused to vehicles or property; lower being all other cases). The drugs guidelines refer to "obvious signs of impairment" and "evidence of an unacceptable standard of driving". These guidelines therefore include elements related to the standard of driving and the offender's behaviour within harm.

3.20 Sentencing levels for standard of driving and death and injury offences are set bearing in mind the maximum penalty for causing death by dangerous driving is being increased to life imprisonment, putting it on a broad par with manslaughter. At the lower end of seriousness, where maximum penalties go down to 2 years, there is less room for

manoeuvre whilst keeping coherent tables based on the quality of the driving and the harm caused.

3.21 Aggravating and mitigating factors are common across many of the guidelines, although these do vary based on the offence. For example, in the standard of driving offences driving an HGV is an aggravating factor, where it is a high culpability factor in the unlicensed/uninsured and drug driving offences. For some guidelines aggravating or mitigating factors may refer to a victim (where they are a vulnerable road user, or where they are a close friend or relative of the offender) whereas in other guidelines there will be no victim. Again, the drug driving guidelines are drafted to be more in line with their equivalent unfit through drink or drugs guidelines, rather than the other new and revised guidelines on which we are consulting.

Question 4: are there any further comments or suggestions on the draft guidelines in the annexes?

4 IMPACT AND RISKS

4.1 A consultation stage resource assessment is being finalised and will be circulated to Council members separately. Although the assessment is subject to final checks, we expect it to show that the revised guidelines may result in a requirement for additional prison places running into the hundreds, in particular stemming from the guidelines for causing death by dangerous driving, causing death by careless driving when under the influence of drink or drugs, and causing serious injury by dangerous driving.

4.2 For the offences of causing death by careless or inconsiderate driving and dangerous driving, it is anticipated that the draft guidelines may result in an impact on prison and probation resources, although it is not possible to quantify any impact at this stage.

4.3 For the other offences covered by the draft guidelines, it is difficult to estimate the impact of the guidelines, either due to low volumes or due to a lack of data available on how current cases would be categorised under the new guideline.

4.4 The impact of the new and revised guidelines, particularly for causing death by dangerous driving and causing serious injury by dangerous driving, is clearly significant. It is 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, we have increased sentencing levels across most categories.

4.5 Council may be content that this reflects the most rational approach to these guidelines, particularly considering the need for sentencing levels to be set in proportion to other offences (for example, the levels for causing serious injury by dangerous driving need to be higher than those for causing serious injury by careless driving). However, we will need to defend why we have taken this approach, and be clear of the extent to which it flows from the legislative changes in light of the anticipated impacts on prison places.

Question 2: bearing in mind the anticipated impact, is the Council content to sign off the draft guidelines for consultation, subject to the final resource assessment broadly reflecting the findings above?

4.6 We may face criticism from both directions, that our proposed sentence levels are not high enough to reflect the harm caused by dangerous and careless driving, but also that in raising sentencing levels to reflect the new maximum penalties we are contributing to sentence inflation.

4.7 Many of these offences are complex in that harm and culpability can be distinctly out of proportion to each other. Some of the offences relate to the standard of driving, whilst others relate to whether someone should lawfully be on the road, regardless of how they drive. This complexity is compounded by a piecemeal approach to legislating in an emotive area which has resulted in very differing maximum penalties which our guidelines need to navigate. All of this will require careful explanation at consultation, including an upfront explanation of what is in our gift and what the parameters set by Parliament are.

4.8 As above, if the final consultation stage resource assessment confirms the need for several hundred prison places, we will need to prepare lines which defend the approach taken, why our estimates differ from those of the Government, and how the impact is a result of the legislative changes alongside the guidelines.

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Sentencing Council meeting:	**13 May 2022**
Paper number:	**SC(22)MAY04 – Miscellaneous Amendments**
Lead Council member:	**Jo King**
Lead official:	**Ruth Pope** **Ruth.pope@sentencingcouncil.go.uk**

1 ISSUE

1.1 The Sentencing Council has an annual programme of consulting on miscellaneous changes to guidelines and this provides a good opportunity to amend, update or improve existing guidelines or supporting material.

1.2 The suggestions for changes come from a variety of sources including feedback via our website, emails for sentencers and other guideline users, issues that have arisen in the development of guidelines and changes to legislation.

1.3 In preparation for this year's consultation, views and suggestions were canvassed from the MCSG working group and these are reflected in this paper.

1.4 This is the first of three meetings to discuss the miscellaneous amendments prior to consultation in September. The responses to the consultation will be discussed in December and January to enable any changes agreed upon to be made on 1 April 2023.

2 RECOMMENDATION

2.1 The Council is asked to consider what if any action should be taken in relation to the diverse matters set out in the paper and whether these should be consulted on as part of the miscellaneous amendments consultation.

3 CONSIDERATION

Changes to the Imposition guideline

3.1 There have been a number of suggestions for changes to the Imposition guideline. Some are very straightforward and several of these are included in the list of changes proposed in response to the Police, Crime, Sentencing and Courts Act 2022 at 3.20 below. Others relate to the interaction between probation and the courts and some envisage an expansion of the guideline to cover overarching issues that are not covered elsewhere.

3.2 It seems likely that the scope of the issues under consideration would merit separate consideration (as opposed to including them in the miscellaneous amendments) but it may be possible to incorporate some of them in this project or to run a separate consultation on

the Imposition guideline at the same time. We are speaking to the probation service and are considering the initial findings from an evaluation of the Imposition guideline and will bring proposals to the June Council meeting.

The wording on discretionary bans in the totting guidance

3.3 In 2020 the Council consulted on changes to the guidance on 'totting up' disqualifications. The revised guidance includes the following paragraph:

> 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 should ordinarily prioritise the "totting" disqualification ahead of a discretionary disqualification.

3.4 A concern has been raised that courts are too often imposing discretionary disqualifications where 12 or more points have been imposed and, to discourage this, the wording above should be the same as that in the discretionary disqualification guidance, which says:

> 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'*)*.

3.5 The MSCG working group discussed this and the general view was that the wording in the totting guidance should be consistent with that used in the disqualification guidance. It was suggested that the key point about imposing penalty points ahead of a disqualification should be in bold.

3.6 The issue that needs to be addressed is that of a short disqualification (less than 56 days) being imposed that avoids a longer period that would result from totting-up (at least 6 months). It may be preferable to amend both pieces of guidance. Suggested revised wording is:

> **Discretionary disqualification:**
> 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'*)*.
>
> **Totting up:**

> 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.

Question 1: Does the Council agree to consult on the suggested change to the wording on discretionary disqualification and totting up guidance?

The wording on obligatory disqualification in guidelines.

3.7 We received a query from a solicitor regarding the following wording in the drug driving guidance: 'Must disqualify for at least 3 years if offender has been convicted of a relevant offence in preceding 10 years – consult your legal adviser for further guidance'.

3.8 She had been told by a legal adviser this was being interpreted as 10 years preceding the conviction for, rather than the commission of the offence.

3.9 Similar wording is used in the excess alcohol guideline:

- 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 in preceding 3 years – 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 preceding 10 years – consult your legal adviser for further guidance
- Extend disqualification if imposing immediate custody

3.10 The 'disqualification guidance' includes the following information:

> An offender must be disqualified for at least three years if he or she is convicted of one of the following offences **and** has within the 10 years preceding the commission of the offence been convicted of any of these offences (RTOA 1988, s.34(3))

3.11 The working group felt that it would be helpful for the guidelines to spell out that it is the date of the commission of the offence that is significant. Therefore, it is proposed that the wording in both the excess alcohol guideline and the drug drive guidance (as well as the draft guideline) be changed to:

- 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 in the 3 years preceding the commission of the 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 offence – consult your legal adviser for further guidance
- Extend disqualification if imposing immediate custody

3.12 As this change merely clarifies the existing legal position, the Council may feel that it does not need to be consulted on and can be made immediately.

Question 2: Does the Council wish to make the proposed changes to the wording on obligatory disqualification in guidelines and, if so, should these be subject to consultation?

Default relevant weekly income amounts

3.13 The explanatory materials contain guidance on how fine levels should be fixed with reference to the fine bands in guidelines. So, for example, the starting point for a Band B fine is expressed as 100% of relevant of weekly income. Relevant weekly income (RWI) is normally the actual weekly income of the offender but in two circumstances the guidance gives an assumed figure for the RWI:

a) where an offender is in receipt of state benefits or on low income (RWI £120)

b) where an offender fails to provide reliable information as to means (RWI £440)

These default RWI figures were last updated in September 2015 when the digital MCSG was launched.

3.14 The Council last considered updating the RWI figures in 2019, but felt that although income levels may have increased since the figures were set, disposable income may not have done so. The working group was of the view that the default amount when an offender fails to provide reliable information should be reviewed and probably increased, but the figure for those on low income/benefits should not be increased because their spending power will not have increased. The situation since the working group met (in February) may now be even more difficult for those on low incomes.

