

11 November 2022

Dear Members

## Meeting of the Sentencing Council – 18 November 2022

The next Council meeting will be held in the **Queens Building Conference Suite, 2nd Floor Mezzanine** at the Royal Courts of Justice, on Friday 18 November 2022 at 9:45. This will be a hybrid meeting, so a Microsoft Teams invite is also included below.

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

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

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

**The agenda items for the Council meeting are:**

- |                                         |             |
|-----------------------------------------|-------------|
| ▪ Agenda                                | SC(22)NOV00 |
| ▪ Minutes of meeting held on 21 October | SC(22)OCT01 |
| ▪ Action log                            | SC(22)NOV02 |
| ▪ Equality and Diversity research       | SC(22)NOV03 |
| ▪ Motoring offences                     | SC(22)NOV04 |
| ▪ Animal cruelty                        | SC(22)NOV05 |
| ▪ Underage sale of knives               | SC(22)NOV06 |

## 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

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

**Steve Wade**

Head of the Office of the Sentencing Council

# Sentencing Council

## COUNCIL MEETING AGENDA

**18 November 2022**  
**Royal Courts of Justice**  
**Queen's Building**

- |               |                                                                                      |
|---------------|--------------------------------------------------------------------------------------|
| 09:45 – 10:00 | Minutes of the last meeting and matters arising (papers 1 and 2)                     |
| 10:00 – 11:15 | Equality and Diversity research - presented by Emma Marshall and Ruth Pope (paper 3) |
| 11:15 – 11:30 | Break                                                                                |
| 11:30 – 12:00 | Equality and Diversity research - presented by Phil Hodgson (paper 3)                |
| 12:00 – 13:00 | Motoring offences - presented by Ollie Simpson (paper 4)                             |
| 13:00 – 13:30 | Lunch                                                                                |
| 13:30 – 14:15 | Animal cruelty - presented by Zeinab Shaikh (paper 5)                                |
| 14:15 – 15:15 | Underage sale of knives - presented by Ruth Pope (paper 6)                           |

# Sentencing Council

## **COUNCIL MEETING AGENDA**

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## MEETING OF THE SENTENCING COUNCIL

21 OCTOBER 2022

### MINUTES

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Members present: Bill Davis (Chairman)  
Tim Holroyde  
Rebecca Crane  
Rosa Dean  
Nick Ephgrave  
Diana Fawcett  
Elaine Freer  
Max Hill  
Jo King  
Stephen Leake  
Juliet May  
Maura McGowan  
Beverley Thompson

Apologies: Richard Wright

Representatives: Christina Pride for the Lord Chancellor (Deputy  
Director Head of Bail, Sentencing and Release  
Policy)

Members of Office in  
attendance: Steve Wade  
Ruth Pope  
Zeinab Shaikh  
Ollie Simpson  
Jessie Stanbrook

## **1. MINUTES OF LAST MEETING**

- 1.1 The minutes from the meeting of 23 September 2022 were agreed.

## **2. MATTERS ARISING**

- 2.1 The Chairman noted that Jo King and Ollie Simpson had spoken at the Magistrates Association annual conference on the work of the Council and the ways that magistrates contribute to the work of the Council. The presentation was well received and those attending had provided helpful feedback on sentencing guidelines.

## **3. DISCUSSION ON IMPOSITION – PRESENTED BY JESSIE STANBROOK, OFFICE OF THE SENTENCING COUNCIL**

- 3.1 The Council discussed initial amendments to the Imposition guideline pertaining to its overall structure, the community order and the pre-sentence report sections (with remaining sections to be discussed at future meetings).
- 3.2 The Council agreed that the guideline should be restructured and reformatted, with the exact chronology to be agreed once all sections have been discussed. Some decisions were made on amendments to the information on community order requirements, the table setting out the three levels of community order, and the pre-sentence report sections, but exact wording and framing will be agreed at a later meeting.

## **4. DISCUSSION ON EFFECTIVENESS – PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL**

- 4.1 The Council discussed the findings of the literature review of evidence on the effectiveness of sentencing published on 30 September. The Council agreed that there were various references which could be made to the evidence on sentencing and reoffending, including in the revised Imposition guideline and potentially in offence specific guidelines where this was appropriate.
- 4.2 The Council noted that there may be various reasons why a court might pass a short custodial sentence including when a longer sentence had been reduced for mitigation and for a guilty plea or because all non-custodial options had been tried with a repeat offender. The Council also considered future areas where research could be gathered, including in relation to female offenders and effectiveness in relation to other purposes of sentencing.

## **5. DISCUSSION ON REDUCTION IN ASSISTANCE TO THE PROSECUTION – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**

- 5.1 The Council considered a request from the Serious Fraud Office (SFO) on behalf of a number of law enforcement agencies for a new guideline

to provide greater certainty as to the amount of the reduction in sentence that will apply to those who enter into an agreement to assist the prosecution.

5.2 The Council was not persuaded that it would be possible to develop a guideline that would give more guidance than was currently contained in caselaw or that there was a case for devoting the necessary resources to such a guideline.

5.3 The Council agreed to discuss options for providing some limited guidance with the SFO.

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

6.1 This was the second meeting to review responses to the public consultation on the animal cruelty sentencing guidelines.

6.2 In this meeting, the Council focused on feedback to its proposals for the guideline on the section 9 offence ('failure to ensure animal welfare'). The Council considered the additional feedback that respondents provided on harm factors and on clarifying the statutory maximum sentence for this offence.

6.3 The Council discussed the need for a balance between providing guidance to sentencers which reflects the likely circumstances of these cases, and the range of sentences available up to the six month statutory maximum.

## **7. DISCUSSION ON BUSINESS PLAN – PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL**

7.1 The Council considered and agreed a mid-year update to its 2022-23 Business Plan, covering revisions to the timings of some guidelines, which is scheduled for publication in November.

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## SC(22)NOV02 November Action Log

### ACTION AND ACTIVITY LOG – as at 11 NOVEMBER 2022

	Topic	What	Who	Actions to date	Outcome
<b>SENTENCING COUNCIL MEETING 23 September 2022</b>					
1	<b>False Imprisonment and Kidnap offences</b>	Mandy to devise a combined false imprisonment and kidnap guideline to be used in a resentencing exercise to test the viability of such a guideline for both offences with one sentence table. Results of this exercise to be discussed at the next meeting for this guideline (March).	<b>Judicial members (minus Jo king and plus Richard Wright.) to take part in the resentencing exercise</b>	<b>ACTION ONGOING:</b> Mandy devising guideline.	
2	<b>Witness intimidation</b>	Police to provide information about the types of warnings that may be issued that would be relevant to the witness intimidation guideline.	<b>Nick Ephgrave</b>	<b>ACTION ONGOING:</b> Nick's office has been in touch for information on what is required	

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**Sentencing Council meeting:**  
**Paper number:**

**18 November 2022**  
**SC(22)NOV03 – Equality and Diversity  
research**

**Lead official:**

**Emma Marshall, Nic Mackenzie, Ruth Pope  
and Phil Hodgson**  
**emma.marshall@sentencingcouncil.gov.uk**

## **1 ISSUE**

1.1 In October 2021, the Council commissioned the University of Hertfordshire (UH) to conduct research into equality and diversity in the work of the Sentencing Council, to help fulfil the Council’s strategic objective to *“explore and consider issues of equality and diversity relevant to our work and take any necessary action in response within our remit”*.<sup>1</sup> We have recently discussed the key findings, recommendations and potential Council response to these with the Equality and Diversity working group.

## **2 RECOMMENDATION**

2.1 The Council is asked to consider the recommendations and options for further work, as well as next steps, ahead of publishing the full report in January 2023.

## **3 BACKGROUND AND APPROACH**

### **Background**

3.1 In 2021, the Sentencing Council published its strategic objectives for 2021-2026, including a specific action to *“explore the potential for the Council’s work inadvertently to cause disparity in sentencing across demographic groups by commissioning independent external contractors to undertake a project to review a sample of key guidelines and processes”*. The Council therefore commissioned UH in October 2021 to conduct research into equality and diversity in the work of the Sentencing Council.

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<sup>1</sup> [Sentencing Council strategic objectives 2021-2026](#).

3.2 The research aimed to identify and analyse any potential for the Council's work to cause disparity in sentencing outcomes across demographic groups, and to make recommendations for how to mitigate these disparities, if possible. It explored aspects such as the language, factors and explanatory text used in guidelines, as well as their structure, the guideline development processes, the relationship with stakeholders, and communications. It took into consideration protected characteristics under the Equality Act 2010: age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership, and pregnancy and maternity. There was a specific focus on the protected characteristics that are more relevant to sentencing, and those where sufficient data exists, namely race, age and sex, as well as considering other potentially relevant issues such as 'primary carer' status and socio-economic background.

3.3 The full report from the research has already been circulated for comment and we hope to publish this in early January. This will enable us to present key findings at the conference we have scheduled for 13 January 2023 and to facilitate a discussion between attendees.

3.4 We also wish to publish a short response document alongside the report. This will provide the opportunity for the Council to reaffirm its commitment to this area of work and to outline the future work that it plans to take forward to address some of the recommendations. This meeting will therefore outline the recommendations and potential responses to these, reflecting the discussion at the recent working group meeting.

## **Approach**

3.5 The research examined three groups of offence-specific guidelines currently in operation in England and Wales – Robbery<sup>2</sup>, Theft<sup>3</sup>, and Harassment - as well as the on Sentencing children and young people overarching guideline. It used a multi-method approach consisting of:

- Analysis of the text used in those particular guidelines;
- Data analysis (using Crown Court Sentencing Survey (CCSS) data from 1 January 2013 to 31 March 2015 and ethnicity data from the Ministry of Justice's (MoJ's) Court Proceedings Database (CPD)); and
- Co-production: engaging with civil society (CS) organisations, defence lawyers and sentencers, to contribute to the production of knowledge and solutions for the project.

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<sup>2</sup> All offences.

<sup>3</sup> Theft from the person, theft from a shop or stall, theft in breach of trust, and receiving stolen goods.

3.6 It should be noted that there are a variety of limitations to take into account when considering the report. These include the fact that: the CCSS data is relatively old and only captures the principal offence; some factors that were on the CCSS forms were not factors in the actual guidelines, which means that the data do not fully reflect the sentencing practices during the period when they were collected; and some of the sampled guidelines have changed since the CCSS data was collected. As a result of these last two issues, certain terms are used in the report to cover all factors, both past and present:

**Generic factors:** factors that appear across most guidelines, for example ‘remorse’ or ‘previous convictions’.

**Offence-specific factors:** factors that are specific to one offence or certain types of offences.

**Upward factors:** factors that increase a sentence (at the time of the CCSS, these covered ‘aggravating factors indicating higher culpability and harm’ and in newer guidelines they include separate harm, culpability and aggravating factors).

**Downward factors:** factors that decrease a sentence (at the time of the CCSS, these covered ‘mitigating and personal factors indicating lower culpability and harm’ and in newer guidelines they include separate harm, culpability and mitigating factors).

3.7 In terms of the co-production aspect of the work, although the research endeavoured to include the views of as many relevant organisations, sentencers and defence lawyers as possible, participation was still self-selecting. Opinions also often conflicted with each other due to varying experiences, perceptions, and focuses and it is possible that sometimes individual partner’s perceptions may have been coloured by personal and professional biases.

3.8 It should also be noted that in the Equality Act 2010, the terms sex and race are used. However, in the CCSS dataset, gender and ethnicity are used and these terms are reflected in the research report.

### **Key findings, recommendations, and options**

3.9 The research identified a wide range of findings. These cover: the stepped approach of guidelines, factors within the guidelines (including generic factors and offence-specific factors), sex/ gender, age, race/ ethnicity, other specific issues, and the broader work of the Sentencing Council.

3.10 We have set out the main findings and recommendations below. We have grouped these into sections, rather than presenting them in the order they appear in the research

report: recommendations tend to overlap and so it is useful for some to consider them collectively. A fuller summary of the findings appear in Annex A and a list of the recommendations in Annex B.

## **4 ANALYSIS AND RESEARCH**

4.1 Paragraphs 3.6 and 3.7, above, outline the limitations of this research which impacted on the analysis undertaken and the potential interpretation of findings. As a result, the UH team recommend that the Council undertakes further analysis in some areas, both quantitatively and qualitatively.

### *Quantitative data collection and analysis*

4.2 The UH team propose that some of the findings from the research suggest that more recent data should be collected and analysed for some offences, and that we endeavour to collect larger samples of data in order to look in more detail at particular subgroups of offenders.

4.3 In particular, co-production partners raised the issue of ethnicity. They felt that there were a number of issues that could have a disparate effect on offenders from ethnic minorities (e.g. gang membership, carer status, addressing addiction or offending behaviour, expression of remorse, and mental disorder and learning disability). However, contrary to other previous research, their analysis of the CCSS data indicated that, after controlling for all relevant factors, adult Black offenders convicted of robbery offences were less likely to receive a custodial sentence than White offenders. For the same offence, Asian ethnicity was associated with a shorter custodial sentence compared to White offenders.

4.4 The UH team conclude that these findings are not strong evidence of disparity as it was only present in one out of seven offences explored. However, in recognition of other, conflicting, analysis that has been conducted they recommend that:

- For stronger conclusions about racial or ethnic disparities, data that oversample ethnic minority groups should be collected, to ensure conclusions about ethnic minority groups are robust and that the disparity between co-production partners' perceptions and the results of regression analysis can be explored

4.5 The collection of more data would also permit more analysis on the intersectionality<sup>4</sup> of different factors (for example the impact of different guideline factors on Black women or on young adult offenders of different ethnicities). They recommend:

- The Council endeavours to collect a larger volume of data than is currently available in order to analyse for intersectionality effectively.

4.6 UH also flag the need to collect more data on robbery offences for both adults and children and young people as a result of co-production meetings which discussed guideline factors relating to group offending, 'use of weapon' and 'wearing a disguise'. Findings from the CCSS analysis on robbery offences committed by children and young people also found that only a very small number of 'downward' factors had an impact on sentencing outcomes.