3.15 The explanation for the RWI of £440 on the Council's website is:

> **No reliable information**
>
> Where an offender has failed to provide information, or the court is not satisfied that it has been given sufficient reliable information, it is entitled to make such determination as it thinks fit regarding the financial circumstances of the offender (Sentencing Code, s.126). Any determination should be clearly stated on the court records for use in any subsequent variation or enforcement proceedings. In such cases, a record should also be made of the applicable fine band and the court's assessment of the position of the offence within that band based on the seriousness of the offence.
>
> Where there is no information on which a determination can be made, the court should proceed on the basis of an **assumed relevant weekly income of £440**. This is derived from national median pre-tax earnings*; a gross figure is used as, in the absence of financial information from the offender, it is not possible to calculate appropriate deductions.

Where there is some information that tends to suggest a significantly lower or higher income than the recommended £440 default sum, the court should make a determination based on that information.

A court is empowered to remit a fine in whole or part if the offender subsequently provides information as to means (Sentencing Code, s.127). The assessment of offence seriousness and, therefore, the appropriate fine band and the position of the offence within that band are not affected by the provision of this information.

*(This figure is a projected estimate based upon the 2012-13 Survey of Personal Incomes using economic assumptions consistent with the Office for Budget Responsibility's March 2015 economic and fiscal outlook. The latest actual figure available is for 2012-13, when median pre-tax income was £404 per week details can be found in an HMRC report. (This link goes to an external website. It will not work if you are offline.))

3.16 Clearly it is no longer accurate to say the figure currently in use is based on the latest information. Using the most up-to-date figures on personal incomes the estimated median pre-tax income per week is around **£500**.

3.17 The explanation given on the website for the RWI of £120 for those on benefits is:

While a precise calculation is neither possible nor desirable, it is considered that an amount that is approximately half-way between the base rate for jobseeker's allowance and the net weekly income of an adult earning the minimum wage for 30 hours per week represents a starting point that is both realistic and appropriate; this is currently £120. The calculation is based on a 30 hour working week in recognition of the fact that many of those on minimum wage do not work a full 37 hour week and that lower minimum wage rates apply to younger people.

With effect from 1 October 2014, the minimum wage is £6.50 per hour for an adult aged 21 or over. Based on a 30 hour week, this equates to approximately £189 after deductions for tax and national insurance. To ensure equivalence of approach, the level of jobseeker's allowance for a single person aged 18 to 24 has been used for the purpose of calculating the mid point; this is currently £57.90. The figure will be updated in due course in accordance with any changes to benefit and minimum wage levels.

3.18 If the Council were minded to update the RWI based on the same formula using current data, this would give a new low income figure of **£170** (this is due mainly to an increase in the national minimum wage for 21-22 year olds to £9.18). Using the national minimum wage for 18-20 year olds would give an RWI of **£130**. However, the Council may feel that in the current financial climate, this would not be a good time to increase the RWI for those on benefits/ low income.

3.19 Whether or not the Council wishes to review the default RWI figures, the explanations for the calculation will need to be reviewed.

Question 3: Does the Council wish to revise the default RWI figures, and if so in what way? How should the RWI be explained on the website?

Changes required by forthcoming legislation

3.20 The Police, Crime, Sentencing and Courts Act 2022 received Royal Assent on 28 April and most of the provisions relevant to sentencing will come into effect two months from then. Unfortunately, at time of writing, the Act has not yet been published. The following provisions have been identified as relevant to guidelines along with the proposed approach to making any changes:

Legislative change	**Guideline change**
Doubling the maximum penalty for assaulting an emergency worker	Guideline will be updated when the change comes in by altering the maximum only. No requirement to consult.
Introduce mandatory life sentences for unlawful act manslaughter of an emergency worker acting in the exercise of their function	Add a note to the guideline. No requirement to consult?
Change in the threshold for passing a sentence below the minimum term for repeat offenders for certain offences. (Change from unjust in all the circumstances to exceptional circumstances)	The wording in the relevant guidelines will be updated. No requirement to consult?
The change in release point from halfway to two-thirds will be reflected in the provisions to provide for an appropriate extension period as part of a discretionary driving disqualification.	This has come into effect on RA. Guidance on this is being considered as part of the motoring paper. Depending on decisions made – the guidance could be included more widely?
Changes to the adult out of court disposals (OOCD) framework	Explanatory materials will need to be updated. No requirement to consult.
Changes to maximum curfew hours	Update information in the Imposition guideline. No requirement to consult.
Abolishing Senior Attendance Centres	Remove reference to this in the Imposition guideline. No requirement to consult.
Criminal damage to memorials: a memorial damaged where the value of damage does not exceed £5,000 will no longer only be triable summarily, but can be tried either way	Note will need to be added to the Criminal damage guidelines to clarify. No requirement to consult?
Detention and Training Orders: removal of fixed lengths; courts will now have the power to impose a DTO of any length as long as it is at least 4 months and no longer than 24 months	Update Children and Young People guideline. No requirement to consult.
DTOs: amendments to ensure that time on remand or bail (subject to a qualifying curfew condition and an electronic monitoring condition) is counted as time served	Update Children and Young People guideline. No requirement to consult.
Abolition of reparation orders	Update Children and Young People guideline. No requirement to consult.

Assaults on those providing a public service: creation of statutory aggravating factor relating to certain offences that are committed against those providing a public service, performing a public duty or providing services to the public	Update relevant guidelines by adding a statutory aggravating factor. No requirement to consult
SHPOs: enabling courts to impose positive requirements etc	Update explanatory materials to the MCSG. The Council has already agreed wording to go into all sexual offences guidelines which will be published shortly. No requirement to consult
Football Banning Orders: amendments to list of relevant offences and requirement on court to make an order on conviction etc	Update explanatory materials No requirement to consult Query whether reference to Football banning orders should be added to any offence guidelines?

3.21 Changes in the PCSC Act relating to motoring offences and sexual offences are being dealt with in the new and revised guidelines. If the Council agrees that the majority of changes outlined above can be made without consultation, it may be appropriate to publish a news item and list of the changes on our website to alert users to the changes when they are made. Alternatively, the Council may wish to consult on some of these matters to draw attention to the fact that the guidelines are being updated to seek views on the exact wording. Any updates to the guidelines will need to make it clear if the changes apply only to offences committed on or after the in force date – in some cases there will be two regimes in place for a while.

Question 4: Does the Council agree with the proposed approach to the legislative changes?

Potential double counting in summary driving offences guidelines

3.22 Feedback from a user has identified two instances where factors in guidelines could result in double counting:

- Speeding: the suggestion is that 20mph zones are usually, if not exclusively, located near schools. Should there be a warning to avoid double counting for the purposes of the 'location e.g. near school' aggravating feature?
- Fail to stop/report road accident: Regarding the factor: 'Offence committed in circumstances where a request for a sample of breath, blood or urine would have been made had the offender stopped' the suggestion is that if there has been an accident, a request for a sample would always be requested by the police.

3.23 The working group did not agree with the assertion that 20mph zones are nearly always located by schools and did not recommend any change to that guideline. The group felt that the suggestion regarding fail to stop/report had more merit and that it was possible

that this factor could lead to almost all cases going into high culpability. Enquiries will be made with the police on this point.

Question 5: Does the Council agree that no change is required to the aggravating factor in the speeding guideline?

Question 6: Does the Council agree that the possibility of double counting in the fail to stop/ report guideline should be investigated?

Fine level for use of a mobile phone

3.24 A suggestion has been received that the fine band starting point for Use of mobile telephone should be changed to Band B to reflect the doubling of the fixed penalty notice fine and penalty points introduced in March 2017. The counter argument is that the maximum penalty for this offence remains a level 3 fine (£1,000). Most other offences with that maximum have a starting point of Band A.

3.25 The working group did not think that the starting point should be increased as Parliament had not increased the maximum fine.

Question 7: Does the Council agree not to change the starting point for use of a mobile phone?

The mitigating factor of Age and/or lack of maturity

3.26 This mitigating factor appears in most guidelines and is accompanied by an expanded explanation setting out that age and/or lack of maturity can affect both the offender's responsibility for the offence and the effect of the sentence on the offender.

3.27 In about half of the guidelines in which the factor appears it is qualified by the words 'where it affects the responsibility of the offender'.

3.28 There does not appear to be any reason why the wording of the factor varies between guidelines (the expanded explanation is standard across all of them).

3.29 For consistency and to ensure that the factor is taken into account in all relevant cases, the proposal is to remove the words 'where it affects the responsibility of the offender'.

Question 8: Does the Council agree to standardise the mitigating factor relating to age/lack of maturity? If so, does the Council agree that this does not need to be consulted on?

Breach of post sentence supervision

3.30 It has been suggested that the guideline should include a reference as to when the unpaid work requirement of the supervision default order should be completed by. The guideline currently says:

i. A supervision default order must include either:

an unpaid work requirement of between 20 hours – 60 hours

OR

a curfew requirement for between 2 – 16 hours for a minimum of 20 days and no longer than the end of the post sentence supervision period.

ii. The maximum fine which can be imposed is £1,000.

3.31 Paragraph 3(4)(b) of schedule 19A to the Criminal Justice Act 2003 states that in relation to Sch. 9 of the Sentencing Act 2020: "Paragraph 1(1) of Schedule 9 applies— (a) as if the reference to the responsible officer were to the supervisor, and (b) as if, in paragraph (b), for "during a period of 12 months" there were substituted "before the end of the supervision period."" This indicates that the unpaid work should be completed by the end of the supervision period.

3.32 This could be achieved by adding the words in red below:

i. A supervision default order must include either:

an unpaid work requirement of between 20 hours – 60 hours to be completed before the end of the post sentence supervision period

OR

a curfew requirement for between 2 – 16 hours for a minimum of 20 days and no longer than the end of the post sentence supervision period.

ii. The maximum fine which can be imposed is £1,000.

Question 9: Does the Council agree to add the proposed wording to the Breach of post sentence supervision guideline? If so, should the change be consulted on?

Guilty plea guideline

3.33 Section F of the guilty plea guideline includes information on exceptions to the usual reductions for offences with minimum terms. At present it does not include any reference to the minimum sentence which applies to serious terrorism sentences. This could either be accommodated by an additional paragraph (F6) or by expanding the existing F5 (proposed additions in red):

F5. Minimum sentences under sections 268C, 282C, 312, 313, 314 and 315 of the Sentencing Code for persons aged 18 or over

In circumstances where:

- an appropriate custodial sentence of at least 14 years falls to be imposed (under section 268C or 282C of the Sentencing Code) on a person aged 18 or over who has been convicted of a serious terrorism offence (as defined in section 306(2) of the Sentencing Code)

- an appropriate custodial sentence of at least six months falls to be imposed (under section 312 or 315 of the Sentencing Code) on a person aged 18 or over who has been convicted under sections 1 or 1A of the Prevention of Crime Act 1953; or sections 139, 139AA or 139A of the Criminal Justice Act 1988 (certain possession of knives or offensive weapon offences) **or**
- an appropriate custodial sentence falls to be imposed under section 313 (third class A drug trafficking offence) or section 314 (third domestic burglary) of the Sentencing Code

the court may impose any sentence in accordance with this guideline which is not less than **80 per cent** of the **appropriate** custodial period.[5]

[5] In accordance with s.73(2A), (3) and (4) of the Sentencing Code.

Question 10: Does the Council agree to add the proposed wording to guilty plea guideline? If so, should the change be consulted on?

4 EQUALITIES

4.1 The issue of setting the default RWI figure has implications for fairness in setting fine amounts and it may have a disproportionate effect on certain groups with protected characteristics. The wording of the factor relating to age and lack of maturity also has implications for equality and fairness.

4.2 Depending on the decisions the Council makes, these issues can be addressed in the consultation.

Question 11: Are there any issues relating to equality or diversity that can or should be addressed by this consultation?

5 IMPACT AND RISKS

5.1 The impact of majority of the proposals in this paper will be relatively minor. The most significant changes are those necessitated by legislative changes. Any change to the default relevant weekly income figure is likely to have a wide impact although the precise implications will be difficult to measure (not least because not all fines that are imposed are paid in full). There may also be reputational risks if the Council were to be seen to be insensitive to the financial constraints on those on low incomes.

5.2 Further consideration will be given to the impact of the changes once the Council has decided which ones to proceed with.

Sentencing Council

Sentencing Council meeting:	**13 May 2022**
Paper number:	**SC(22)MAY05 – Blackmail and Threats to disclose**
Lead Council member:	**TBC**
Lead official:	**Mandy Banks** **Mandy.Banks@sentencingcouncil.gov.uk** **0207 071 5785**

1 ISSUE

1.1 This is the first meeting to discuss the scope of the project. It is proposed to develop new guidelines for the offence of blackmail and the new threats to disclose private sexual images. Potentially the new offence of non fatal strangulation could also be included.

1.2 There are currently four Council meetings scheduled to discuss the draft guidelines, with a consultation to run around the end of 2022. This timetable is indicative only however at this early stage of the project.

2 RECOMMENDATION

2.1 At today's meeting the Council are asked:

- To agree the scope of the project

3 CONSIDERATION

Blackmail

3.1 There currently is no guideline for this offence, and it has been on the Council's list of priority offences to be worked once time allows. Due to a number of reasons including workload within the office, this offence has been picked up ahead of immigration. Immigration offences will then be the next guideline to be picked up once an official has capacity.

3.2 The offence of blackmail is committed when a person with a view to gain for themselves or another or intending to cause loss to another makes an unwarranted demand with menaces. (Section 21 of the 1968 Act). It is a serious offence, indictable only, with a maximum penalty of 14 years imprisonment. In 2020, around 110 offenders were sentenced for this offence with 65 per cent sentenced to immediate custody. However, it is possible that the figures for 2020 may have been impacted by the COVID-19 pandemic: around 130 adult offenders were sentenced in 2019 with 77 per cent being sentenced to immediate custody and around 160 were sentenced in 2018, of which 79 per cent received an immediate custodial sentence. Over the last decade the average custodial sentence length has

remained stable at around 2 years 10 months (post guilty plea).

Question 1: Is the Council content to start work on a new guideline for blackmail offences?

Threats to disclose private sexual photographs and films with intent to cause distress

3.3 The Council may recall that a guideline for disclosing private sexual images came into force in October 2018. Last year as part of the Domestic Abuse Act 2021 the offence of disclosing private images was expanded to cover threats to disclose private sexual photographs and films with intent to cause distress, with commencement in June 2021 (section 33 of the Criminal Justice and Courts Act 2015). This is an either way offence with a maximum penalty of two years custody. As it has now been nearly a year since the legislation came into force it is proposed to develop a draft guideline, or possibly amend the existing guideline to cater for threats as part of this project alongside blackmail. It is suggested that there is some synergy between the two offences.

3.4 Unfortunately, the Court Proceedings Database (CPD) does not record data separately for disclosing and threats to disclose private sexual images, which means we cannot distinguish volumes for the two versions of the offence from one another. The CPS instead have been asked for any data they hold on prosecutions of threats to disclose cases. It is hoped that we may have some data from the CPS in time for the Council meeting.

3.5 As noted above, it is suggested that there is some synergy between the two offences, so it seems practical to incorporate this work alongside a new blackmail guideline. It is possible that the existing 2018 guideline could be amended to incorporate threats to disclose images, rather than needing a new guideline, so may be a fairly discrete piece of work. It is also suggested that the Council's decision to start work on this will be welcomed, as it is nearly a year since the legislation commenced.

Question 2: For the reasons noted above, is the Council content to include the new threats to disclose private sexual images work within the scope of the project?

Strangulation or suffocation offence

3.6 In addition, the Domestic Abuse Act inserted a new offence of strangulation or suffocation in The Serious Crime Act 2015, section 75A. This is an either way offence with a maximum penalty of five years custody. This is due to be commenced at the end of this month**.** This clearly is a very new offence and so we do not know what the likely volumes of cases sentenced will be. The Council may prefer to wait and see how the sentencing of this offence develops, and revisit developing a draft guideline at a later date. There is less of a synergy with this offence and the other two offences proposed as part of this project. Or the Council may feel that it is appropriate to include within this project- the Council has

developed guidelines for completely new offences before on occasion. Moreover, there may be read across with assault offences, to provide a basis for developing a guideline, so it may not be a particularly large project and wouldn't significantly lengthen the timescales involved. It again may be a practical way to incorporate work on a new offence within this project, and the Council will be seen to be responsive to new offences in starting work on this new guideline.

Question 3: Does the Council wish to include the new strangulation or suffocation offence within this project? Or postpone to a later date once we have more information on volumes of cases?

3.7 At the next meeting in July a draft blackmail guideline will be prepared for discussion. There is no space on the very full June agenda for this guideline and the gap will allow time for transcripts of sentenced cases to be ordered and considered to assist in the preparation of the draft guideline.

4 EQUALITIES

4.1 As part of the development of these guidelines, the available equalities data will be examined for any disparities within the sentencing of these offences. This data will be presented to Council at a future meeting.

5 IMPACT AND RISKS

5.1 It is anticipated that the development of these new guidelines will be welcomed by stakeholders. Blackmail is one of the few remaining serious offences without a guideline, so producing a guideline ends that gap. The new offences created by the Domestic Abuse Act have attracted a certain amount of attention and so producing guidelines for them will be welcomed by campaign groups in particular.

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Sentencing Council

Sentencing Council meeting:	**13 May 2022**
Paper number:	**SC(22)MAY06 – Terrorism**
Lead Council member:	**Maura McGowan**
Lead official:	**Ruth Pope** **ruth.pope@sentencingcouncil.gov.uk**

1 ISSUE

1.1 From 20 October 2021 to 11 January 2022, the Council consulted on revisions to terrorism guidelines brought in by the Counter Terrorism and Sentencing Act 2021. At the April meeting the Council considered the responses relating to those legislative changes.

1.2 The consultation also covered changes to the Preparation of terrorist acts guideline to ensure that judges approach cases involving undercover police or security services, in a consistent manner.