4.7 On group offending, while co-production partners welcomed the Council's replacement of 'gang' by 'group' in most guidelines, some sentencers felt the scope of 'group' is too broad, and some argued that 'group membership' alone should not be seen as a factor that might increase a sentence. However, the text analysis showed that none of the sampled guidelines treat group membership *per se* as a factor which could increase sentences (the expression used relates to a **role** where 'offending is part of a group activity'<sup>5</sup> or an 'offender was a member of, or was associated with, a group promoting hostility based on race or religion (where linked to the commission of the offence)'<sup>6</sup>) and the CCSS analysis indicated that there was very little association between this factor and the likelihood of receiving a custodial sentence or a longer custodial sentence. As a result, the UH team to recommend more research on this.

4.8 On the impact of 'use of weapon' in robbery cases, co-production partners raised concerns about this, with some arguing that this affects offenders from ethnic minority backgrounds more than others, because they are often labelled as 'violent' and 'gang members'. However, although CCSS analysis for both adult robbery offences and robbery offences committed by children and young people indicated that the factor is a strong factor in predicting the length of custody, this factor was found to have slightly *lower* importance for robbery offences committed by children and young people compared to adult robbery cases, contradicting the perceptions of the co-production partners. On 'wearing a disguise' some

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<sup>4</sup> The term intersectionality highlights the 'multidimensionality' of marginalised subjects' lived experiences (Crenshaw 1989, 139; Nash 2008, 2). Multidimensionality can be understood as the co-existence of two or more protected characteristics in the Equality Act 2010, and/ or other factors of marginalisation, such as economic deprivation.

<sup>5</sup> Robbery and theft guidelines.

<sup>6</sup> Harassment and stalking guideline.

partners (although not all) felt that the word 'hood' (an example given in the factor) is more easily associated with young people from certain subgroup cultures such as 'rap gangs'.

4.9 Three recommendations cover these findings:

- Re-evaluate the potential impact of group affiliation as a sentencing factor in adult robbery cases by using more recent data, because there is a clear gap between co-production partners' perceptions and the findings of CCSS data analysis.
- Obtain more recent data to evaluate the impact of 'use of weapon' and 'wearing a disguise' in robbery cases, and a larger sample of ethnic minority offenders to test the hypotheses that these two upward factors affect children and young people from ethnic minority groups more than others.
- Conduct further research into why some downward factors do not seem to have an impact on sentencing outcomes in robbery cases involving children and young people.

4.10 We have a data collection planned for January to June 2023 that covers several different offences, including robbery. We will therefore have some data available for analysis later in 2023 which may shed some light on some issues. However, taking account of the fact that the collection will only last for six months, as well as the likely response rates, we may find that volumes are too low for meaningful analysis of the specific factors that UH mention or the intersectionality of these with different demographic characteristics. If so, we will need to wait until we have more data available in the future (potentially from the Common Platform).

4.11 In addition, it is important to note that our data collections only cover adult offenders and we do not have any currently planned that will specifically cover children and young people. We could consider this, but this would be a longer-term piece of work, which would not yield quick results: given the smaller number of children and young people sentenced we would need to run the data collection for a much longer time period than we do now to obtain a sufficient sample size. It is also unlikely that we could ever improve on research published by the Youth Justice Board in 2021<sup>7</sup>. Although it did not look at specific guideline factors, the analysis did control for a range of relevant variables, including gender, ethnicity, age, local area, offence history, nature of the offence, offence seriousness, outcome, remand decision, court type, sentence and sentence length. It had a sample size of almost 90,000 children, far in excess of any sample we could achieve. The working group therefore recommended that

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<sup>7</sup> Youth Justice Board (2021) *"Ethnic Disproportionality in Remand and Sentencing in the Youth Justice System"*



at this stage the collection of data on children and young people should not be a priority area for the Council.

**Question 1: Is the Council content that while we may have some initial data available for analysis in 2023, there may be a delay in collecting larger samples of data and undertaking further quantitative analysis?**

**Question 2: Is the Council content that we do not prioritise the collection and analysis of data on children and young people at this point in time?**

#### *Qualitative data collection and analysis*

4.12 The UH team recommend several pieces of qualitative work. The first relates to female offenders and the findings from the research found that co-production partners had different opinions on gender and sentencing disparity: some sentencers argued that women tend to be treated more favourably in sentencing, while some CS organisations disagreed: for them female offenders are often blamed for ‘double deviance’ (Gelsthorpe and Sharpe, 2015)<sup>8</sup>. CCSS analysis showed that after controlling for other factors, men were more likely to receive a custodial sentence for robbery (adult) and all theft offences. For robbery (adult) offences men also received longer custodial sentences.

4.13 Differing views also emerged regarding ‘being a sole or primary carer for dependent relatives’: that this factor often helps offenders (often women, especially single mothers) ‘avoid’ a prison sentence; that sentencers might give a single mother a harsher sentence, because ‘she should have known better’; that it is not applied consistently in practice; and that because the factor is perceived to be related to women and mothers, other ‘less typical’ carers might be overlooked in practice. The analysis showed that, regardless of gender, after controlling for upward and downward factors, the odds of immediate custody for carers was lower than the odds for those without the carer status for robbery (adult) offences, receiving stolen goods, theft in breach of trust, and theft from a person. It was also associated with a shorter custodial sentence for robbery (adult), but not for any type of theft.

4.14 The recommendation is that the Council:

- Further explores sentencers’ attitudes about female offenders to understand the role their perception of equity has in sentencing. Specifically, further research could examine whether the leniency is applied equally to all women, or selectively, and

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<sup>8</sup> ‘Double deviance’ means that female offenders are perceived to be twice as deviant as male offenders, once for breaking the law, and once for deviating from traditional gender norms about how a woman should act.

whether factors such as a perception of blameworthiness, gender roles, and of the paternalistic role of the court influence the sentencing of women.

4.15 We could also explore whether there are inconsistencies in the interpretation of what is a 'carer' in qualitative work.

4.16 On age, CCSS analysis did not find a strong relationship between age and sentencing outcomes and that older age was significant for receiving custody in only two offences. Additionally, the analysis found that age as a downward factor is not used extensively for offenders older than 60. Vulnerability was also discussed in co-production meetings in the context of elderly offenders, with a few partners mentioning that the vulnerability and special needs of elderly offenders should be considered more (note that issues relating to young offenders are covered later). UH recommend the Council explores:

- Any potential bias against older offenders (for example over 60 years of age), and 'age and/ or lack of maturity' as a downward factor could be used more extensively for older offenders.

4.17 It is important, however, to note that this analysis was undertaken on 'age' rather than the current factor of 'age and/ or lack of maturity' which relates these issues to the offender's responsibility for the offence and the effect of the sentence on them. Given that the factor is different now, we can explore use of this factor in our qualitative work, as well as analysing any data that becomes available in the future.

4.18 There were also findings in relation to victims. In this study, for both robbery and theft offences, the victim-related upward factors 'targeting vulnerable victim' and 'victim particularly vulnerable' were significant in the decision to imprison, although were not always significant in predicting the length of a custodial sentence. The research report cites existing research (e.g. Walklate, 2012) that suggests that not all victims are equally valued by the criminal justice system and "*disparity is not always caused by the demographic characteristics of offenders*" and recommend the Council:

- May wish to explore the relationship between sentencing outcomes and the demographic data of victims, as well as exploring the findings in relation to the impact of 'victim-related' aggravating factors from an EDI perspective, as disparity is not always caused by the demographic characteristics of defendants; it might be caused by the characteristics of victims as well.

4.19 More generally, UH recommend investigating:

- The application of upward factors in theft cases to address potential inconsistencies highlighted in the CCSS analysis (e.g. such as why ‘previous convictions’ seems to be important in some theft offences but not others; why ‘group membership’ is important in receiving stolen goods but not in other types of theft etc).

4.20 The working group agreed that all of these recommendations can be explored as part of work we committed to in the five-year strategy: a review of the expanded explanations to look at sentencers’ interpretation and application of the relevant factors. We are currently scoping this work with a view to starting fieldwork in the new year and will include these factors. Through the use of hypothetical sentencing scenarios that we vary, we can look at the way in which different factors are applied: for example, how sentencers interpret the concept of a ‘carer’ in relation to different types of domestic situations, whether different factors are applied in different ways between male and female offenders and older and younger offenders, and whether varying the victim in a scenario makes any difference to outcomes. This work would not only inform any changes needed to individual factors and expanded explanations, but could also feed into consideration of whether separate guidance/ a guideline is needed for female offenders or young adults, which are themselves actions in the five-year strategy.

4.21 In addition, while it will not be possible in the short term to address some of UH’s recommendations through the collection and analysis of quantitative (see paragraph 4.10), we can also use our qualitative work to explore some of these concerns (for example the issue of the understanding around role in relation to group offending).

**Question 3: Is the Council content to explore the above factors as part of the review of expanded explanations?**

**Question 4: On female offenders, is the Council still content to consider whether separate guidance/ a guideline is needed after the review of expanded explanations has completed?**

4.22 Co-production partners also flagged the potential for the factor ‘Physical/ mental illness; mental disorder and learning disability’ to lead to disparities in sentencing between different groups. It was felt that offenders from ethnic minority groups may be less likely to disclose mental disorders and learning disabilities, due to cultural differences and the fear of social stigma. Others argued that lack of mental health support is becoming a general issue for all offenders, including those from White middle-class backgrounds: they noted that how to evidence mental disorder and learning disability is becoming a real challenge for all social groups.

4.23 UH acknowledge that some of these issues are addressed in the relevant expanded explanations (which link to the Sentencing offenders with mental disorders, developmental disorders, or neurological impairments overarching guideline). However, they recommend the Council:

- Might consider a qualitative study on the lived experience<sup>9</sup> of offenders with mental health issues and chronic addictions. The findings might lead to a better understanding of how sentencing can be used to enable the desistance of offenders with multiple needs.

4.24 As part of the Council's strategic actions, we have included an action in the objective relating to effectiveness to: *“Consider the possibility of future work with offenders to understand which elements of their sentence may have influenced their rehabilitation by undertaking a scoping exercise in this area”*. We plan to start scoping a piece of work in 2023 after some of our current high priority work has completed and as part of this, we could consider including questions that are relevant to the issues of mental health and addiction, including the reasons why some offenders choose not to, or cannot disclose these issues. The latter point will be important because as the report notes: *“sentencing guidelines can only ensure equal treatment for offenders who disclose mental disorder or learning disability. If offenders cannot, or choose not to, disclose mental disorders or learning disabilities, any disparity that might be caused by these situations would be largely beyond the remedy of guidelines”*.<sup>10</sup>

**Question 5: Is the Council content to address this recommendation as part of the forthcoming work with offenders on effectiveness?**

## **5 THE STEPPED APPROACH IN GUIDELINES**

5.1 Annex A outlines the findings in relation to the stepped approach in guidelines: that the seriousness of the offences has the largest effect on sentencing outcomes for some offences included in the study and that ‘upward’ factors generally had a stronger effect. Text analysis also indicates that offence specific guidelines have a greater percentage of each guideline devoted to describing upward, as opposed to downward factors. In addition, CS

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<sup>9</sup> Lived experience refers to ‘the experiences of people on whom a social issue or combination of issues has had a direct impact.’

<sup>10</sup> The Imposition review is considering issues around the point at which sentencers request PSRs and when they receive information necessary for the sentence. This includes how and when a sentencer requests a PSR that will collect information that may influence an assessment of remorse (including information on any mental or learning difficulties).

partners were generally concerned about the stepped approach in offence specific guidelines, arguing that mitigating factors might not have a sufficient impact on sentencing outcomes because they are considered only at Step 2 and that it might be harder for some groups of offenders to evidence and advocate mitigation at court (a view also put forward by some defence lawyers but disagreed with by sentencers who noted that personal mitigation was always 'at the back of their mind').

5.2 As a result, UH recommend that the Council:

- Considers adding an extra step to the existing approach in adult guidelines. In this step, sentencers would review the sentence they have arrived at with mitigating factors and the offender's personal circumstances in mind.

5.3 They also recommend piloting such a step in selected courts if the Council agrees to add this.

5.4 In the Robbery for children and young people guideline, there is text that reads:

*Step 3 – Personal mitigation*

*Having assessed the offence seriousness, the court should then consider the mitigation personal to the child or young person to determine whether a custodial sentence or a community sentence is necessary. The effect of personal mitigation may reduce what would otherwise be a custodial sentence to a non-custodial one, or a community sentence to a different means of disposal.*

5.5 The recommendations suggest that similar text in the adult guidelines would help remind sentencers of the need to reflect on the sentence and ensure that all relevant mitigation has been taken into account. It is argued that it would benefit all offenders being sentenced, but particularly those in groups where evidence suggests that there are mitigating factors that might need to be more actively considered.

5.6 A similar point was made by in the independent review of the Council conducted by Professor Sir Anthony Bottoms in 2018 in relation to effectiveness in sentencing. It was endorsed in The Prison Reform Trust's response to the Vision consultation and a Council discussion at the time about including a 'step back' concluded that the practical challenges of this (sentencers are unlikely to have time to review such evidence during a sentencing exercise, which may limit its impact), and the fact that guidelines already link to the Imposition guideline (which asks a series of questions to test whether the custody threshold has been passed, whether a custodial sentence is unavoidable, what the shortest term commensurate with the seriousness of the offence is, and whether the sentence can be

suspended) led to the suggestion not been taken forward. Furthermore, there is no evidence that sentencers do not consider mitigation when matters are brought to their attention, and our road-testing with sentencers confirms that they consistently consider whether there are relevant mitigating factors and do take these into account. We would also argue that the issue is more one of whether courts are aware of all the mitigation relevant to a case, and whether they have all the information they need to make these considerations.

5.7 The working group agreed that in light of these issues, the addition of a further step in guidelines would not necessarily change the extent to which mitigation is taken into account. However, it did feel that it was an important issue to consider and that this should be included as part of the current review of the Imposition guideline. This is considering issues around whether and the point at which sentencers request PSRs and consequently receive all the information necessary for sentencing (including personal mitigation).