1.3 At this meeting the Council will be asked to consider the remaining issues arising from the consultation and it is hoped that the guidelines can be signed off for publication in July to come into force in October 2022.

2 RECOMMENDATION

2.1 It is recommended that the Council:

- agrees changes to the guidance on the approach to cases involving undercover police or security services in the Preparation of terrorist acts, and Explosive substances (terrorism only) guidelines
- agrees that life sentence minimum terms included in the Preparation of terrorist acts, and Explosive substances (terrorism only) guidelines should remain unchanged
- considers whether any changes should be made to terrorism sentencing guidelines regarding sentencing offenders aged under 18
- considers whether changes should be made to the harm assessment in the preparation of terrorist acts guideline and/or explosive substances guideline
- considers whether to add an aggravating factor relating to explosive precursors and/or planning in the preparation of terrorist acts guideline and/or explosive substances guideline
- signs off the guidelines for publication in July

3 CONSIDERATION

Background

3.1 There are nine terrorism guidelines which came into force on 27 April 2018:

- Preparation of Terrorist Acts (Terrorism Act 2006, section 5)
- Explosive Substances (Terrorism Only) (Explosive Substances Act 1883, section 2 and section 3)
- Encouragement of Terrorism (Terrorism Act 2006, sections 1 and 2)
- Proscribed Organisations – Membership (Terrorism Act 2000, section 11)
- Proscribed Organisations – Support (Terrorism Act 2000, section 12)
- Funding Terrorism (Terrorism Act 2000, sections 15 - 18)
- Failure to Disclose Information about Acts (Terrorism Act 2000, section 38B)
- Possession for Terrorist Purposes (Terrorism Act 2000, section 57)
- Collection of Terrorist Information (Terrorism Act 2000, section 58)

3.2 In October 2019, the Council consulted on amendments to some of these guidelines to reflect changes to terrorism legislation in the Counter-Terrorism and Border Security Act 2019 new legislation.

3.3 The Council considered the responses to the consultation and drafted some further changes in light of these but paused work because further terrorism legislation was planned.

3.4 The Council consulted on further changes resulting from the Counter–Terrorism and Sentencing Act 2021, which was given Royal Assent on 29 April 2021.

3.5 The 2019 revised guidelines will be published alongside the revisions made under the most recent consultation process, and the accompanying consultation response document will incorporate both the 2019 changes and the changes under discussion today.

Notes for culpability and harm in the Preparation of terrorist acts, and Explosive substances (terrorism only) guidelines

3.6 The existing Preparation of terrorist acts guideline can be seen here and the draft consulted on can be found here.

3.7 Following the approach taken in some relevant sexual offences guidelines which set out the approach the courts should take when sentencing cases, where sexual activity with a child has been incited but ultimately did not take place or the child did not exist, the Council reflected that similar scenarios arise when sentencing some terrorist cases. In a terrorist case there are two likely scenarios; one where the law enforcement authorities have the offender under surveillance and would step in before the terrorist act could be carried out; and secondly where a law enforcement authority poses as a terrorist jointly involved in the terrorist activity who takes steps to ensure the terrorist activity does not go ahead (for

example they may provide a fake explosive device, or intervene before the activity goes ahead).

3.8 Such scenarios present difficulties for judges in assessing the likelihood of harm. They may also present difficulties when assessing culpability, as many of the factors within the preparation guideline relate to how far preparations were advanced to the extent that the activity was likely to have been carried out.

3.9 A number of cases have come before the courts involving these types of scenarios and the Council considered that guidance was necessary to assist judges to sentence these cases in a consistent manner. The Council consulted the following additional text, to appear at Step 1 of the guideline before the culpability and harm factors:

Notes for culpability and harm

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

Culpability

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

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

Harm

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

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

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

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

3.10 Professor Emeritus Clive Walker from the University of Leeds considered that the proposed guidance was inadequate:

> The problem is that the current formulation has a myopic focus on the offender and fails to take account of other circumstances, especially the role of state agents. To

see this purely through the prism of culpability and harm on the part of the offender is too narrow, especially as the draft guideline as to 'culpability' effectively dismisses LEA involvement as a relevant factor at all. Furthermore, the proposal with relevance to 'harm' includes the idea that any mitigation depends purely on timing and again ignores the nature of the involvement of the LEA.

Above all, and as a straightforward consideration which might be reflected upon for elaboration in the guidance, the other circumstances should include the ethical consideration of whether there has been compliance with the rules and regulations about Covert Human Intelligence Sources. The relevant code has now been modified and clarified by the Covert Human Intelligence Sources (Criminal Conduct) Act 2021, which, *inter alia*, emphasises the special protection of children/vulnerable adults (ss.2, 3) and requires notification to a judicial commissioner so as to ensure some independent audit (s.6). The Act has been followed up by extensive regulations in the *Covert Human Intelligence Sources: Revised Code of Practice* (Home Office, 2021) which sets out guidance as to recruitment, authorisations, criminal conduct, management, record keeping, safeguards, and complaints. One might predict that these rules will become much cited in litigation involving undercover activities, with disclosure and the extent of innovation and coercive influence will remain significant issues. The *Consultation Paper*, pp.22, 23 fails to link any of these issues might be relevant to the ethics of sentencing.

The wider perspective to be taken into account relates to the ends of criminal justice which surely should be served by sentencing. In this way, the behaviour of the LEAs remains of relevance even though the condemnation of the offender is the prime issue. Account should be taken of the common category of '"probabilistic offenders" who will in the future commit the offense outside an undercover operation with a probability less than one' (McAdams, R.H., 'The Political Economy of Entrapment' (2005) 96 *Journal of Criminal Law and Criminology* 107, 140). All efforts should be made to impose the rule of law and respect for human rights on undercover LEAs. The executive and legislature have made a somewhat half-hearted effort earlier this year. Now is the turn of the Sentencing Council to consider further action in line with the expressed wishes of the judiciary.

3.11 Most other respondents were generally content with the proposals. Jonathan Hall QC, the independent reviewer of terrorism legislation, agreed with the guidance but pointed out that the proposed wording would not apply to MI5 officers as MI5 is not a law enforcement authority. The CPS agreed and suggested that the guidance should apply to both law enforcement authorities and intelligence organisations.

3.12 The Criminal Bar Association (CBA), made some suggestions:

We do not disagree but we do sound a note of caution about the juxtaposition of this passage within the Definitive Guideline. At the moment at Step One the shaded box entitled Harm states that "Harm is assessed based on the type of harm risked and the likelihood of that harm being caused. When considering the likelihood of harm, the court should consider the viability of any plan". Where an LEA is involved there will now be a preceding box which will stipulate that the harm should be assessed not on the basis of the harm that was risked or that was likely to occur but on the basis of the harm the offender intended to cause and the viability of the plan. Is there a distinction between the harm intended and the harm risked? And if the viability of the

plan is relevant to the risk of harm, why is it a separate consideration to the harm intended when an LEA is involved?

It might make more sense throughout Step 1 to refer to both the harm intended (subjective) and the harm that might foreseeably have been caused (objective) as both of these matters are specifically referred to in section 63 of the Sentencing Code as being relevant to an assessment of the seriousness of the offence in addition to any harm actually caused by the offender.

Alternatively, we wonder whether the passage in respect of LEA involvement might better read "in a case that involves an LEA, the harm should be assessed in the first instance by reference to the offender's intentions, followed by a downward adjustment at step 2 to reflect the fact that the harm did not occur. The extent of this adjustment will be specific to the facts of the case….[and so on as per the current draft]" Given the mens rea of the offence is one of intention anyway, might the box at the top of p.4 (the general harm guidance) read "Harm is assessed based on the type of harm intended and the likelihood of that harm being caused. When considering the likelihood of harm, the court should consider the viability of any plan".

Also, the section in the new proposed box about the discount that will be available to an offender who voluntarily desists at an early stage should presumably apply whether an LEA has been involved or not. Why should the lone defend who abandons his preparations be denied the benefit of a discount when a defendant who has unwittingly allied himself with an LEA and who does likewise could receive a substantial discount?

3.13 An anonymous respondent was opposed to the idea of any downward adjustment in terrorism cases.

3.14 The proposed wording was tested in research with judges. A summary of this road testing is provided at Annex A. When sentencing a scenario involving undercover LEAs the assessment of harm was more consistent using the revised guideline compared to the existing version. Using the revised guideline, most judges assessed harm as category 1 – which was what was expected.

3.15 The judges were generally positive about the proposed wording but there were various suggestions for further explanation or examples to be provided for different levels of adjustment:

- One of these related to the degree to which the preparations were complete – this is catered for in the culpability assessment and the guidance specifically says that the involvement of the LEA does not affect the assessment of culpability.
- Another was for the significance of the LEA involvement to be a relevant factor in deciding the reduction, i.e. how well connected was the offender without LEA involvement? The guidance would indicate that this is not a relevant consideration. The guidance talks about the extent to which the attack would have gone ahead but for the LEA involvement as opposed to the extent to which the attack could not have been planned *without* LEA involvement.
- Similarly one suggested that the LEA involvement might mean that the offender was unable to pull out.

- There was a query about the reference to the 'viability of the plan' as to whether this meant the viability but for the fact that LEAs were involved or the viability taking into account the LEA involvement.
- There were other comments which indicated some confusion or misunderstanding of the guidance.

3.16 Taken with the comments from the CBA and other respondents a slightly modified version is proposed:

Notes for culpability and harm

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

Culpability

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

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

Harm

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

The extent of this adjustment will be specific to the facts of the case. In cases where, but for the fact that a co-conspirator was an LEA or the offender was under surveillance, the offender would have carried out the intended terrorist act, a small reduction within the category range will usually be appropriate.

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

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

3.17 There was also a suggestion from one judge that these notes should be signposted at step 2. This difficulty with that suggestion is that this guideline is already contains several notes and cross refences and so any additional attempt at signposting may just clutter up the guideline.

Question 1: What changes does the Council wish to make to the guidance on LEAs?

Life sentence minimum terms included in the Preparation of terrorist acts, and Explosive substances (terrorism only) guidelines

3.18 The consultation noted that the way in which the minimum term is to be calculated when imposing a life sentence for certain terrorism, violent and sexual offences has changed to take account of changes to release provisions meaning that, for certain offences, offenders must now serve two thirds of their determinate sentence before they can be considered eligible for release, as opposed to half of their sentence. It was also noted that the Police, Crime, Sentencing and Courts Bill will prescribe the approach that judges should take in setting the minimum term.

3.19 The current Preparation of terrorist acts and Explosive substances (terrorism only) guidelines include life sentences with specified minimum terms within the sentencing table. The consultation document pointed out that in calculating appropriate life sentence minimum terms the Council did not first decide upon a notional determinate sentence and then halve it. Indeed, the Council positively chose to include life sentences on the face of the guideline rather than unrealistic lengthy determinate sentence given that, for the most serious cases, life sentences are generally inevitable. The Council put forward the view that the sentencing levels remain correct for these offences and the minimum terms in the existing sentence tables should not be amended to reflect the change to the approach that is now required when setting a life sentence minimum term for certain offences.

3.20 Aside from on anonymous respondent who stated that sentences should be increased, all those who responded to this question in the consultation agreed with the Council's proposed approach.

Question 2: Does the Council agree that these minimum terms should remain the same?

Other issues raised in response to the consultation

3.21 Professor Walker commented as follows:

> Those proposed adaptations seem appropriate in accordance with the stated legislative policies which must of course be followed. It has, however, been pointed out in my earlier (2017) submissions to the Sentencing Council that its initial guidance as published in 2018 was unsatisfactory in various respects. Those still remaining defects include: its coverage in terms of offences; its faulty premises in terms of alleged seriousness or the inadequacy of contemporary judicial responses; and the failure to engage with the objectives of sentencing in regard to terrorism including in the light of prison and release regimes. The legislative policies themselves might also be criticised (and criticisms have been made by this author in Walker, C. and Cawley, O., 'De-risking the release of terrorist prisoners' [2021] Criminal Law Review 252-268), though it is recognised that the Sentencing Council has less room for manoeuvre.

3.22 No changes are proposed to address Professor Walker's criticisms which appear to be of a general nature and, to a large extent, not within the remit of the Council to address.

3.23 Paul Goldspring (Senior District Judge (Chief Magistrate) of England and Wales) stated:

> Since the majority of terrorism offences committed by adults will be dealt with in the Crown Court, there is very little comment that I would wish to make on the proposed amendments to the guidelines for those offenders.
>
> However, I feel it is important to draw the attention of the Sentencing Council to those youths who find themselves before the courts for involvement in offending under the Terrorism Acts. It is arguable that they represent both the most worrying cases and yet also those most likely to benefit from rehabilitative measures following a finding of guilt.
>
> Whilst the proposed guidelines for adults will take all but the lowest level matters far beyond the powers of a magistrates' court, the Youth Court is likely to retain some severe cases due to the young age of the defendant having the effect of reducing the suggested sentence.
>
> As has been previously recognised by the Senior Judiciary in the circumstances of serious sexual offending, it is generally considered more appropriate for young people to be dealt with in Youth Courts and subsequently monitored and supported by Youth Offending Teams. This letter does not seek to suggest that more cases should necessarily remain in the Youth Court but simply to pose the question whether the stark difference in sentencing regimes between it and the Crown Court is desirable in these most sensitive of cases?
>
> As an example, there was recently an application by the Secretary of State in relation to a youth who was due to be released from a Young Offenders' Institute for the "training" portion of the Detention and Training Order imposed for terrorism offences. The application was to extend the period of detention on the basis that further work was required before the YOT could be satisfied that the risk posed to the community was reduced. In this case, the youth had been detained at a YOI as a radical supporter of far-right wing organisations but had become indoctrinated to Islamic extremism whilst incarcerated.
>
> It is perhaps a matter for debate whether the resources and programmes available to the YOT or the Probation Service are more effective in these cases. However, the youth sentencing system appears to offer a more flexible safeguard in the form of the Secretary of State's ability to apply for a longer period of detention even after sentence where appropriate.
>
> It is appreciated that the numbers of youths involved in such offending is relatively small, but perhaps a modified guideline would be of assistance to outline the very particular factors for consideration in the sentencing exercise for those under 18?

3.24 A member of the public who responded to the consultation also raised concerns about the lack of sentencing guidelines for under 18s.

3.25 The Council does not appear to have considered producing a guideline for children and young people for terrorism offences. The volumes are very low[1] and the Council has

[1] A total of seven offenders aged under 18 were sentenced for terrorism offences in the five years from 2016 to 2020. Four of these were for the s5 preparation of terrorist acts offence.

only produced offence specific guidelines for sentencing children and young people for higher volume offences that have particular relevance to offenders under 18. The overarching Sentencing Children and Young People guideline would apply in the absence of an offence specific guideline. This states (at 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.

3.26 Currently the terrorism guidelines (with the exception of the Explosive substances guideline) all state in the header: 'This guideline applies only to offenders aged 18 and older'. This is not the standard approach across most guidelines. In general this information is included in the 'Applicability' drop down. Views are sought as to whether the terrorism guidelines should continue with the non-standard approach.

Question 3: Should any changes be made to the terrorism guidelines regarding sentencing offenders aged under 18?

3.27 The Government response made the following suggestions:

> Regarding the explosives guidelines we would encourage the Council to consider adding an aggravating factor to the revised guidelines that would capture offenders who deliberately take steps to circumvent the legal controls in place for the purchasing of explosive precursors. We would also ask the Council to consider whether the guidelines adequately capture the harms caused by offences involving significant damage to infrastructure and recommend that the risks of substantial impact upon civic infrastructure, and widespread or serious damage to property or economic interests are designated a category 2 harm. Category 2 harm does not put these infrastructure target attacks above loss of life, but recognises the significant long lasting impact of these attacks on the economy and society.

3.28 The harm factors are:

Harm

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

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

Category 1

- Multiple deaths risked and very likely to be caused

Category 2

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

Category 3

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

3.29 The consultation did not envisage any changes to the harm assessment (apart from the notes relating the LEA involvement considered above). The harm assessment was the subject of considerable discussion and several revisions before the first (2017) consultation and again post consultation before the definitive guidelines were published in 2018 – although the discussions focussed mainly on the risks of death. The suggestion made in the Government response could be relevant to cases where infrastructure was targeted in situations where deaths were not a likely direct consequence (otherwise category 2 would apply anyway). This could include cases where a warning is given so that an area is cleared of people or where a communications or power network is attacked in a remote unmanned location.

3.30 The Explosive substances guideline can apply in cases where an explosion takes place and actual harm to property occurs (the section 2 offence). As the guideline currently stands, unless the explosion was very likely to cause death, even if the actual damage was extensive, harm category 3 would apply.

3.31 In the harm assessment, the level of harm associated with risk of death depends upon the number of deaths risked and the likelihood of that risk eventuating. Whereas risk of property and infrastructure damage is considered at just one level regardless of the extent of the damage (all other cases, are also at category 3) or the likelihood of it being caused. If the Council agreed that risk of substantial damage to property or infrastructure should be included in category 3 harm, presumably this would apply where it was very likely to be caused.

3.32 A difficulty with making a change of this nature at this stage is that it has not been consulted on.

3.33 An aggravating factor of 'Steps take to circumvent the legal controls on the purchasing of explosive precursors' could be added to the relevant guidelines. This factor could conceivably be relevant to offenders at culpability A, B or C. Currently the aggravating factors which are specific to these offences are:

- Recent and/or repeated possession or accessing of extremist material
- Communication with other extremists
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection
- Offender attempted to disguise their identity to prevent detection
- Indoctrinated or encouraged others

3.34 Under the Poisons Act, it is an offence to purchase a regulated explosive precursor (i.e. chemicals which can be used to make an explosives) without a Home Office issued explosives precursors and poisons licence, additionally, there is an obligation on retailers to report any suspicious purchases or attempted purchases. The Home Office notes that there have been cases where explosive precursors used were purchased from overseas. There have also been cases where the offender has paid in cash for substances making it very hard for the retailer to provide any details of that transaction, or where several different bank accounts have been used to make purchases. The assumption is that the reason for doing such things is to reduce the likelihood of detection via the legal controls in place. This in turn shows a degree of planning and sophistication that could justify an increase in sentence.