**Question 6: Does the Council agree that the issue of effective consideration of all relevant mitigating factors should be explored as part of the review of the Imposition guideline?**

5.8 The working group also discussed a related point previously raised in the independent review of the Council: that of increasing the salience of mitigation by including more factors within guidelines. It has been suggested that one way of doing this is to include a mitigating 'counterpart' to an aggravating factor, where appropriate. However, it will be important to bear in mind what the 'base-line' version of the offence is, as reflected in the sentence table. For example, if the starting points for an offence are based on an offender operating alone, it makes sense to aggravate for group offending and not to mitigate for solo offending. It may be the case therefore that not all factors have a corresponding 'counterpart'. The working group therefore felt that while it would not be appropriate to systematically include 'mirror' mitigating factors for all aggravating factors, there should be thought given to whether any further factors need to be included when developing future guidelines.

5.9 The policy team has noted this suggestion and will include appropriate counterpart factors for the Council's consideration in the development of guidelines.

**Question 7: Does the Council agree that the consideration of additional mitigating factors should be considered on a guideline-by-guideline basis and as appropriate?**

## 6 GUIDELINE FACTORS AND EXPANDED EXPLANATIONS

6.1 The research highlighted a number of issues related to factors included in guidelines (see Annex A for a fuller summary of the findings). There are several recommendations for the Council to create new factors – and associated expanded explanations – or to amend existing factors in the report. For those that are adopted, we recommend including them in the review of expanded explanations in order to test sentencers' interpretation and application of the relevant factors.

### *Remorse*

The research team recommended that the Council:

- Could extend the expanded explanation for 'remorse', and include 'learning disability, communication difficulties and cultural differences' as influential factors in the evaluation of remorse.

6.2 This reflects co-production partners' views that 'remorse' might lead to disparity in sentencing: offenders from certain ethnic minority groups might find the expression of remorse challenging due to their cultural beliefs; a lack of maturity and the peer pressure of 'staying tough' might affect young offenders; and offenders with learning disabilities and communication difficulties might find it harder to appear remorseful in front of probation officers and sentencers.

6.3 If the Council did wish to revise the expanded explanation for remorse, proposed amended wording is set out below (additions in red font).

*The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction).*

*Lack of remorse should never be treated as an aggravating factor.*

*Remorse can present itself in many ways. A simple assertion of the fact may be insufficient, and the offender's demeanour in court could be misleading, due to nervousness, a lack of understanding of the system, **learning disabilities, communication difficulties**,<sup>11</sup> a belief that they have been or will be discriminated against, peer pressure to behave in a certain way because of others present, a*

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<sup>11</sup> We believe that the aspect of cultural difficulties is already covered (e.g. nervousness, lack of understanding of the system).

*lack of maturity etc. If a PSR has been prepared it will provide valuable assistance in this regard.*

6.4 The working group agreed that it would be useful to test the additional text as part of the evaluation of expanded explanations.

6.5 However, it should be noted that this will only benefit offenders if the court is aware that these issues need to be taken into account. The UH report noted that co-production partners felt that offenders from ethnic minority groups are less likely to disclose issues such as mental disorder and learning disability. As noted earlier, the Imposition review is considering issues around whether and when sentencers request PSRs and receive information necessary for the sentence. This includes information that may influence an assessment of remorse (including information on any mental or learning difficulties).

**Question 8: Does the Council agree to test the proposed additional text in the remorse expanded explanation in research?**

*Determination and/ or demonstration of steps taken to address addiction or offending behaviour*

6.6 Although CCSS analysis showed this factor was associated with mitigating against immediate custody and receipt of a longer custodial sentence for some of the adult offences included in the research, no association was found for robbery offences involving children and young people. Co-production partners also had differing views on how this may lead to disparity between groups, with some suggesting that offenders from ethnic minority backgrounds are more likely to demonstrate determination to address offending behaviour because of a strong family culture/ domestic support, and others arguing that class inequality is more relevant (wealthy defendants may be able to more easily access addiction treatment services). Some CS organisations were concerned that sentencers might not consider offenders' efforts to address addiction or offending behaviour when they tried to seek support, but appointments have been delayed by the system.

6.7 Although UH flag that the approach to the expanded explanation (see below) seems sensible, because 'the reduction of crime' is a statutory aim of sentencing in accordance with s.57 Sentencing Act 2020, they also suggest "*the relationship between addiction and the offence may be more nuanced than the current expanded explanation recognises, especially when it is intertwined with mental health issues*".

6.8 We have already flagged that we can explore related issues as part of qualitative work with offenders (see paragraph 4.24). However, given the concerns raised by CS



partners about sentencers potentially not always taking into account offenders' efforts to access help, especially when it has been delayed for reasons outside of their control, it would be worth considering slightly amending the relevant expanded explanation. The following additional text (in red) was discussed with the working group who agreed on its inclusion:

*Where offending is driven by or closely associated with drug or alcohol abuse (for example stealing to feed a habit, or committing acts of disorder or violence whilst drunk) a commitment to address the underlying issue (including where support has been sought but not yet received) may justify a reduction in sentence. This will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation.*

*Similarly, a commitment to address other underlying issues that may influence the offender's behaviour (including where support has been sought but not yet received) may justify the imposition of a sentence that focusses on rehabilitation.*

*The court will be assisted by a PSR in making this assessment.*

**Question 9: Does the Council agree to make additions to the expanded explanation for the factor 'Determination and/ or demonstration of steps taken to address addiction or offending behaviour'?**

*Difficult/ deprived background*

6.9 A field was included in the CCSS forms (but not in the guidelines) for the downward factor 'difficult/ deprived background'. Although not a perfect fit, this was used in the UH report as a loose proxy for socio-economic status (SES). Although co-production partners felt that offenders from deprived backgrounds were at a disadvantage because they would find it more difficult to demonstrate mitigating factors (e.g. an offender with fewer financial resources might find it harder to devote time to charity work and so be less able to draw on mitigation relating to good character), 'difficult/ deprived background' was not associated with the length of sentence nor with a lower likelihood of receiving a custodial sentence, for the robbery and theft offences in the study.

6.10 UH acknowledges the success of youth courts in terms of considering the individual as well as the offence. However, they feel there is more that can be done specifically for children and young people given there was no significant difference in sentencing outcomes for robbery committed by children and young people with the 'difficult/ deprived background' factor and those without. They therefore recommend that the Council:

- Considers guidance to increase the use of the notion of 'difficult/ deprived background' for robbery offences for children and young people, by adding it as a downward factor.

This issue is, however, already covered within the Children and young people guideline:

*1.13 Factors regularly present in the background of children and young people that come before the court include deprived homes, poor parental employment records, low educational attainment, early experience of offending by other family members, experience of abuse and/or neglect, negative influences from peer associates and the misuse of drugs and/or alcohol.*

*1.14 The court should always seek to ensure that it has access to information about how best to identify and respond to these factors and, where necessary, that a proper assessment has taken place in order to enable the most appropriate sentence to be imposed.*

6.11 The Robbery and Bladed articles and offensive weapons guidelines for children and young people also have a personal mitigating factor of:

*Unstable upbringing including but not limited to:*

- *time spent looked after*
- *lack of familial presence or support*
- *disrupted experiences in accommodation or education*
- *exposure to drug/ alcohol abuse, familial criminal behaviour or domestic abuse*
- *victim of neglect or abuse, or exposure to neglect or abuse of others*
- *experiences of trauma or loss*

6.12 The working group discussed this and felt that the issue was sufficiently covered and it was therefore unclear what more the guidelines can do.

**Question 10: Does the Council agree that the issue of the offender having a difficult or deprived background is already covered in the Children and young people guideline and that no further action is needed?**

6.13 Related to this, and to the earlier point about mitigation, CS partners felt that insufficient consideration of mitigating factors might have a bigger impact on certain offenders. They included within this offenders from deprived backgrounds, because compared to other offenders, it can be even harder for these groups to evidence and advocate mitigation at court (and as the CCSS findings indicated, 'difficult/ deprived

background' was not associated with the length of sentence nor with a lower likelihood of receiving a custodial sentence). A further recommendation is that the Council might:

- Consider including 'difficult/ deprived background' in the mitigation lists of theft and robbery guidelines. These factors are highly relevant in crimes for financial gain.

6.14 The Council could consider introducing a new factor that relates to an offender's 'Difficult personal circumstances or background' in adult guidelines. This would also help to address a similar issue that arose as part of the consultation on the Burglary guideline whereby the Howard League suggested that the guideline should remind sentencers of the accumulated disadvantage that Black offenders may have faced, which should be explored and factored in as a mitigating factor.

6.15 It may be appropriate to create text similar to that in the Children and young people guideline about multiple disadvantages, to be included within the adult guidelines, and which does not refer solely to Black offenders. Using inclusive language such as 'different groups within the criminal justice system', will ensure that the disadvantages faced by groups such as Gypsy, Roma, Traveller (GRT) can be taken into account.

6.16 The associated expanded explanation could therefore be something similar to:

*The court will be assisted by a pre-sentence report in assessing whether there are factors in the offender's background or current personal circumstances which may be relevant to sentencing. Such factors **may** be relevant to:*

- *the offender's responsibility for the offence and/ or*
- *the effect of the sentence on the offender.*

*There are a wide range of personal experiences or circumstances that may be relevant to offending behaviour. The Equal Treatment Bench Book contains useful information on social exclusion and poverty (see in particular Chapter 11, paragraphs 101 to 114). The Sentencing offenders with mental disorders, developmental disorders, or neurological impairments guideline may also be of relevance.*

*Courts should consider that different groups within the criminal justice system have faced multiple disadvantages which may have a bearing on their offending. Such disadvantages include but are not limited to: experience of discrimination, negative experiences of authority, early experience of loss/ neglect/ abuse, early experience of offending by family members, negative influences from peers,*

*misuse of drugs/ alcohol, low educational attainment, insecure housing, mental health difficulties, poverty, and early experience of domestic abuse in the family.*

6.17 In discussion, the working group agreed that testing such a factor as part of the review of expanded explanations would be useful but did highlight some difficulties in respect of the extent to which such a factor should impact on the sentence.

**Question 11: Does the Council wish to test a mitigating factor in adult guidelines relating to difficult personal circumstances or background in the review of expanded explanations?**

*Good character and/ or exemplary conduct*

6.18 In analysis, it was found that for harassment offences, 'good character' was associated with lower odds of immediate custody. Likewise, 'offence out of character' (the factor that was on the CCSS form) was significant for adult robbery offences. Co-production partners, however, commented that the factor 'good character and/ or exemplary conduct' is more likely to be applied to wealthier defendants, because the example given in the guideline is 'charitable work'. As a result, UH suggest that the Council:

- Considers providing more inclusive examples of good character and/ or exemplary conduct, alongside existing examples.

6.19 Consideration has been given to what suitable examples may be added, but it is difficult to propose any examples for good character that are inclusive enough. We therefore discussed with the working group removing the example from the expanded explanation, to which they agreed. We do, however, think that we should test the expanded explanation as part of our research work in order to understand more about what sentencers regard as good character when applying this factor.

**Question 12: Does the Council agree to remove the example of good character in the expanded explanation and to test this factor in research work?**

*Attempt to conceal identity*

6.20 Related to the above, it is noted that in the robbery guidelines there is an aggravating factor of 'attempt to conceal identity (for example, wearing a balaclava or hood)'. Although this is not a specific recommendation coming out of the research, it may be worth considering removing all references to 'balaclava or hood': the report cites research that suggests the word 'hood' might be more easily associated with young people from certain

subgroup cultures such as 'rap gangs'<sup>12</sup>. As we are suggesting removing the examples from 'good character', the working group agreed that it would also be appropriate to remove the examples given for this factor.

**Question 13: Does the Council agree to remove the examples of a balaclava or hood from all relevant guidelines?**

*Work or training/ loss of job or reputation*

6.21 For some offences, it was possible to look at the impact of the offender being/ potentially being in work or training. 'Currently in, or prospects of work/ training' was a significant predictor of immediate custody for all theft offences and predicted the length of sentence for receiving stolen goods; 'loss of job or reputation', predicted the length of immediate custody for theft in breach of trust. For robbery offences committed by children and young people 'currently in, or prospects of work/ training' was associated with a shorter custodial sentence. The UH team therefore suggest that the Council:

- Might consider including 'in work or training', and 'loss of job or reputation' in the mitigation lists of theft and robbery guidelines. These factors are highly relevant in crimes for financial gain.

6.22 The guidelines do not contain factors relating to in work/ training, or loss of job or reputation. If the Council wishes to include a mitigating factor related to these, potential text for an expanded explanation is:

*This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. See also the [Imposition of community and custodial sentences guideline](#).*

*Where an offender is in, or has the immediate prospect of starting, work or training this may indicate a willingness to rehabilitate and desist from future offending. The court may be assisted by a PSR in assessing the relevance of this factor to the individual offender.*

*The absence of work or training should never be treated as an aggravating factor.*

*For more serious offences where a substantial period of custody is appropriate, this factor will carry less (if any) weight.*

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<sup>12</sup> Maxwell (1991).

6.23 However, it is important to ensure that any additional factors added to guidelines do not widen disparities between any groups. Previous analysis of a small sample of sentencing transcripts conducted by the Analysis and Research team in relation to the 2020 research publication '[Investigating the association between an offender's sex and ethnicity and the sentence imposed at the Crown Court for drug offences](#)', found that among the reasons for suspending a sentence for White offenders were issues related to employment or future prospects of employment. No such reasons appeared in the list for offenders from ethnic minority groups. Similar reasons appeared when analysing the relevant transcripts that involved female offenders, but not for male offenders.

6.24 The transcript analysis was not published alongside the statistical findings of the project due to the large number of limitations associated with it: small sample sizes (31 transcripts in total), the inability to fully match other factors of the case to ensure comparability, some cases not being applicable for a suspended sentence, and the fact that absence of a factor in a particular case may mean that it was not relevant or just not noted. However, it does suggest that some caution is needed when considering including a factor relating to employment or training. Despite this, it is worth noting that in the 2014 dataset, the factor of 'currently in, or prospects of work/ training' was ticked in 11 per cent of theft forms overall and 5 per cent of robbery forms which may indicate that court will take this into account whether or not it is a factor on in guidelines

6.25 We discussed the value of producing a new factor and expanded explanation – one which would be tested in advance – with the working group. They felt that it would be more appropriate for this issue to be addressed as part of the review of the Imposition guideline. It would be possible for guidance on the custody threshold or whether or not to suspend a sentence to refer to the offender's employment or training status. Alternatively, or in addition, we could explore the issue as part of the expanded explanations review.