3.35 If the Council felt that the current factors do not adequately capture such behaviour, an additional aggravating factor could be added. It may be preferable to focus on the planning and attempts to avoid detection, so that the factor would apply in other circumstances, thereby future-proofing the guideline. A suggested factor is:

- Offender used sophisticated methods to avoid detection (such as taking steps to circumvent the legal controls in place for the purchasing of explosive precursors).

Question 4: Does the Council wish to wish to make changes to the harm assessment in the preparation of terrorist acts guideline and/or explosive substances guideline?

Question 5: Does the Council wish to add an aggravating factor relating to explosive precursors and/or planning in the preparation of terrorist acts guideline and/or explosive substances guideline?

3.36 Annex B contains the following guidelines incorporating the changes agreed at last month's meeting (Insertions are shown in red and deletions are ~~struck through~~):

- Preparation of Terrorist Acts (Terrorism Act 2006, section 5)
- Explosive Substances (Terrorism Only) (Explosive Substances Act 1883, section 2 and section 3)
- Proscribed Organisations – Membership (Terrorism Act 2000, section 11)
- Proscribed Organisations – Support (Terrorism Act 2000, section 12)

3.37 Once any changes agreed at this meeting are made, the revised guidelines will be published in July to come into effect on 1 October.

3.38 The revisions to the following guidelines (at Annex C) will also be published and come into effect at the same time:

- Encouragement of Terrorism (Terrorism Act 2006, sections 1 and 2)
- Funding Terrorism (Terrorism Act 2000, sections 15 - 18)
- Failure to Disclose Information about Acts (Terrorism Act 2000, section 38B)
- Collection of Terrorist Information (Terrorism Act 2000, section 58)

3.39 There are a few points of detail across all the guidelines on which guidance is sought:

- The issue mentioned at 3.26 above relating to the applicability of the guideline also applies to the guidelines at Annex C
- The wording of the mitigating factor 'Age and/or lack of maturity' – should it be qualified by the wording 'where it affects the responsibility of the offender'?
- The wording of the step 'Required special sentence for certain offenders of particular concern': should this refer to life, serious terrorism sentences and extended sentences in all guidelines regardless of whether they are available for the particular offence on the basis that it may be sentenced alongside other offences for which those disposals are available?

Question 6: Subject to any changes agreed at this meeting is the Council content to publish the guidelines at Annex B and C?

4 IMPACT AND RISKS

4.1 The resource assessment will be updated in the light of any changes agreed at this meeting and circulated to Council members alongside the response to consultation document for approval ahead of the publication of the guidelines.

Sentencing Council

Sentencing Council meeting:	**13 May 2022**
Paper number:	**SC(22)MAY07 – Aggravated vehicle taking**
Lead Council member:	**Rebecca Crane**
Lead official:	**Zeinab Shaikh** **zeinab.shaikh@sentencingcouncil.gov.uk**

1 ISSUE

1.1 The Council is invited to consider the scope of revised guidelines for aggravated vehicle taking offences, alongside updated culpability and harm factors. Further discussions are scheduled for upcoming meetings, with the intention to prepare for sign-off for consultation, alongside a resource assessment, in the autumn.

2 RECOMMENDATIONS

2.1 That the Council:

- agrees to split aggravated vehicle taking offences into four separate guidelines (covering vehicle/property damage, injury, death, and dangerous driving respectively);
- approves provisional culpability and harm factors for each of the four guidelines.

3 CONSIDERATION

Aggravated vehicle taking

3.1 In November 2021, the Council agreed to split off aggravated vehicle taking from wider work to revise and update motoring offences in line with changes coming out of the Police, Crime, Sentencing and Courts Bill. The Council also agreed to revise guidelines for aggravated vehicle taking as soon as possible.

3.2 As agreed by the Council in June, the scope of this work will cover:

- Aggravated vehicle taking without consent – death caused
- Aggravated vehicle taking without consent – injury caused
- Aggravated vehicle taking without consent – dangerous driving
- Aggravated vehicle taking without consent – vehicle/property damage

3.3 Section 12A of the Theft Act sets out four different variations of the aggravated vehicle taking offence – causing injury (including death), involving dangerous driving, causing property damage, or causing damage to the taken vehicle. The legislation also sets out that causing death has a higher maximum penalty of 14 years. As outlined in the Magistrates' Courts Act 1980, property/vehicle damage of a lower value (in effect, anything under £5,000) will be triable only summarily and therefore subject to a maximum penalty of

six months' custody. Otherwise, the maximum penalty for aggravated vehicle taking is two years' custody.

3.4 Aggravated vehicle taking combines elements of both motoring and theft offences, and so there are a wide number of comparator guidelines to consider in any work to revise and update guidelines for these offences. With the exception of aggravated vehicle taking causing death, the offences are covered by two existing magistrates' guidelines, with one covering injury and dangerous driving, and the other covering vehicle/property damage. These guidelines were last revised in 2008 and so are out of date and do not follow the detailed structure of more recent guidelines.

3.5 There is currently no existing guideline for aggravated vehicle taking causing death. Volumes for this are very low (usually in the single figures annually) however. CPS charging guidance explains that, where there is evidence of the defendant driving dangerously, prosecutors should charge the alternative offence of causing death by dangerous driving. There is also the basic offence of vehicle taking without consent, triable only summarily, for which the guideline was last updated in 2017 as part of the wider MCSG updates. This is not within scope of work to revise motoring guidelines as it follows the structure of more recent guidelines and already provides detailed guidance on step 1 and step 2 factors.

3.6 The volumes for aggravated vehicle taking vary widely between specific offences. Cases resulting in vehicle/property damage or involving dangerous driving are high in volume, while those resulting in death are markedly lower in volume.

Number of adult offenders sentenced for aggravated vehicle taking:[1]

	2018	2019	2020
Aggravated vehicle taking – death caused	0	2	1
Aggravated vehicle taking – injury caused	53	55	34
Aggravated vehicle taking – dangerous driving	242	258	206
Aggravated vehicle taking – vehicle/property damage of £5,000 or over	227	228	165
Aggravated vehicle taking – vehicle/property damage of less than £5,000 (summary only)	651	566	395

Scope of revised guidelines

3.7 Aggravated vehicle taking is a broad category and covers a range of cases, from those involving property damage or dangerous driving, through to death. As they share the same basic offence of vehicle taking without consent, there is some overlap between these different types of aggravated vehicle taking, though they are usually easily differentiated

[1] In 2018, one offender was sentenced for an aggravated vehicle taking offence where it is unclear whether this was dangerous driving, causing injury or damage of £5,000 or over. This has not been included in the figures above.

from one another by the type of harm caused. A case of aggravated vehicle taking which results in a crash that causes serious injury to another driver, for example, will differ to a case involving dangerous driving, where the harm is limited to the risk posed through excessive speeding on a busy road or similar.

3.8 In approaching this work, we have considered whether different types of aggravated vehicle taking might be grouped together, in order to simplify and streamline guidelines, taking a cue from existing aggravated vehicle taking guidelines, where dangerous driving is paired with injury. We have considered whether it would be feasible to combine these offences into a single, broad guideline, with the different types of aggravated vehicle taking representing varying levels of harm. However, after discussion, including input from operational and policy colleagues in the CPS, and consideration of how different types of harm and culpability might be represented in such a guideline, we do not feel it is possible to do this without losing nuance. This approach also risks confusing matters by combining culpability factors that are going to be markedly different for different types of aggravated vehicle taking, such as dangerous driving in comparison to vehicle or property damage.

3.9 While a grouped approach was feasible when the guidance provided to sentencers was more minimal, the more detailed approach taken in recent guidelines makes this trickier. Even in the current combined guideline for dangerous driving and injury, the culpability and harm involved differs greatly between the two offences, and this is evident in examples of greater harm, which do not mention dangerous driving at all, while the higher culpability factors largely seem relevant only to dangerous driving. While, on the surface, there is some overlap between the different types of aggravated vehicle taking, as they stem from the same basic offence, there are also many culpability and harm factors that will be specific to a particular aggravated vehicle taking offence and not others.

3.10 Given the differing maximum penalties, harm and culpability factors involved, and differing volumes, we believe the most sensible approach would be to separate out the different types of aggravated vehicle taking into their own guidelines as follows:

- Aggravated vehicle taking – death caused
- Aggravated vehicle taking – injury caused
- Aggravated vehicle taking – dangerous driving
- Aggravated vehicle taking – vehicle/property damage

3.11 This approach differs from existing guidelines only in that it pulls dangerous driving out into its own guideline (given that harm and culpability factors, such as tiredness or aggressive driving, are likely to differ greatly for this in comparison to the other forms of aggravated vehicle taking). It also provides a standalone guideline for causing death (as harm factors are likely to differ from cases where injury is caused, particularly if there are

multiple deaths, and due to the markedly higher maximum penalty). As with the existing guideline, property damage and damage to the taken vehicle are combined, as these are likely to share the same step one factors and carry the same maximum penalties.