**Question 14: Does the Council wish to consider the relevance of work or training solely through the review of the Imposition guideline?**

**Question 15: Alternatively, or in addition, should a new mitigating factor and accompanying expanded explanation be tested as part of the expanded explanations review?**

*Exceptional hardship*

6.26 Given UH's mention of exceptional hardship being relevant for crimes involving financial gain: "*...as both robbery and theft are property offences, and people commit these*

*often for financial gain, these factors are relevant from the EDI<sup>13</sup> perspective. This is particularly important in cases that fall on the cusp of custody. If aforementioned mitigation factors can be taken into consideration, an offender might receive a community sentence instead of immediate custody. Their financial position will then not be further compromised by imprisonment”, they suggest that:*

- The Council might consider whether it is necessary to include ‘offender experiencing exceptional financial hardship’ for more theft offences and in the robbery guideline.

6.27 It should be noted that the Council has previously rejected a suggestion that this should be added to the Burglary guideline. The only guidelines where it appears is shop theft and benefit fraud where the offending may be a direct response to need. It is not apparent which other guidelines this may apply to and so we do not recommend that we include such a factor more widely. The working group discussed this and felt that these are the only two offences where this factor is particularly relevant and therefore the recommendation should not be taken forward.

**Question 16: Does the Council agree that it is not appropriate to include a mitigating factor of ‘exceptional hardship’ in more guidelines?**

*Pregnancy*

6.28 The research undertook analysis on sex/ gender and also looked at the factor ‘sole or primary carer for dependent relatives’. As part of this, the UH team reviewed the expanded explanation and noted the reference to sentencing offenders who are pregnant. In discussions, a small number of co-production partners also flagged the fact that pregnancy and maternity pose very specific challenges for the criminal justice system. The team recommend:

- Specifying pregnancy and maternity as a discrete phrase where medical conditions are referred to in the guidelines.

6.29 They feel that as it is a named Equality Act 2010 category, pregnancy should be a distinct item where medical conditions are mentioned.

6.30 In response, the Council could consider slightly amending the existing expanded explanation for sole and primary carer, removing the references to pregnancy and

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<sup>13</sup> Equality, Diversity and Inclusion.

maternity<sup>14</sup>, and create a new mitigating factor of 'Pregnancy' and an accompanying expanded explanation:

*When sentencing an offender who is pregnant relevant considerations may include:*

- *any effect of the sentence on the physical and mental health of the offender and*
- *any effect of the sentence on the unborn child*

*This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. See also the [Imposition of community and custodial sentences guideline](#).*

*For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.*

6.31 The working group agreed that this would be helpful, particularly given the open letter signed by a broad coalition of groups and individuals with an interest in this area requesting a review into bail and sentencing practices for pregnant women. It would demonstrate the Council's recognition of the importance of taking into account some of the specific issues facing pregnant offenders during the sentencing process.

**Question 17: Does the Council agree to splitting out the issue of pregnancy from the existing 'carer' factor and creating a new separate mitigating factor and expanded explanation?**

*Young adults*

6.32 CS partners praised the guideline for Sentencing children and young people for considering the '*capability*' and the '*vulnerability*' of young offenders and the '*more individualistic approach*' adopted by it. However, there was a concern related to the difference between 'emotional and developmental age' and 'chronological age': some CS partners were concerned that certain young offenders are treated as adults by criminal justice agencies because of their physical appearance ('adultification') and defence lawyers argued that young offenders who are 18 might not be mentally mature and might still face similar challenges as they did at 17. Sentencers however argued that they can use

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<sup>14</sup> "*In addition, when sentencing an offender who is pregnant relevant considerations may include: any effect of the sentence on the health of the offender and any effect of the sentence on the unborn child*".



discretionary powers to reduce the sentence even if the offender is no longer covered by the Sentencing children and young people guideline.

6.33 UH recommend:

- The Council could consider ways in which more guidance can be issued for sentencing young adults to improve consistency and precision in sentence reduction for young adults.

6.34 The need for guidance/ a guideline for sentencing young adults was raised as part of responses to the Vision consultation, notably in responses from the Howard League and Transform Justice. The strategy committed to considering whether separate guidance is needed after the evaluation of expanded explanations has reported. If further guidance is developed, the wording in the Children and young people guideline could be adapted, which currently reads:

*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.***

6.35 Similar wording could be considered for young adults. For example:

*When considering the relevant sentence arrived at by application of this guideline, the court **may** feel it appropriate to apply a reduction broadly within the region of 15 - 20 per cent (for example) for those aged 21 – 25 and allow a greater reduction for those aged under 21. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction, **the emotional and developmental age and maturity of the young adult is of at least equal importance as their chronological age.***

6.36 The working group agreed that this type of wording might be suitable but that, as stated in the strategy document, this issue needs careful consideration and should be discussed further after the evaluation of the expanded explanations has been completed.

**Question 18: Does the Council agree that we should return to the potential need to produce separate guidance on sentencing young adults after the review of the expanded explanations has been completed?**

### *Dynamic spatiality*

6.37 The research report defines this as: *“a way to characterise the frequent change in residential space of traveller groups that adopt nomadism or semi-nomadism as a lifestyle, specifically referring to the caravan dwelling households of gypsies and Irish travellers. It is used in this context to denote negation of a territorial conception of residence”*. Discussions found a consensus that travellers (as a group with unique spatial needs) are an ignored group, and they tend to be disadvantaged in sentencing. It was felt that their unique needs can be met by taking it into account when ‘no shows’ at a hearing are flagged up as an upward factor. For example, an offender might not have turned up in court due to a need to shift their caravan at short notice, or because they didn’t receive the summons in the post due to frequent changes of location. UH recommend:

- The Council could consider a downward factor based on dynamic spatiality, giving allowance for lateness and uncertainty in response and presence.

6.38 Consideration was given to developing a mitigating factor relating to the difficulty that groups such as GRT may have with attending court when required because of frequent changes of address or moving at short notice. However, this would only be relevant in situations where lateness or failure to attend causes disadvantage in the sentencing process. There is no aggravating factor relating to failure to appear at court as this would be dealt with by the issuing of a warrant and/ or laying a Bail Act offence. The most obvious consequences of this would be a charge of failure to surrender to bail and/ or loss of credit for a timely guilty plea. In the former case (if the offence was made out) the relevant guideline has a low culpability factor of ‘Reason for failure to surrender just short of reasonable cause’ which could be relevant. The Reduction in sentence for a guilty plea guideline does not specifically address the issue of an offender who does not attend (or enter a plea by post) at the first hearing, but in a situation where an offender had not received court documents the normal practice would be to allow credit if a plea is entered on the first occasion that they become aware of court proceedings. It is therefore not immediately apparent how the difficulties faced by GRT groups can be addressed through sentencing guidelines.

6.39 The working group discussed this and felt that it would not be appropriate to introduce a mitigating factor relating to dynamic spatiality. However, it did feel that the difficulties associated with not having a fixed address were worthy of consideration. One suggestion was that this could potentially be addressed as part of the review of the Imposition guideline with regard to the suitability of community order requirements. There

was also a suggestion that the implications for the Guilty plea guideline should be considered.

**Question 19: Does the Council have any suggestions as to how the difficulties encountered by those who frequently change location can be reflected in sentencing guidelines?**

## **7 THE BROADER WORK OF THE SENTENCING COUNCIL**

7.1 UH discussed broader aspects of the work of the Council in co-production meetings, namely: accessibility and usability of the sentencing guidelines and their impact on the process of sentencing; the guideline development process; and the achievement of Equality, Diversity and Inclusion (EDI) ambitions embedded in the strategic objectives of the Sentencing Council.

### *The format and accessibility of guidelines*

7.2 There were criticisms of the format of the digital guidelines, for example: the use of drop-down boxes, the length of some of the expanded explanations making them difficult to read, the problems of having multiple windows of information open on the screen. UH raised the issue of awareness of and familiarity with expanded explanations by defence lawyers and sentencers. The general consensus was that there does not seem to be a need to refer to the expanded explanations. Sentencers reported that they usually rely on the Probation Service to get information about personal mitigating factors, but they felt that report writers are not necessarily familiar with the sentencing guidelines and/ or expanded explanations.<sup>15</sup>

7.3 UH reported prompted and unprompted references to the Equal Treatment Bench Book (ETBB) made by sentencers and sometimes by CS representatives. Several sentencers used it regularly, while also familiarising themselves with the contents of the full volume; other sentencers used only some sections of it, as and when the situation warranted; and others did not recall using it much at all. Although not all sentencers use the ETBB, those who have consulted it speak highly of its practicality and comprehensiveness on the subject of fair treatment and the need to avoid disparity amongst different individuals.

7.4 UH recommended that the Council:

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<sup>15</sup> The Probation Service was not independently involved in this research, and therefore, the above comment needs to be understood as reported by the sentencers.

- Considers changing the format of the display of expanded explanations on the webpage, for example by making them automatically displayed and continuous, below the factor.
- Considers more efficient ways of directing sentencers to the ETBB, which gives sentencers more specific guidance on how to ensure 'fair treatment' and avoid 'disparity' of outcomes for different groups.

7.5 We are currently working with contractors on a user-testing project. This project is exploring how sentencers access and use the sentencing guidelines and navigate the Sentencing Council website, including linking to the ETBB. The findings of this work will inform future development of features on the website, including the expanded explanations.

7.6 This work, taken with the review of the expanded explanations, will enable us to come back to the Council with proposals to address the issues raised relating to awareness, format, accessibility and content.

7.7 In addition, the Imposition guideline project will consider whether more direct reference to EDI issues and the ETBB would be beneficial in an updated version of this guideline. If indeed there is a lack of familiarity amongst sentencers, then further actions point towards training, for which Judicial College is responsible.

**Question 20: Is the Council content to consider these issues once the review of the expanded explanations and user testing have been completed?**

*Engagement and training*

7.8 CS partners suggested that sentencers need to have some awareness about the 'lived experience' of the different groups they represent. They also suggested that a better way to increase use of expanded explanations would be through 'lived experience' training delivered through guideline training. UH recommended that the Council:

- Considers combining lived experience training with guideline training (it is noted however that judicial training falls outside the Council's realm of responsibility).

7.9 In terms of guideline development, CS partners were keen to understand more and to get more involved in the development process. CS partners felt that EDI concerns were not manifested clearly as levers for guideline development, and there was a need to develop standards of evaluation for EDI in the development process. Partners wanted to know what criteria were used in guideline evaluation, and the standards used for assessing guideline effectiveness (generally and for EDI specifically).

7.10 It was found that public consultations do not reach all of the CS organisations involved in the study. Lack of resources and disruption caused by the pandemic has disrupted CS organisations working in criminal justice issues, and there would be benefits to the Council engaging more proactively with them on EDI issues.

7.11 A number of organisations would welcome one-to-one engagement with the Sentencing Council in their work, in order that it better understands lived experience. Co-production partners felt the Council's strategic objectives will be best served by more direct engagement with EDI lived experience.

7.12 As a result of these findings, UH recommend the Council:

- Might consider a more integrated approach to developing sentencing guidelines, as sentencers are not the only participants of the sentencing process. It should assess if there are better ways to communicate, engage and collaborate with the Probation Service, Youth Offending Teams, prosecutors, and defence lawyers, all of whom participate and contribute to decision making in sentencing.
- Might want to increase the use of real-life case studies in public communication and education, to illustrate how guidelines are interpreted and applied at court, and how they shape the outcome of sentencing through an adversarial procedure. The Council could provide a fuller picture, so that audiences wider than those who regularly use sentencing guidelines, such as offenders (especially those with protected characteristics), victims (especially those with protected characteristics), their families, relevant non-government organisations (NGOs) and professionals and the general public, can better relate their own experience to the guidelines.
- Clarifies the standards for guideline evaluation. For example, what are the criteria for 'effective' guidelines? How does the Council determine whether a guideline is 'effective', particularly from the EDI perspective? These standards should be communicated more clearly to relevant CS organisations, minority groups, and members of the public. By doing so, greater transparency can be achieved, which is crucial for the good reputation of the Council and for improving confidence in the criminal justice system.
- Further expands stakeholder engagement, through more diverse means, including more targeted consulting, one-to-one meetings or targeted focus groups.

7.13 In relation to the communication-related recommendations, for example broadening our concept of guideline 'consumers', finding more diverse ways to communicate with the general public and looking at how we can engage with stakeholders in ways that facilitate their participation in the development of sentencing guidelines, these will feed into a review

of the Confidence and Communication Strategy. This is in addition to the findings from the public confidence research that we are in the process of completing (a draft report has recently been commented on by the Council and is due to be published later in the month).

7.14 On using a more integrated approach to developing guidelines and assessing if there are better ways to communicate with other ‘consumers’, such as the Probation Service, Youth Offending Teams, prosecutors and defence lawyers, the Imposition project is engaging specifically with a variety of these consumers for early input pre-consultation. The Council always consults on proposed guidelines, and all consultations are open to anyone to contribute, including members of the public. The OSC has refined our project initiation process to include detailed consideration of how other consumers, specifically offenders (especially those with protected characteristics) and their families, victims (especially those with protected characteristics), and members of the public can be engaged with at an earlier stage in the consultation process, as and when it is relevant and beneficial.

7.15 In light of stakeholders’ remarks made in response to the Vision consultation, work has also already been commissioned by the Equality and Diversity working group to review our approach to identifying and targeting audiences for consultation, with a view to eliciting a broader and more representative body of responses, including from those with lived experience.

7.16 The recommendation that we should use more scenarios in our communications has been considered before by the Council and is not without its challenges. There is, for example, no such thing as a ‘typical’ case. However, we will explore further the potential of using stories and examples, where appropriate, to help illustrate our communications. Since July 2022, sentencing remarks from Crown Court hearings have been filmed for broadcast; the Council is already directing website visitors to these videos, which illustrate very clearly the role of guidelines in sentencing. We will also be promoting the new version of You Be the Judge to a wide range of audiences when it becomes available online, which we anticipate will be in 2023.

7.17 On standards for evaluating guidelines, as outlined in our response to the Vision consultation, we are considering how we define the ‘success’ of our guidelines and will continue to do so. Where data exists, our work takes account of issues related to sex and race and we are actively seeking to improve the data we have in this area (e.g. in our forthcoming data collection, we have reinstated collection of the case Unique Reference Number to enable us to link to MoJ data on ethnicity).

7.18 The fact that judicial training is outside the remit of the Council also means that we cannot directly action the recommendation related to lived experience training. We have,

however, made enquiries as to what might already be available on this. It appears that there is unconscious bias e-learning on the LMS (Judicial College site) which talks about not making assumptions about people and following structured decision making, but nothing specifically on 'lived experience' training. We could therefore feed this suggestion in as part of future discussions with the Judicial College.

7.19 On lived experience more generally, the Council wishes to engage more directly with those with lived experience in the development of its guidelines. The Council intends to reach out to those with lived experience in the upcoming Imposition guideline review, and if successful will continue to reach out to those with lived experience for input into all relevant guidelines.

**Question 21: In relation to finding more diverse ways to communicate with the general public, engaging with stakeholders in the development of sentencing guidelines, and exploring audiences to target and communicate from an equality and diversity perspective, is the Council content to consider these as part of a review of the Confidence and Communication Strategy?**

**Question 22: Is the Council happy to continue considering how we measure the 'success' of our guidelines through ongoing work, particularly work in the analytical team?**

**Question 23: Is the Council content for us to feed in suggestions for lived experience training to the Judicial College and to consider what else might be done as part of the review of the Imposition guideline?**

**Question 24: Based on the findings from this research, do members feel there are any other issues to consider and action?**

## **8. NEXT STEPS**

8.1 We plan to publish the full report from the research in early January, alongside a short response document that will be circulated for comment in due course.

8.2 Note that as the actions will be picked up as part of various on-going projects - including the revision of the Imposition guideline, the review of expanded explanations, user testing, the Confidence and Communication strategy, and potentially the next round of miscellaneous amendments - we are not proposing that we come to the Council with a suite of EDI changes to be consulted on as a single project. Rather the recommendations that the Council wishes to pursue will be picked up across the various cross cutting issues arising

from this paper: while some of the actions may be stand alone or one-offs, many of them will be ongoing and will be incorporated into the general approach to development of guidelines, work on communications and public confidence and current and future analytical projects. We will therefore monitor progress across all these areas and update the working group in early 2023.



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

**18 November 2022**  
**SC(22)NOV04 – Motoring offences**  
**Rebecca Crane**  
**Ollie Simpson**  
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## **1 ISSUE**

1.1 First meeting considering responses to the motoring guidelines consultation which closed on 29 September. This paper focuses on the broad themes emerging from responses on standard of driving offences (involving dangerous driving and careless driving).

## **2 RECOMMENDATIONS**

2.1 That Council considers the main themes emerging from responses to the consultation, ahead of more detailed drafting decisions in future meetings.

## **3 CONSIDERATION**

3.1 We received a total of 305 responses to the consultation. 159 of these were individualised, standalone responses. 91 were responses with a focus on road safety from a cycling perspective calling for lengthy driving disqualifications. 55 were virtually identical responses expressing concern about road safety and offering general support for the guidelines.

3.2 Several responses were delayed, partly as a result of the consultation being held over the summer, partly because of the period of national mourning. The Justice Select Committee has yet to provide a response.

3.3 We also conducted extensive road testing with sentencers over the consultation period. This involved interviews with 22 magistrates and 22 judges, looking at scenarios across five offences. The findings of this road testing are being finalised, involving as they do writing up the results of a large number of interviews.

3.4 This paper therefore examines some of the clear overarching themes arising from the responses received and analysed on the standard of driving offences, with the intention that we return to detailed drafting points at future meetings. Because of the number of guidelines, their interaction with one another, and the volume of responses, the process of getting to a definitive guideline is likely to be iterative.

*Culpability factors*

3.5 The culpability factors we proposed for dangerous driving offences are reproduced below:

<p><b>A-</b> High culpability</p>	<ul style="list-style-type: none"> <li>• Deliberate decision to ignore the rules of the road and disregard for the risk of danger to others.</li> <li>• Prolonged, persistent and deliberate course of dangerous driving</li> <li>• Consumption of substantial amounts of alcohol or drugs leading to gross impairment</li> <li>• Offence committed in course of police pursuit</li> <li>• Racing or competitive driving against another vehicle</li> <li>• Disregarding warnings of others</li> <li>• Lack of attention to driving for a substantial period of time</li> <li>• Speed greatly in excess of speed limit</li> </ul>
<p><b>B-</b> Medium culpability</p>	<ul style="list-style-type: none"> <li>• Brief but obviously highly dangerous manoeuvre</li> <li>• Engaging in a brief but avoidable distraction</li> <li>• Driving knowing that the vehicle has a dangerous defect or is dangerously loaded</li> <li>• Driving at a speed that is inappropriate for the prevailing road or weather conditions</li> <li>• Driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs</li> <li>• Disregarding advice relating to driving when taking medication or as a result of a known medical condition which significantly impaired the offender's driving skills</li> <li>• Driving when knowingly deprived of adequate sleep or rest</li> <li>• The offender's culpability falls between the factors as described in high and lesser culpability</li> </ul>
<p><b>C-</b> Lesser culpability</p>	<ul style="list-style-type: none"> <li>• Standard of driving was just over threshold for dangerous driving</li> <li>• Momentary lapse of concentration</li> </ul>

3.6 A significant number of respondents believed that several of the Culpability B factors for dangerous driving should be moved to Culpability A. By way of a few typical examples:

“I consider some which have been ranked medium as warranting moving to high. In particular, those that involve a specific and deliberate decision, such as engaging in a brief but avoidable distraction, or knowingly driving when deprived of sleep. These are a very specific decision to operate machinery in an obviously dangerous manner.” – *Member of the public*

“Anyone who is over the limit and has made a decision to get in a vehicle, drive and kill someone should be placed in the high culpability category. I don’t think this should be in the medium category at all.” – *Christopher Barrow (widower of RTC victim)*

IAM RoadSmart agrees with the proposed culpability factors for this and other guidelines involving dangerous driving. However we do feel that some of the medium culpability factors are based on deliberate intent and should be reconsidered as potentially requiring 'upgrading' to High Culpability. These would be: driving knowing that the vehicle has a dangerous defect or is dangerously loaded; disregarding advice relating to driving when taking medication or as a result of a known medical condition which significantly impaired the offender’s driving skills; driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs; and driving when knowingly deprived of adequate sleep or rest.” – *IAM RoadSmart*

“We do not agree with all of the behaviours listed in the medium culpability category. These are again all examples of behaviour which created serious dangers for other road users, but we believe that the sentencing council should consider moving some of the factors from the medium culpability to the higher culpability category, as they are based on deliberate decisions. For us, driving knowing that the vehicle has a dangerous defect or is dangerously loaded, disregarding advice relating to driving when taking medication or as a result of a known medical condition which significantly impaired the offender’s driving skills, driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs and driving when knowingly deprived of adequate sleep or rest should be considered as a potential high culpability factors. Choosing to drive in the knowledge of impairment is a deliberate decision that disregards the safety of others.” – *Royal Society for the Prevention of Accidents*

3.7 The road safety charity Brake also provided a list of factors that they considered should be considered as high or very high culpability: although worded differently this included many of the factors we have proposed as medium culpability.

3.8 Clearly, recategorizing a number of elements from medium to high could have a substantial impact on sentences imposed and the impact on the prison population. We have already assessed the impact of the revised causing death by dangerous driving guideline at 260 prison places per year and at 80 additional places for causing serious injury by dangerous driving.

3.9 There were some suggestions for reworking the levels. Brake and Roadpeace thought there should be a “very high culpability” level, to place causing death by dangerous driving on a par with manslaughter. There was also the suggestion from a couple of respondents (including Christopher Barrow, cited above) that only two levels of culpability were needed: a “high” category for particularly egregious driving and “all other cases”, with sentence levels corresponding to our proposed two higher levels.

3.10 There may be a case for this latter point: where someone’s driving has fallen far below the standard one would expect of a careful and competent driver resulting in a death, there is arguably a floor underneath which we should not go. A “momentary lapse of concentration” is more properly an example of careless driving by definition, perhaps.

3.11 Equally, there may be a degree of semantics in play. Where someone is found to be in the medium category we propose a starting point of six years’ custody, with a range up to nine years, which represents a substantial prison sentence. The “lesser” range may be rarely used, but it is still useful to cover those cases which may result from fleeting but undeniably dangerous mistakes.

**Question 1: does the Council want to consider in principle moving some of the listed medium culpability elements to high (noting the impact on prison resources)?**

**Question 2: does the Council wish to retain a three level culpability model?**

3.12 Many of the above comments about moving medium culpability elements to high also held true for respondents on careless driving. Our proposed culpability table was as follows:

A - High culpability	<ul style="list-style-type: none"> <li>• Standard of driving was just below threshold for dangerous driving and/or includes extreme example of a medium culpability factor</li> </ul>
B - Medium culpability	<ul style="list-style-type: none"> <li>• Unsafe manoeuvre or positioning</li> <li>• Engaging in a brief but avoidable distraction</li> </ul>

	<ul style="list-style-type: none"> <li>• Driving at a speed that is inappropriate for the prevailing road or weather conditions</li> <li>• Driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs</li> <li>• Driving vehicle which is unsafe or where driver's visibility or controls are obstructed</li> <li>• Driving in disregard of advice relating to the effects of medical condition or medication</li> <li>• Driving whilst ability to drive impaired as a result of a known medical condition</li> <li>• Driving when deprived of adequate sleep or rest</li> <li>• The offender's culpability falls between the factors as described in high and lesser culpability</li> </ul>
<b>C – Lesser culpability</b>	<ul style="list-style-type: none"> <li>• Standard of driving was just over threshold for careless driving</li> <li>• Momentary lapse of concentration</li> </ul>

3.13 There was some concern about confusion between the culpability elements for careless driving and for dangerous driving.

“There is much overlap with the proposed culpability factors for careless driving. We understand that there will be overlap but urge that greater clarification, including examples, is given. This problem is aggravated by the overlap with the CPS charging standards.” - *Action Vision Zero*

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

“The culpability factors for careless driving should clearly be seen as being less onerous and should not include any of the culpability factors for dangerous driving ...Whilst we agree with most of the culpability factors [for dangerous driving] ...we believe the following to be careless rather than dangerous driving:

- brief but avoidable distractions

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

...we also believe some of the culpability factors for careless driving to be dangerous rather than careless. A clear distinction is needed between making a mistake and risky behaviour, for this reason there cannot be any overlap in the culpability factors for dangerous and careless driving.” – *Nicole and Chris Taylor, parents of an RTC victim*

“I strongly disagree with all the medium factors for death by careless driving. Most of these could be placed into Dangerous Driving factors, and in many circumstances would be more appropriate there. If unsure whether a case is Death by Careless driving rather than DD when someone has either fallen asleep at the wheel or using a handheld device, having these factors written down as careless driving will only muddy the water further. These factors do not need to be written down explicitly, but should rely on caselaw and the discretion of the prosecution and court.” – *Member of the public*

3.14 Professor Sally Kyd of Leicester Law School was more relaxed about the overlap but still expressed concern about how this might affect prosecution decisions:

“These factors will inevitably demonstrate overlap with causing death by dangerous driving [CDDD]. This is appropriate, given that where a jury has failed to convict of CDDD, despite the evidence of a factor listed by the CPS as providing evidence of dangerous rather than careless driving, it is important that such a case is catered for in the sentencing guidelines (although in many cases that would warrant it falling in level A High Culpability). I’m not sure about two of the factors within medium culpability:

i) Driving whilst impaired by alcohol or drugs. This would presumably mean that the requirements of the s.3A offence could be made out, so I would not expect this factor to be needed here?

ii) Driving vehicle which is unsafe or where driver’s visibility or controls are obstructed. Technically, there is no equivalent provision to s.2A(4) for careless driving. This is, in my view, a gap in the law, but I’m not sure it is right that sentencing fill this gap without legislation being introduced. I’m not sure that this factor is needed.

I wonder why the Sentencing Council has not drawn on the factors in the CPS legal guidance here, as they have done for CDDD?” – *Professor Sally Kyd*

3.15 There may be a case that there is a confusing amount of overlap between the careless and dangerous guidelines, which feeds into a wider picture of uncertainty about the two standards. Our strongest counter-argument would be that it is not the guidelines' role to provide a taxonomy of bad driving, but that we are listing elements which may be common across both standards depending on the context. For example, someone may drive dangerously whilst deprived of sleep, or they may drive carelessly whilst deprived of sleep – by the point of sentencing, that distinction will have been decided by prosecutors and/or courts based on factors which may or may not be referenced in the guidelines.

3.16 A couple of responses hint at a more radical approach:

“Just merge it with Dangerous driving and just have ‘causing death (or life changing injury) by driving’” – *Member of the public*

“Why do we have Dangerous and Careless Driving? Have one offence of Causing Death by Driving.” - *Roadpeace*

Notwithstanding, these may be referring to legislating for one offence, one could envisage a single guideline that had (for example) four culpability levels (higher dangerous, lesser dangerous, higher careless, lesser careless) and three harm levels (death, high harm, all other cases). Aggravating and mitigating factors could be common across them all.

3.17 In any case, were we to look again at distinguishing the culpability factors between careless and dangerous driving this would represent a fairly fundamental overhaul of our proposals. It may involve further resentencing, road-testing and even needing to go out again for some form of consultation.