Culpability and harm factors

3.12 Provided that the Council is content to proceed with four separate guidelines, we have begun to draft step one factors for the different variations of aggravated vehicle taking. In doing so, we have considered comparator guidelines, including those for general theft and the basic offence of vehicle taking without consent. For the purposes of drafting step one factors, our starting point has been to look at the harm likely to occur for specific offences, as this is the primary difference between the varying kinds of aggravated vehicle taking. At this stage, we are asking the Council to indicate if it is content, in principle, with these factors; we will look again at these in the round when we draft step two factors, particularly aggravating and mitigating factors.

Vehicle/property damage

3.13 Vehicle and property damage is the most common form of aggravated vehicle taking, and the majority of cases are of lower value (under £5,000, and therefore triable only summarily) at 395 cases in 2020, versus 165 cases of higher value damage. Community sentences are the most common outcome (in 2020, 56 per cent of adult offenders received community orders for lower value damage, and 42 per cent for higher value damage), followed by immediate custody (in 2020, 16 per cent of adult offenders were sentenced to immediate custody for lower value damage, and 27 per cent for higher value damage). This trend is also evident in previous years.

3.14 Our analysis of 24 transcripts from the Crown Court suggests that these cases are often opportunistic rather than planned. Other common factors include drivers being under the influence of alcohol and/or drugs and attempting to evade the police. There is also overlap with dangerous driving, including speeding:

Examples of cases from Crown Court transcripts
• Stole car from father while disqualified from driving. Crashed into church lychgate and gravestones • Stole two motorcycles, one after the other; crashed and abandoned the first, then rode second in highly dangerous police chase • Stole partner's car after drinking and crashed it, writing it off • Stole car from victim with vulnerable children and drove dangerously while attempting to evade arrest • After drinking at a party, stole another party goer's car keys and smashed car into telephone pole, damaging fences and walls • Stole car keys from victim's jacket pocket and was in a collision, hitting a bus stop and writing the car off

- While under influence of cocaine and cannabis, stole girlfriend's car and attempted to evade police, crashing into lamp post and post-box, writing the car off
- Took a friend's car without permission and went to collect someone else; lost control of car due to rain and crashed through a fence, hitting and damaging several other vehicles
- Took partner's car and became engaged in police chase, speeding in residential areas and on busy roads. Lost control and crashed into railings
- Engaged in police chase, speeding on busy roads; damaged police vehicle

3.15 In drafting harm and culpability factors for vehicle/property damage, we have considered the existing guideline, as well as the current guideline for criminal damage (which has a significantly higher maximum penalty of ten years where the damage is valued over £5,000) and the guideline for the basic offence of vehicle taking without consent.

3.16 For the harm table, we have retained many of the high harm factors in the existing guideline, such as where damage occurs to an emergency services vehicle. The existing factor of the vehicle belonging to an elderly or disabled person has been widened to cover vulnerable victims more generally. Other factors have also been adapted or expanded, to cover off the types of damage most likely in these cases: damage to the taken vehicle is split off from damage to other property, with these reflected in all three categories of harm. Under the existing guideline, this is represented more inconsistently, with only the medium harm category mentioning damage to another vehicle or property. The lower harm category specifically refers to damage of under £5,000, to make clear where the dividing line would be, in terms of harm, between summary only and either way cases. We have not included explicit consideration of the distress caused within the harm table, in contrast to the criminal damage guidelines, as this may risk overcomplicating the harm table and, arguably, may not be as relevant for this offence.

3.17 The vehicle taking aspect of this offence is reflected in the culpability table, where we have carried over the lower culpability factors of exceeding authorised use and retaining a hire car beyond the return date from the existing guideline, and in the existing higher culpability factor of the vehicle being taken as part of a burglary or from private premises. These may also cover damage that occurs to the taken vehicle itself. The higher culpability category also includes consideration of where the vehicle/property was deliberately destroyed, or the intention was to do so, dropping down to recklessness as to whether very serious damage was caused in medium culpability. This combines factors from both the existing guideline and the criminal damage guidelines.

3.18 While provision in section 12(1) of the Theft Act allows for passengers to be charged with all aggravated vehicle taking offences, where they know the vehicle has been taken without consent, we have also suggested a new factor in lower culpability, of knowingly

allowing oneself to be carried in vehicle but playing a minor role in the offending, to cover instances where passengers are present in the car but are not actively encouraging the driver to damage the vehicle or other property. In the unlikely event that a driver has been observing the rules of the road and has simply been unlucky in having a collision or causing damage, we have added a lower culpability factor to cover where the vehicle was not driven in a reckless or unsafe manner. We have also suggested including coercion/exploitation and mental disorders/learning disabilities as standard factors in culpability across all the revised guidelines.

Harm	Factors
Category 1	• Taken or damaged vehicle belonging to vulnerable person (where not category 3) • Emergency services vehicle (where not category 3) • Damage caused in moving traffic accident • Severe damage to taken vehicle • High value of damage to another vehicle and/or property
Category 2	• Greater damage to taken vehicle • Moderate value damage to another vehicle and/or property
Category 3	• Minor damage to taken vehicle of under £5,000 • Low value damage to another vehicle and/or property of under £5,000

Culpability	Factors
High	• Vehicle or property deliberately destroyed (or intention to cause very serious damage to property) • Under influence of alcohol/drugs • Vehicle taken as part of burglary or from private premises • Sophisticated nature of offence/significant planning • Trying to avoid arrest • Involvement of others through coercion, intimidation or exploitation
Medium	• Recklessness as to whether very serious damage caused to vehicle or property • Other cases that fall between categories A and C because: o Factors are present in A and C which balance each other out and/or o The offender's culpability falls between the factors described in A and C
Lower	• Vehicle not driven in a reckless or unsafe manner • Knowingly allowing oneself to be carried in taken vehicle but playing a minor role in the offending • Involved through coercion, intimidation or exploitation • Mental disorder or learning disability, where linked to commission of offence • Exceeding authorised use of e.g. employer's or relative's vehicle • Retention of hire car for short period beyond return date

Injury

3.19 In comparison to aggravated vehicle taking causing vehicle/property damage or involving dangerous driving, causing injury is less common. In 2020, only 34 adult offenders were sentenced for this offence, with the most common outcome being immediate custody (35 per cent), followed closely by community sentences and suspended sentence (both at 32 per cent). The average custodial sentence length (mean) for this offence in 2020 was estimated to be 14 months pre-guilty plea (and 9.8 months post-guilty plea), suggesting that cases receiving immediate custody are often of medium severity.

3.20 Of the ten transcripts of Crown Court cases analysed, the majority fall within low to medium severity. Common themes involve the offender attempting to evade police, police officers themselves sustaining injuries, and the presence of passengers:

Examples of cases from Crown Court transcripts
• Took vehicle while working on it for the owner; vehicle clipped kerb and was in head-on collision, injuring two occupants in the other car. One was left with broken vertebrae and required a back brace for a period of time, while other occupant required a cast for their injured hand • Following family dispute, intentionally rammed father's taxi which was carrying two passengers, leaving them with anxiety about being out in public • While driving vehicle without licence, hit motorcyclist and left him with serious injuries requiring hospitalisation for two days. Offender fled scene afterwards • While under the influence of alcohol, offender was driving a car he knew to be stolen and was carrying passengers. When stopped by police, offender attempted to drive off, dragging two police officers by a few feet, and leaving them with cuts and bruises • Opportunistically took vehicle from a front drive and was later seen by police stealing fuel. Drove into police officer in attempt to evade arrest, causing minor injuries that led to him being off work for some time

3.21 In drafting the harm and culpability factors, we have considered the current guidelines for actual and grievous bodily harm, as well as looking across at the step one factors being proposed for other aggravated vehicle taking offences to ensure consistency. The existing guideline for this offence also covers dangerous driving so much of the guidance it provides on harm and culpability is more focused on dangerous driving, rather than on causing injury. We propose broadly mirroring the draft three-category harm table and associated factors for furious or wanton driving causing injury that the Council has provisionally agreed (annex A). This three-category approach allows for more gradation when considering the impact of any injuries caused and sets the threshold for serious injuries at category 2 as a minimum.

3.22 In the culpability table, we have mirrored the proposed wording for vehicle/property damage, with some adapting as necessary, as many of those factors will be relevant to this offence. In high culpability, a factor has been added to reflect instances where there is a recklessness as to whether serious injury is caused, adapted from the criminal damage

guidelines. To ensure gradation, we have also included a medium culpability equivalent, of recklessness as to whether minor injury is caused.