**Question 3: does the Council wish to look at creating a greater distinction between dangerous and careless culpability elements?**

3.18 There are a number of other specific issues that recurred in responses and in road testing. We can return to these when considering specific drafting points, but as an overview they included:

- use of a mobile or handheld device should count as a high culpability factor;
- many of the terms are too subjective, and there should be greater specifics over (eg) excess speeds;

- uncertainty as to the difference between a “momentary lapse of concentration” and “engaging in a brief but avoidable distraction”;
- victim being a vulnerable road user should be a step one consideration.

**Question 4: Council is welcome to give preliminary views on these further proposals for culpability (although I plan more detailed discussion for future meetings).**

### *Harm*

3.19 Virtually all respondents agreed to our proposal for there being one level of harm for cases involving death, and with our proposed approach to cases involving multiple deaths . This said

*“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.”*

3.20 A majority were content with our two level approach to harm. A few did wish to see a three box system:

“The definition of Category 2 is too broad. At the top end you could have a life threatening injury that the individual does recover from after a lengthy recovery process, but in the meantime has lost their job and/or experienced other significant impacts on their personal circumstances. That would be life changing but would not meet the criteria for Category 1 because they do eventually get back their health and their potential to regain employment. At the bottom end of the range there would be injuries that the individual recovers from without permanent impact on their life.” – *Member of the public*

“There should be 3 sections of harm as it is for a grievous bodily harm (GBH) offence. This range of harm levels as seen with GBH and best reflect the reference to the impact of the victim... If there are 3 levels of harm as seen with GBH, then the lowest level of harm should include some level of community order sentencing within the range... providing a category 3 of harm (like with GBH) would provide a more inclusive sentencing structure. I note this particularly when it comes to serious injury by careless driving as there are only 2 harm levels and the second (which is lower) still only provides a custodial sentence rather than having a range that does include community order sentencing (to be used in discretion on a case by case basis alongside its mitigating factors – if there are any). - *Roadpeace*



For this offence, the council have decided to suggest harm factors that are said to mirror those in the GBH guideline. However, both the s.18 and s.20 OAPA guidelines have three categories for harm covering particularly grave injury, grave injury, and all other cases.

If the harm factors for this offence are meant to mirror that guideline it may be logical to have three categories of harm, not two and to include in a new category 2, offences which gave injury or result in permanent irreversible injury or conditions not falling in category 1, with category 3 reserved for all other cases. – *HM Council of District Judges (Magistrates' Courts)*

“It is not entirely clear why there are only two levels of harm whereas the equivalent non-motoring offence (S.20 GBH) has three levels. It appears that custody is the default position – absent any significant mitigating factors that takes the sentencer out of the sentencing range.

I would support three levels of category harm with starting points and sentencing ranges the same as s.20 OAPA – GBH offence. I cannot understand the rationale for departing from the s.20 guideline considering that the level of injury will be broadly commensurate and the level of mens rea, whilst not exactly similar, is broadly the same (recklessness v dangerousness).” – *Dr Adam Snow*

3.21 Some judges and magistrates in road testing were also concerned about there being only two categories, and that there is too big a gap between the top level and “all other cases”, and thought there should be a middle category to cater for the wide varieties of injury that might result from a collision.

3.22 The West London Bench considered the matter carefully:

“We are not convinced that just because the maximum penalty for this offence (and that for “Causing serious injury by careless driving”) is relatively low compared to other standard of driving offences, a two-level harm approach is satisfactory. We believe it really depends on whether (a) a two-level harm approach gives sufficient sentencing flexibility for the types of cases that will be charged under this offence; and (b) a three-level harm approach offers no real advantages over two levels or makes it unnecessarily complicated by introducing the extra level.

[...]

On careful reflection, it does seem unnecessarily complicated to try and split such injuries into two further categories, as we find it difficult to make distinctions between “grave injury” or “really serious injury or harm”. We therefore agree with just one other harm level (Category 2) to cover all other cases. In this case, Category 1 harm covers serious long-term, life-changing injuries and Category 2 harm covers all other grave and really serious injuries, which could include permanent, irreversible injury but which is not of a life-changing nature. Perhaps it would help sentencers to have information of this sort spelled out for Category 2, so the distinction was clearer.” – *West London Magistrates Bench*

3.23 On balance the weight of opinion is in favour of a two harm model, although we can return in detail to the point if necessary.

3.24 The Criminal Sub-Committee of the Council of HM Circuit Judges questioned why the approach to multiple deaths would not apply to cases involving multiple injuries:

“There will be many cases in which more than one person receives serious injuries – and whilst such instances will no doubt result in separate counts the same applies in relation to multiple fatalities. For consistency we would suggest that some similar wording should apply in the case of multiple injuries as for multiple deaths.” - *Criminal Sub-Committee of the Council of HM Circuit Judges*

3.25 The most obvious difficulty here is that the courts will be constrained by the maximum penalties (five years for causing serious injury by dangerous driving, two years for the new offence of serious injury by careless driving). Nonetheless, multiple injuries could adjust a starting point upwards within or out of a *category* range, our proposed levels allow for headroom of a year above the offence range to cater for this, and there is force in the logic of having a consistent approach.

**Question 5: does Council wish to consider further the case for a three harm model in cases of serious injury?**

**Question 6: does Council wish to apply the upwards adjustment wording for multiple death cases to cases involving multiple injured victims?**

*Sentence levels*

3.26 Our proposed sentence levels for the standard-of-driving offences are set out at **Annex A**. As a very high level summary, the balance of opinion was that we had got the levels for causing death by dangerous driving correct (albeit some, such as Brake, wished to see sentence levels exactly match those for manslaughter). Likewise for causing death by careless driving under the influence of drink or drugs.

3.27 Views were mixed on the levels for other offences. In terms of pure numbers, most thought that sentences were too lenient. Some respondents acknowledged that we were constrained by the statutory maximum penalty, others didn't. Some asked why we were not proposing ranges which went up to the maximum:

"In respect of the offence of Causing Death by Careless Driving whilst Parliament considered that the maximum sentence should be one of 5 years imprisonment the Guideline suggests that 4 years would be appropriate to deal with the worst example of this offence. It would appear that Parliament's proposed maximum sentence has been deliberately ignored... Should the Council choose not to extend the range of sentence to 5 years could they provide guidance when such a sentence would be appropriate? ... The present Council proposals in the above ... examples cannot be said to follow Parliament's will and it is unclear why this should be the case." – *Nicholas Atkinson KC*

3.28 Crucially, many groups, including road safety groups and the families of victims, argued that sentence levels at the lower end of culpability were too high.

"The proposed levels [for causing death by careless driving] all have custody as a starting point with a community order only included in the range proposed for the least culpability level. As shown above, custodial sentences are rarely used with causing death by careless driving convictions. Only one in four drivers convicted of this offence went to prison in 2021. We have argued that careless driving includes human errors and lapses. The Safer System approach, adopted by the DfT and transport authorities across the country, acknowledges people make mistakes and aims to design a transport system so that these mistakes do not prove fatal or serious. We do not think it fair to send drivers to prison because transport operators, politicians and policy makers have allowed excess risk in our system." – *Action Vision Zero*

"The death by careless driving [guideline] does need to include more community orders and not solely custodial orders, especially when it falls under lesser culpability... Overall, these sentencing guidelines [for causing serious injury by dangerous driving] reflect custody sentencing as the default rather than having some sort of community order at the lowest levels of culpability (C – Lesser Culpability) to take into account mitigating factors for example. If there are 3 levels of harm as seen with GBH, then the lowest level of harm should include some level of community order sentencing within the range." - *Roadpeace*

“We believe careless driving should mainly be punished with non-custodial sentences. However, we also believe some of the culpability factors for careless driving to be dangerous rather than careless.” – *Nicole and Chris Taylor, parents of RTC victim*

I think [the penalties for causing death by careless driving] are too high. The proposed levels all have custody as a starting point with a community order only included in the range proposed for the least culpability level. Whilst there was a need to close the gap between causing death by dangerous driving with a higher maximum penalty, and the sentencing for this offence, I think this goes too far. Whilst a prison sentence is appropriate for level A High Culpability, it is not necessarily appropriate for level B medium culpability...

The proposed sentence levels [for causing serious injury by careless driving] are the same as for dangerous driving. If a driver falls far below the standard of a competent and careful driver, they will always display a higher level of culpability than someone who just drives below the standard of a competent and careful driver, no matter the outcome of the driving. Whether a driver causes a RTC is beyond their control (it is reliant on the reactions of other road users in many cases), as is the severity of any injuries that result, as well as whether anyone luckily escapes without injury. The worse the standard of driving, the more likely a collision will ensue, with the risks involved. I would therefore wish to see the sentencing for this offence being below that of dangerous driving, even though the maximum penalty is the same.” – *Professor Sally Kyd*

3.29 Both HM Council of District Judges (Magistrates’ Courts) and the Magistrates’ Association took issue with our description of the proposed increases for causing death by careless driving as a “modest uplift”. However the former agreed with the increase, and the latter were unclear whether they supported it or not.

3.30 Importantly, the above comments come in the context of seeking a more robust use of disqualification (see below).

**Question 7: without prejudice to further discussion on specific sentencing levels, does Council wish to consider the principle of adjusting levels downward for lower culpability careless driving?**

*Aggravating and mitigating factors*

3.31 We can consider the detail of individual step two factors at the next meeting. Some themes emerged from responses which may be useful to summarise:

- The wording “impeccable driving record” was thought to be unclear, a finding confirmed in road testing;
- several standard personal mitigating factors were thought to be inappropriate – for example, if someone had a mental condition some queried whether this was in fact an aggravating feature of the offending;
- similarly for youth and immaturity, some suggested that this was irrelevant once an offender had reached the legal age to drive and had passed their test;
- several respondents queried whether the victim being a close friend or relative really merited being a mitigating factor;
- some thought that whilst failing to assist should be aggravating, providing assistance at the scene was simply what one would be expected to do;
- as mentioned above, some road safety groups argued for victim being a vulnerable road user to be moved to step one.

### *Disqualification*

3.32 Perhaps the clearest and most consistent message from responses was about the use of disqualification. The following typifies approaching 100 responses received on the subject:

“I am writing to urge you to include the use of driving bans in the sentencing of motoring offences revised guidelines. I would like to make the following points:

Driving bans would be a just and effective sentence for those who have committed 'dangerous' driving offences, but who are not evidently 'dangerous' people, and who therefore do not need to be locked up for the public's protection.

Long prison sentences should be reserved for more obviously 'reckless' offenders, including those who have flouted previous driving bans - the case of Christopher Gard exemplifies why this is essential.

Using driving bans more widely could result in jurors being likely to convict for 'dangerous' driving offences in the first place, ensuring that the 'objective' definitions of 'careless' and 'dangerous' driving work as Parliament intended when it created them in 1991.”

3.33 Here is a sample of what others said:

“Disqualification, when enforced, prevents reoffending for the duration of the term of the ban. If coupled with restorative justice, training and competency assessment it can also encourage considerate and legal behaviour.

We note that the Sentencing Council offers little guidance on variable, including longer, periods of disqualification and advises that disqualification be minimized in cases where it might impact the offender's employment or other responsibilities – a consideration that might also be applied to custody. Such advice needs re-assessment: if the court is told that an offender's profession requires regular driving then it needs to be assured that the risk of re-offending has been minimized by, for example, training and competency assessment. While in some cases retaking a driving test is mandated, current advice does not, for example, suggest a service vehicle competency assessment or completion of a Safer Urban Driving course as a part of the penalty for professional drivers.

The Sentencing Council advises against using longer driving bans because offenders may choose to disregard them and drive without the authority to do so. Enforcement is matter for the police and legislators and we are concerned that the Sentencing Council's perception of ineffective enforcement should then be considered a factor in determining penalties. The Sentencing Council may wish to advise police and legislators to consider new technologies to monitor and enforce against disqualified drivers using vehicles instead of suggesting more lenient penalties because it considers enforcement is inadequate." – *London Cycling Campaign*

"I cannot see anything about length of driving bans on this document, and this should form part of the approach. Driving bans should have a minimum of 5 years imposed for such offences, with disqualifications for life in relation. There should be an option of lifetime bans, or at least lifetime bans with review every 5-10 years. There should definitely be an option of banning someone from driving larger vehicles, especially LGV, PSV, HGV as a result of causing death by dangerous driving. It should be that anyone convicted of such offences should expect a lifetime ban from this type of vehicle" – *South Yorkshire Police*

"We welcome the inclusion of disqualification and the recognition that it is a sentence. This is a step forward as it has previously been seen as an "ancillary penalty". But in practice, this is a second class sentence with much less information given on its use.

We do not support the guidance saying that the disqualification period should be "not longer than necessary". We urge the Sentencing Council to make more of disqualifications as a sentence, with

- Long disqualification periods used for drivers who have caused death or serious injury

- More bans are given with any exemption requiring the use of telematics such as speed limiters, journey data recorders, or electronic tags
- Judges and magistrates trained in the importance of disqualification as well as the road user hierarchy of responsibility” – *Action Vision Zero*

“I do not disagree with the guidance that is provided. I do think, though, that more work needs to be done on this question. We need to know more about how sentencers currently use disqualification and how they determine lengths of disqualification. How much consistency is there in sentencing practice? What can be done to reduce inconsistency, as sentencing guidelines has achieved in relation to imprisonment. It is true that it is complex (the related work being done by the Sentencing Council to clarify the wording of guidance on statutory minimum periods of disqualification demonstrates this and is welcomed) but an attempt might be made to try to set out more prescriptive guidance. In my view, a change in attitude to disqualification is needed. Driving is a privilege and not a right; it is justifiable to remove that privilege where a driver has shown they have abused that privilege, and it is a far less burdensome way to incapacitate a driver, compared to imprisonment. So it should not be simply about adding disqualification to a prison sentence, and ensuring that provisions are followed to ensure the offender is disqualified after release from prison, but could be about replacing some of the period of imprisonment with a longer period of disqualification in appropriate cases. It is certainly the case that sentencers should not be reluctant to impose life bans on the very worst drivers.” – Professor Sally Kyd

3.34 A great number of responses echoed Professor Kyd’s point about driving being a privilege and not a right, and calling for lengthy minimum disqualification periods and lifetime bans. To reiterate, the use of disqualification (and often lengthy disqualification) was probably the most consistent message from all responses. Although not part of this consultation, respondents also took the opportunity to criticise the use of “exceptional hardship” to avoid disqualification from “totting” disqualifications.

3.35 In road testing, no participants found the guidance we provided without prompting. Once they had read it, they generally felt it was helpful background information, though thought it might not be possible to read through in the time usually available. As suggested above, some respondents thought we could provide more detail on disqualification periods. For example, the Magistrates’ Association thought there should be information about the length of discretionary bans at or after the sentencing table.

3.36 We considered this carefully before consultation. I maintain that providing disqualification ranges would be a complicated matter, and would be highly offender-specific. However, given the strength of feeling there may be a case for developing more extensive standalone guidance on driving disqualifications, providing all the proposed general information, but also possibly using a stepped approach which takes into account i) the seriousness of the offending, ii) the offender's future dangerousness; iii) the offender's prospects for rehabilitation; and iv) the interaction with the penalty imposed.

3.37 Even this approach would not surmount the issue of the very high minimum disqualification periods that have been introduced for causing death by dangerous driving and causing death by careless driving under the influence of drink or drugs. We may also wish to investigate the behavioural implications of imposing lengthy bans. This would obviously take place outside the timeframe envisaged for the current project.

3.38 However, Council members may feel that the general guidance proposed (see [pages 61 to 63 of the consultation document](#)) remains sufficient in providing sentencers with general support on disqualification, with experience and judgecraft assisting to set a disqualification period in individual cases.

**Question 8: does the Council think further work on disqualification is necessary, in light of responses received?**

#### **4 IMPACT AND RISKS**

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

4.2 These assessments are far different to [the assessment the Government made at the point of introducing the legislation](#) that a "high" scenario for raising the penalty for causing death by dangerous driving would involve 30 more prison places. That assessment appears to be based on the assumption that only the worst cases would see an increase in sentencing severity. By contrast, we have increased sentencing levels across most categories.

4.3 If we were to move a number of medium culpability factors into high culpability, we would need to run further resentencing exercises but would likely see those already high



figures increase. Should Council wish to reduce the sentence levels for lesser culpability careless driving cases, that may have some impact on the resource assessment, but not to a great extent. Subject to what Council decides at this meeting, and in subsequent meetings we will work to refine our estimates of the impacts.

4.4 In terms of handling, whilst some themes emerge clearly, it will be impossible to satisfy all viewpoints. There is clearly a vocal constituency that wants to see ever more severe punishments regardless of the culpability of the offender. Others will see prison sentences as inappropriate for careless drivers in particular, but their desire to see increasingly long disqualifications may be unrealistic without a shift (driven by the Council or otherwise) in how the courts approach driving bans.

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

**18 November 2022**  
**SC(22)NOV05 – Animal Cruelty**  
**Rosa Dean**  
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## **1 ISSUE**

1.1 This is the third meeting to discuss responses to our consultation on the animal cruelty guidelines, with the intention of publishing the final guidelines in spring 2023.

1.2 In this meeting, the Council will be asked to revisit aspects of the s.4-8 guideline, including sentence levels for the most serious offences and how animal fighting offences can be included within scope of the guideline. The Council will also be asked to consider feedback provided on equalities issues and on other miscellaneous issues.

## **2 RECOMMENDATIONS**

2.1 That the Council:

- agrees to increase sentence levels for the most serious animal cruelty offences;
- agrees to keep animal fighting offences within scope of the animal cruelty guideline, but includes caveats to avoid double counting against particular s.8 offences;
- agrees to retain minimal guidance on ancillary orders on the face of the guidelines;
- notes the potential overlap with the new powers for enforcement authorities to issue fixed penalty notices for animal welfare offences;
- notes the responses on equalities issues and other miscellaneous issues that have been raised.

## **3 CONSIDERATION**

### Sentence levels

3.1 In the September meeting, the Council agreed to limit the top of the offence range for animal cruelty offences in the s.4-8 guideline to three years' custody. An important consideration in our rationale for recommending retaining this cap was the need to keep sentences for animal cruelty proportionate with violent attacks on human beings.<sup>1</sup> This was despite calls from major stakeholders and members of the public to increase sentence levels

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<sup>1</sup> For example, s.47 actual bodily harm has a statutory maximum of five years, and an offence range capped at four years. Grievous bodily harm - unlawful wounding has a statutory maximum of five years and the offence range is capped at 4 years 6 months. By contrast, grievous bodily harm with intent had a statutory maximum of life imprisonment and the offence range is capped at 16 years.

across the table and to bring the top of the offence range into line with the statutory maximum of five years' custody.

3.2 Since the September meeting, Battersea Dogs and Cats Home has publicly called for the Council to increase the top of the range to five years, arguing that the revised guideline should reflect Parliament's intention in raising the statutory maximum and the public's wishes more broadly. We anticipate that other major animal charities will make similar calls for an increase to sentence levels, in addition to having provided strong criticism in response to our consultation (see extracts in Annex A).

3.3 We have also had sight of correspondence sent to MoJ and Defra colleagues from a magistrate arguing that the Council's proposed three year cap thwarts the will of Parliament and that, in practice, going outside of the guidelines is "frowned upon" and can very rarely be justified. It is worth noting that, while multiple respondents referred to the will of Parliament when calling for higher sentences, the Government's justice impact test for the change in statutory maximum did not anticipate a significant increase in sentence levels for s.4-8 offences.

3.4 In the September meeting, we briefly discussed the response to our consultation from the Justice Select Committee (included at Annex B) but would like to revisit its suggestion in light of the renewed calls for an increase to sentence levels:

We would suggest that the Council considers raising the upper end of the highest category to three years and six months and that the starting point is increased to two years for the highest category. We also recommend that the Council includes a reminder above the table, as was included in the recently updated burglary guidelines, that sentences above the top of the range can be appropriate when it would be contrary to the interests of justice to sentence within the relevant category range.

3.5 The JSC's suggestion to increase sentence levels in the most severe cases of animal cruelty sits between the proposals we originally consulted on and calls from stakeholders to go up to the statutory maximum. While increasing the starting point and the top of the category range by six months for box 1A would not necessarily prevent criticism from animal charities or other vocal stakeholders, it would signal that the Council has listened to feedback and acknowledged the strength of feeling relating to this set of offences. Amending box 1A as suggested by the JSC would still also maintain a distinction between animal cruelty offences and violence committed against human beings, though it would narrow this gap somewhat.

3.6 Another aspect of our previous rationale for retaining a three year cap was that, where sentencers have not regularly dealt with an offence, sentences might be skewed towards high or low severity, which may bring a risk of sentence inflation if we were to increase the top of the range significantly. While this still holds true, we do not believe that increasing the top of the range by six months will significantly increase this risk.

3.7 We therefore recommend acting on the JSC’s suggestion for the most serious cases of animal cruelty by uplifting sentences in box 1A by six months. We do not believe that it is necessary to increase sentence levels elsewhere in the table, as there will still be sufficient overlap with the category ranges for boxes 1B and 2A. This would also mirror Parliament’s intention in primarily focusing on the most serious cases of animal cruelty.

3.8 Given that only a small proportion of offenders currently receives immediate custody, and as we do not expect that this change would lead to an increase in the proportion of offenders receiving custodial sentences, it is not anticipated that this will have a significant impact on prison or probation resources. However, any resource impacts will be discussed more fully in the resource assessment which will be circulated at sign off.

3.9 While the JSC has suggested adding in a rubric reminding sentencers that they can step outside prescribed ranges in the interests of justice, the Council made a conscious choice to omit this when approving these guidelines for consultation. We do not think there is a strong argument to revert to the rubric, particularly when more recent Council discussions on other guidelines have reaffirmed this stance. An alternative could be to mirror the approach taken in the manslaughter guideline, where a note is placed below the sentencing table explaining that this is for a single offence of manslaughter resulting in a single fatality and referring to the totality step. This would allow the courts the possibility of passing sentences up to the statutory maximum in cases where multiple animals are harmed or where multiple offences were committed on different occasions.

**Question 1: Do you agree to uplift the starting point and the top of the category range for box 1A in the animal cruelty guideline by six months?**

	<b>High culpability</b>	<b>Medium culpability</b>	<b>Lower culpability</b>
<b>Category 1</b>	<b>Starting point</b> 1 year 6 months’ 2 years’ custody	<b>Starting point</b> 26 weeks’ custody	<b>Starting point</b> Medium level community order
	<b>Category range</b> 26 weeks’ custody – 3 years 6 months’ custody	<b>Category range</b> High level community order – 1 year’s custody	<b>Category range</b> Low level community order – High level community order
<b>Category 2</b>	<b>Starting point</b> 26 weeks’ custody	<b>Starting point</b> 12 weeks’ custody	<b>Starting point</b> Band C fine

	<b>Category range</b> 18 weeks' – 1 year's custody	<b>Category range</b> Medium level community order – 26 weeks' custody	<b>Category range</b> Band B fine – Low level community order
<b>Category 3</b>	<b>Starting point</b> 12 weeks' custody	<b>Starting point</b> Medium level community order	<b>Starting point</b> Band B fine
	<b>Category range</b> Medium level community order – 26 weeks' custody	<b>Category range</b> Low level community order – High level community order	<b>Category range</b> Band A fine – Band C fine

### Animal fighting offences

3.10 s.8 of the Animal Welfare Act covers a range of different offences relating to animal fighting:

- s.8(1) prohibits organising, running or taking part in a fight, including accepting or making bets;
- s.8(2) prohibits attending animals fights;
- s.8(3) prohibits publishing, showing or supplying recordings of animal fights.

3.11 On its website, the RSPCA states that it received over 9,000 reports of organised dog fights between 2015-2020. By contrast, the available sentencing data shows that, over the same time period, only around 20 adults were sentenced for s.8 offences, suggesting that many reports may lack the evidence required for prosecution.

3.12 In the September meeting, the Council asked for further consideration to be given to how animal fighting offences, particularly those under s.8(3), would fit within the proposed culpability table. This followed on from the Chief Magistrate, in his reply to the consultation, querying whether there was a risk of double counting given the nature of the s.8(1)(a) and s.8(3) offence:

A practical observation about two of the non-statutory aggravating factors. The use of another animal is valid as is use of technology to publicise as such factors – but could arguably be double counting if the offence charged was s8 Animal Welfare Act 2006 due to the wording of s8(1)(a) and (3)(a-d) respectively – this perhaps ought to be flagged with a 'save in the case of' or similar.

3.13 Under the [guideline as consulted on](#), the majority of s.8 offences would fall under medium culpability, or potentially high culpability if there was evidence of the offender having a leading role in illegal activity, such as running a large operation to organise dog fights or to

publish and make a significant profit from videos of animal fighting. This would effectively mean that these offences would have a minimum starting point of a medium level community order (as under box 3B in the revised sentencing table). Given the threshold of seriousness required to prosecute one of these cases, and that the nature of this offence means the offender will, in effect, be facilitating and/or promoting animal cruelty, it does not seem disproportionate to place these offences in medium culpability at a minimum.

3.14 In the guideline as consulted on, low culpability factors were intended to cover cases of incompetence or an ill-judged decision on the part of the offender, such as one-off incidents or offending occurring over a short period of time, rather than continued or persistent cruelty. In rare instances, one can imagine these offences falling under the low culpability factor of “momentary or brief lapse in judgement” if, for example, this was an isolated incident where the offender attended a dog fight for the first time or shared a single recording with a small number of others, though it is more likely that this would not reach the courts in the first place.

3.15 An alternative could be to separate out animal fighting offences from the animal cruelty guideline altogether, although, given the low numbers of adults sentenced for this in the past, drafting and consulting on a standalone guideline would require a disproportionate amount of resource compared to other, more pressing work for the Council. On balance, therefore, we suggest retaining the culpability table as proposed and keeping s.8 offences within scope of this guideline.

3.16 In addition, the wording of the proposed aggravating factor on the use of technology/social media to record, publicise or promote cruelty would mean all s.8(3) offences are aggravated by default due to the nature of the offence, which is arguably not the intention of this factor. As such, we recommend including a caveat alongside this factor, “(with the exception of s.8(3) offence)”, to make clear that this does not apply to these cases.

3.17 A similar issue arises for the aggravating factor of “use of another animal to inflict death or injury”, which could cause issues of double counting with the s.8(1)(a) offence of causing an animal fight to take place or attempting to do so, as flagged by the Chief Magistrate, as well as the s.8(1)(f) offence of taking part in an animal fight. We therefore recommend including a caveat of “(with the exception of s.8(1)(a) and (f) offences)” alongside this factor.

**Question 2a: Are you content to keep animal fighting offences within scope of the animal cruelty guideline?**

**Question 2b: Do you agree to add caveats alongside the aggravating factors on using technology to promote animal cruelty and the use of another animal to inflict death/injury, to prevent double counting alongside the relevant s.8 offences?**

Miscellaneous issues raised in consultation

*Ancillary orders*

3.18 Two respondents, World Horse Welfare (WHW) and the academic Mike Radford, wanted clearer guidance on ancillary orders. Radford called for wording to be added to the face of the guidelines to remind sentencers that disqualifications are not a substitute for other penalties for animal cruelty offences, pointing to Scottish legislation as an example. WHW took a different approach, focusing instead on the explanatory guidance on disqualifications rather than the wording on face of the animal cruelty guidelines. WHW called for this guidance to include references and links to the relevant legislation and a reminder to consider whether a disqualification order could minimise the risk of harm to animals. It also made a similar suggestion for the guidance on deprivation orders.

3.19 There is a fine balance to be struck between providing the necessary guidance to sentencers and avoiding making the guidelines overly complex. The proposed guidelines already include a link to the [explanatory materials on disqualifications](#) as standard. It is not clear that further detail from the Act is necessary on the face of the guidelines, or that this will support sentencers any more than the proposed wording currently does, particularly as the Act provides minimal detail on disqualifications.