Harm	Factors
Category 1	• Grave and/or life-threatening injury caused • Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment • Offence results in a permanent, irreversible injury or condition
Category 2	• Other cases of serious harm
Category 3	• All other cases

Culpability	Factors
High	• Recklessness as to whether serious injury caused to persons • Under influence of alcohol or drugs • Vehicle taken as part of burglary or from private premises • Sophisticated nature of offence/significant planning • Trying to avoid arrest • Involvement of others through coercion, intimidation or exploitation

Medium	• Recklessness as to whether some injury caused to persons
	• Other cases that fall between categories A and C because:
	  ○ Factors are present in A and C which balance each other out and/or
	  ○ The offender's culpability falls between the factors described in A and C

Lower	• Vehicle not driven in a reckless or unsafe manner • Knowingly allowing oneself to be carried in taken vehicle but playing a minor role in the offending • Involved through coercion, intimidation or exploitation • Mental disorder or learning disability, where linked to commission of offence • Exceeding authorised use of e.g. employer's or relative's vehicle • Retention of hire car for short period beyond return date

Death

3.23 This is a very low volume offence, with fewer than five adult offenders sentenced for this as their principal offence, per year, between 2010-2020. As such, there are very few transcripts available; of the two transcripts analysed, both focused on the same case, involving multiple offenders. In this instance, both offenders were passengers in the taken vehicle, while the driver of the vehicle was charged with the offence of dangerous driving causing death. The incident involved a police chase, with the car colliding with another vehicle carrying a family. Four people died as a result, while three others were left with serious and/or life-changing injuries. This approach is in line with CPS charging guidance, which recommends that prosecutors charge drivers with dangerous driving causing death where relevant, due to the higher maximum penalty for that offence. In effect, this will often mean that it will be passengers in the taken vehicle who will be charged with aggravated vehicle taking causing death.

3.24 As there is currently no existing guideline for this offence, we have looked at the comparator guideline of unlawful act manslaughter in drafting step one factors, as well as the draft factors for dangerous driving causing death that the Council provisionally agreed in autumn 2021 (annex B). A similar approach to harm is recommended here, where rather than have a two or three-category harm table to cover one or more deaths, an explanation is instead provided setting out that harm will always be of the utmost seriousness in these cases and that this is taken into account in the sentencing table.

3.25 For the culpability table, we have proposed mirroring the three-category approach, and the associated factors, proposed for aggravated vehicle taking causing injury due to the likely overlap between cases involving injury and death.

Harm
For all cases of aggravated vehicle taking causing death, the harm caused will inevitably be of the utmost seriousness. The loss of life is taken into account in the sentencing levels at step two.

Culpability	Factors
High	• Recklessness as to whether serious injury caused to persons • Under influence of alcohol or drugs • Vehicle taken as part of burglary or from private premises • Sophisticated nature of offence/significant planning • Trying to avoid arrest • Involvement of others through coercion, intimidation or exploitation

Medium	• Recklessness as to whether minor injury caused to persons
	• Other cases that fall between categories A and C because:
	  ○ Factors are present in A and C which balance each other out and/or
	  ○ The offender's culpability falls between the factors described in A and C

Lower	• Vehicle not driven in a reckless or unsafe manner • Knowingly allowing oneself to be carried in taken vehicle but playing a minor role in the offending • Involved through coercion, intimidation or exploitation • Mental disorder or learning disability, where linked to commission of offence • Exceeding authorised use of e.g. employer's or relative's vehicle • Retention of hire car for short period beyond return date

3.26 An alternative to a standalone guideline for causing death would be to combine this and injury into one guideline, with death sitting in its own category at the very top of the harm table. However, this approach might make it more difficult to take account of cases where there are multiple deaths. It would also create a significant gap between bands in the sentencing table, with the top of the range for injury going to two years at most, and death potentially being significantly higher than this.

Dangerous driving

3.27 Aggravated vehicle taking involving dangerous driving is a high-volume offence and immediate custody is by far the most common outcome, with 61 per cent of offenders receiving this in 2020. Estimated pre-guilty plea average (mean) custodial sentence lengths (ACSL) for previous years suggest that cases involving immediate custody are usually of medium severity. In 2020, the estimated pre-guilty plea ACSL (mean) was 14 months (compared to 10 months post-guilty plea).

3.28 From the 13 Crown Court transcripts analysed, speeding and driving on the wrong side of the road, particularly in residential areas, are common themes, as is attempting to evade arrest. In some of these cases, minor collisions were involved, either with other vehicles on the road or with police cars.

3.29 In drafting step one factors for this offence, we have considered the draft factors for the offence of dangerous driving (annex C) that the Council has provisionally agreed. We have also taken into account the guideline for arson/criminal damage – reckless as to whether life endangered, last revised in 2019, looking at how it staggers varying levels of risk across the three harm categories; this guideline was also considered in drafting the factors for the dangerous driving guideline.

3.30 We have proposed three categories of harm to separate out cases of particularly egregious driving (which either posed a risk of very serious harm or did in fact involve damage to other vehicles/property or injury to others) from cases where there was a low or moderate risk of harm to others. This would provide more guidance to sentencers, allowing for more nuanced consideration of cases falling between high and low harm, while also ensuring consistency of approach with the other aggravated vehicle taking offences (with the exception of death). This does, however, diverge from what has been provisionally agreed for dangerous driving, which uses two categories of harm, and raises a broader question of whether we align harm in aggravated vehicle taking - dangerous driving with the other aggravated vehicle taking offences, or with the offence of dangerous driving.

3.31 For culpability, we have proposed largely mirroring the draft factors for the offence of dangerous driving, as these provide detailed guidance which will also be relevant here and will provide parity as both offences share a two-year maximum penalty. The only departures from the dangerous driving guideline have been to adapt some of the culpability factors to make them broad enough to include passengers who are actively encouraging dangerous and risky driving, and to include consideration of the vehicle taking aspect of this offence in line with what is being proposed for other aggravated vehicle taking offences. We have also included culpability factors to reflect coercion or exploitation, or mental disorders/learning

disabilities, in line with step one factors proposed for other aggravated vehicle taking offences.

Harm	Factors
Category 1	• Prolonged bad driving • Offence results in injury to others • Circumstances of offence created a high risk of very serious harm to others • Damage caused to vehicles or property
Category 2	• Excessive speeding, particularly on busy roads or in built up areas • Circumstances of offence created a moderate risk of harm to others
Category 3	• Circumstances of offence created a low risk of harm to others • All other cases

Culpability	Factors
High	• Deliberate decision to ignore the rules of the road and disregard for the risk of danger to others. • Vehicle driven in prolonged, persistent and deliberate course of dangerous driving • Consumption of substantial amounts of alcohol or drugs leading to gross impairment • Offence committed in course of police pursuit • Racing or competitive driving against another vehicle • Disregarding warnings of others • Lack of attention to driving for a substantial period of time • Speed greatly in excess of speed limit • Vehicle taken as part of burglary or from private premises • Involvement of others through coercion, intimidation or exploitation
Medium	• Brief but obviously highly dangerous manoeuvre • Engaging in a brief but avoidable distraction • Vehicle driven knowing that it has a dangerous defect or is dangerously loaded • Vehicle driven at a speed that is inappropriate for the prevailing road or weather conditions, although not greatly excessive • Vehicle driven whilst ability to drive is impaired as a result of consumption of alcohol or drugs • Disregarding advice relating to driving when taking medication or as a result of a known medical condition which significantly impaired the driver's ability • Vehicle driven when driver knowingly deprived of adequate sleep or rest • The offender's culpability falls between the factors as described in high and lesser culpability
Lower	• Vehicle driven in manner just over threshold for dangerous driving • Momentary lapse of concentration • Knowingly allowing oneself to be carried in taken vehicle but playing a minor role in the offending • Involved through coercion, intimidation or exploitation • Mental disorder or learning disability, where linked to commission of offence • Exceeding authorised use of e.g. employer's or relative's vehicle

	• Retention of hire car for short period beyond return date

Question 1: Are you content to proceed with four separate guidelines to cover the different types of aggravated vehicle taking (vehicle/property damage, injury, death and dangerous driving)?

Question 2: Are you content in principle with the culpability and harm factors as drafted for the different aggravated vehicle taking guidelines?

4 IMPACT AND RISKS

4.1 Revisions to the guidelines for aggravated vehicle taking offences must balance a number of different aspects of these offences, including the circumstances under which the vehicle was taken without consent, the offender's driving or behaviour, and the potential risks they posed and/or the actual harm they caused to others.

4.2 If the offences are split off into four separate guidelines, consideration will need to be given as to how parity is ensured, where relevant, across the different guidelines. We will also need to consider any read across to the other motoring guidelines that are currently being revised and any overlaps, such as with dangerous driving offences.

4.3 The impact of changes to the guidelines is likely to be limited, particularly as maximum penalties for these offences are not changing. Revisions to guidelines are intended to provide more detailed guidance to support sentencers, particularly in light of magistrates' increased sentencing powers for either way offences.

4.4 Subject to the Council's decisions on proposals outlined in this paper, we will look to provide more detailed information on impacts and risks as we progress work on the guidelines for aggravated motoring offences.