3.20 We do, however, believe there is value in revisiting the explanatory materials on disqualifications, to see if further detail could be provided to support sentencers. The materials provide minimal guidance, primarily setting out the court's responsibilities when disqualifying offenders from keeping animals and making reference to relevant sections of the Animal Welfare Act. There is also currently no guidance on disqualifications from keeping animals in the Crown Court Compendium, as these offences were previously summary-only. With s.4-8 offences now being triable either way, this may be a timely point to consider what further guidance could be offered to sentencers. If the Council is content with this approach, we could bring draft wording for sign-off alongside finalised versions of the guidelines in early 2023.

**Question 3: Are you content to retain minimal guidance to sentencers regarding ancillary orders on the face of the guidelines, and to instead review the guidance on disqualifications provided in the explanatory materials?**

*Fixed penalty notices*



3.21 The National Farmers' Union (NFU) and one other respondent flagged the [Animals \(Penalty Notices\) Act 2022](#), calling for the Council to consider how sentences, particularly in cases of low culpability/low harm, might overlap with the new powers to hand out fixed penalty notices of up to £5,000.

3.22 The 2022 Act is intended to strengthen enforcement measures for offences that do not quite reach the threshold for prosecution, but which are too severe for a warning. Parliamentary debates during the passing of the Act suggest the target of this change will primarily be technical transgressions, such as farmers failing to record their livestock's movements or breeders not microchipping their cats. While s.4-9 animal cruelty offences were originally proposed within the scope of these new powers, stakeholders have voiced concern that this would effectively downgrade animal cruelty offences, and they may yet be removed altogether.

3.23 Given the upper limit of £5,000 for these new FPNs, there is certainly the potential for these penalties, particularly at the upper end, to be greater in value than the fines included in the guidelines at the lower end of offence severity (both guidelines include starting points of Band B to Band C fines which are 100% and 150% of relevant weekly income respectively). However, given the differing purpose of a fixed penalty to a court-ordered fine, this would be justifiable.

3.24 Defra is yet to provide guidance via secondary legislation on exactly which offences the new powers will apply to and the levels of penalties that will be available to enforcement authorities. It does not anticipate that this will be laid before December 2023, following a public consultation. Given this ambiguity, we do not recommend making any pre-emptive changes to the sentencing tables to prevent the appearance of any overlap.

#### *Other issues*

3.25 Four members of the public raised the issue of fireworks, citing the negative impact these can have on animals. Where fireworks are used to cause intentional suffering or injury to animals, by being thrown at them, for example, this will likely already be captured by the proposed aggravating factor of "use of a weapon".

3.26 Two magistrates provided positive feedback on the guidelines in general and were supportive of the aim to provide clear, consistent guidance to sentencers. One additional magistrate called for guidelines to be provided for all offences.

#### Equalities issues raised during consultation

3.27 In line with standard practice, our consultation featured three questions on equalities issues. We received 23 responses across these questions.

### *Potential discrepancies*

3.28 One respondent highlighted that cruelty to animals was likely to have a much greater impact on the owner – where they were not responsible for the offence – if they were disabled and relied on the animal as a support animal or guide dog. The guidelines already reflect this additional impact through the proposed aggravating factor of “animal being used in public service or as an assistance dog”.

3.29 Two respondents also raised the issue of religious slaughter, querying whether this should in fact be considered an act of cruelty, given the non-stun methods used in both kosher and halal slaughter. This was also raised as a general point by one sentencer during road testing interviews. Kosher and halal slaughter methods are protected under separate legislation (the Welfare of Animals (Slaughter or Killing) Regulations 1995), though this sets out that these animals should still be treated humanely. Parliamentary debates from 2014 also reaffirmed that the Animal Welfare Act 2006 is overarching. As such, instances where these animals are subjected to suffering or cruelty will already be captured by the factors proposed in the guidelines, including the culpability factor of “ill treatment in a commercial context”.

3.30 The NFU flagged that the s.9 guideline was too lenient when compared to the s.4-8 guideline, although, as they are intended to cover different offences with very different statutory maximum sentences, this is justifiable. Similarly, the RSPCA argued that cruelty in a commercial context should not be treated more leniently than that in a domestic context. With the proposed factors on offending occurring in a commercial context sitting in medium or high culpability, there does not appear to be a significant risk of disproportionality between the contexts in which cruelty or neglect occurs.

3.31 Two respondents also argued for better recording of ethnicity data for offenders, either on the grounds of the overrepresentation of ethnic minority groups within the justice system, or on the basis that this was necessary to better understand the profile of offenders in cases of animal cruelty or neglect.

### *Gypsy, Roma and Traveller Communities*

3.32 Two respondents highlighted the impact of the guidelines on Gypsy, Roma and Traveller (GRT) communities. WHW cited a media and more general societal bias against GRT communities in cases of animal cruelty when compared to other owners of horses. WHW also urged the Council to consider how it could ensure that juries in cases heard in the Crown Court could deliver verdicts based on the facts of each case, rather than be swayed by bias. In addition, the London Criminal Courts Solicitors Association queried whether

consideration had been given to the potential disproportionate impact on GRT communities in drafting the guidelines.

3.33 In line with standard practice for guidelines, we have signposted to the Equal Treatment Bench Book at the top of both of the revised guidelines. Where data has been available, we have also considered the equalities impacts of the proposals on different ethnic groups, though this data also includes high proportions of unknown ethnicity, making it difficult to draw any meaningful conclusions. We do not know, therefore, what further information would be relevant to sentencing and worth including on the face of the guideline.

#### *Vulnerable offenders*

3.34 IVC Evidensia, a veterinary organisation, argued that financial penalties were inappropriate for offenders who do not have financial resources and where this was the original cause of the offending. It suggested that community orders or disqualifications be used as an alternative sentence. WHW made similar suggestions for offenders who were vulnerable due to age or illness, and where this resulted in neglect of their animals.

3.35 In the proposed guidelines, we include the standard drop down guidance on fines, setting out that sentencers must consider the financial means of the offender. While we do not explicitly include financial vulnerability as a mitigating factor on the face of the guidelines, where this has been a primary cause of the offending, sentencers can take this into consideration. As such, we do not suggest including any further mitigation on the face of the guidelines.

## **4 IMPACTS AND RISKS**

4.1 The impacts and risks of the proposed changes to the sentencing table have been outlined earlier in this paper. We do not anticipate that other recommended changes to the aggravating factors will have a significant impact on prison or probation resource.

4.2 A full resource assessment will be prepared for the Council to review alongside the final guidelines at the point of sign off.

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**Sentencing Council meeting:**  
**Paper number:**

**18 November 2022**  
**SC(22)NOV06 – Sale of knives etc to  
persons under eighteen**

**Lead Council member:**  
**Lead official:**

**Jo King**  
**Ruth Pope**  
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## **1 ISSUE**

1.1 From June to August 2022 the Sentencing Council consulted on two sentencing guidelines for the offence of selling knives to persons under the age of eighteen, contrary to s.141A of the Criminal Justice Act 1988: one for sentencing [individuals](#) and one for sentencing [organisations](#).

1.2 At the September meeting the Council agreed changes to the guideline for organisations in the light of the responses to the consultation and the road testing exercise carried out with magistrates which is summarised at **Annex A**.

1.3 This is the final scheduled meeting to discuss these guidelines and sign off for publication.

## **2 RECOMMENDATION**

2.1 The Council is asked to consider:

- changes to factors in the guideline for sentencing individuals
- outstanding issues in the guideline for organisations
- the sentencing levels for both guidelines
- the impact and risks associated with the guidelines

2.2 The Council will then be asked to sign off both guidelines for publication in February, to come into force on 1 April 2023.

## **3 CONSIDERATION**

### *Background*

3.1 The offence of selling knives etc to persons under the age of 18 is summary only; it carries a maximum of six months' imprisonment (or, in the case of an organisation, an unlimited fine). It is a strict liability offence (there is no requirement to show intention or knowledge) subject to a defence of proving that all reasonable precautions were taken and all due diligence was exercised to avoid the offence.

3.2 The offence is prosecuted by Trading Standards departments within local authorities and almost all prosecutions are as a result of test purchases. It is low volume: around 70 individuals and nearly 90 organisations were prosecuted in the five-year period 2016 to 2020.

*Responses to the consultation*

3.3 There were 33 responses to the consultation, many were supportive of the proposals but several have suggested areas for improvement.

*Scope of the guideline*

3.4 The Council discussed the scope of the guideline at the September meeting and confirmed that the scope should be limited to the types of cases actually coming before the courts.

3.5 There was a discussion on the wording relating to the scope of the guideline and some changes were agreed in the guideline for organisations (additions in red, deletions struck through):

This guideline applies to the unlawful sale in a single transaction of **a knife or** a small quantity of knives etc (whether in-store or online) by retailers. It does not apply to cases ~~of a more serious nature such as those~~ involving large quantities of knives or the deliberate or reckless marketing of knives to children.

3.6 The wording of the draft guideline for individuals was slightly different. Applying the same changes this would read:

This guideline applies to the unlawful sale in a single transaction of **a knife or** a small quantity of knives etc (whether in-store or online) by retailers or those employed by retailers. It does not apply to cases ~~of a more serious nature such as those~~ involving large quantities of knives or the deliberate or reckless marketing of knives to children.

3.7 Since the September meeting we have received a response from the Justice Select Committee:

In relation to the text on the scope of the guidelines, we share the concern raised by certain consultees as to whether the reference to a “small quantity of knives etc” is sufficiently precise. Sentencers may require more precise guidance on the number of knives that constitute a small number as opposed to a large number, particularly when knives are often sold as a set. We are also concerned that sentencers could misunderstand whether a case was one “of a more serious nature”. We understand the explanation that the guidance on scope is designed to limit the use of the guidelines to cases arising from prosecutions brought after test purchases are made by trading standards. The present wording appears to give rise to a risk that a sentencer could mistakenly apply these guidelines to a serious case and then potentially apply a more lenient sentence than they otherwise would have given had they not applied them. We would ask the Council to consider if it would be appropriate to include within the text on the scope a reference to the fact that the guidelines should only apply to the test purchase scenario.

**Question 1: Is the Council content with the revised wording on the scope of the guidelines?**

*Culpability*

3.8 The culpability factors consulted on for individuals were:

<b>Culpability</b>
<b>A – High culpability</b> <ul style="list-style-type: none"><li>• Offender in a position of responsibility failed to put in place standard measures to prevent underage sales -<ul style="list-style-type: none"><li>○ For in-store sales standard measures would normally include: identifying restricted products, clear signage, age verification checks/ Challenge 21 or Challenge 25 policy, staff training, maintaining refusals log, till prompts</li><li>○ For online sales standard measures would normally include: identifying restricted products, use of a reliable online age verification tool and/or collect in-store policy with checks on collection.</li></ul></li><li>• Offender in a position of responsibility failed to act on concerns raised by employees or others</li><li>• Offender falsified documents</li><li>• Offender failed to make appropriate changes following advice and/or prior incident(s)</li><li>• Offender disregarded clear measures put in place to prevent underage sales</li></ul>
<b>B – Medium culpability</b> <ul style="list-style-type: none"><li>• Offender in a position of responsibility put in place standard measures but these were not sufficiently adhered to or implemented</li><li>• Offender failed to fully implement measures put in place to prevent underage sales</li><li>• Other cases where the offender’s culpability falls between the factors as described in A and C</li></ul>
<b>C – Lesser culpability</b> <ul style="list-style-type: none"><li>• Offender made significant efforts to prevent underage sales where not amounting to a defence</li></ul>

3.9 The Council agreed changes to the high culpability factors for organisations. Applying those changes to the guideline for individuals the factors would read:

<b>Culpability</b>
<b>A – High culpability</b> <ul style="list-style-type: none"><li>• Offender in a position of responsibility failed to put in place appropriate measures to prevent underage sales -<ul style="list-style-type: none"><li>○ For in-store sales measures should include some or all of the following: identifying restricted products, clear signage, age verification checks/ Challenge 21 or Challenge 25 policy, staff training, a means of monitoring refusals, till prompts</li><li>○ For online sales measures should follow government guidance <a href="#">on the sale and delivery of knives</a> including:</li></ul></li></ul>

<p>identifying restricted products, age verification on delivery or collect in-store policy with age verification on collection</p> <ul style="list-style-type: none"> <li>• Offender in a position of responsibility failed to act on concerns raised by employees or others</li> <li>• Offender falsified documents</li> <li>• Offender failed to make appropriate changes following advice and/or prior incident(s)</li> <li>• Offender disregarded clear measures put in place to prevent underage sales</li> </ul>
<p><b>B – Medium culpability</b></p> <ul style="list-style-type: none"> <li>• Offender in a position of responsibility put in place standard measures but these were not sufficiently adhered to or implemented</li> <li>• Offender failed to fully implement measures put in place to prevent underage sales</li> <li>• Other cases where the offender’s culpability falls between the factors as described in A and C</li> </ul>
<p><b>C – Lesser culpability</b></p> <ul style="list-style-type: none"> <li>• Offender made significant efforts to prevent underage sales where not amounting to a defence</li> </ul>

3.10 The issues relating to assessing culpability raised by magistrates in road testing have largely been addressed by the changes proposed above.

3.11 The highlighted factors apply only to the guideline for individuals. The West London Magistrates’ Bench thought it would be clearer to amend the high culpability factor to read:

- Offender deliberately or recklessly disregarded clear measures put in place to prevent underage sales

3.12 This suggestion could cause problems and could lead to less rather than more clarity. It would be unhelpful for courts to be considering whether the disregard of measures was deliberate/reckless or negligent.

3.13 They also proposed an additional low culpability factor:

- Offender not given sufficient training in the sale of bladed articles to minors by the manager, owner or organisation, as appropriate

3.14 This is not a useful example to include because, it is very unlikely that an individual staff member would be prosecuted in such circumstances, rather the manager, owner or organisation would be prosecuted.

3.15 An individual magistrate thought that the guideline should take into account the extent to which the offender took steps to deceive the retailer. Another suggested adding a medium culpability factor of ‘Offender failed to seek appropriate purchaser identification documents at the point of sale’. Another suggested adding a factor relating to employing underage staff and allowing them to sell knives.



3.16 These suggested additions appear to be unnecessary. In a test purchase situation deceit (such as false ID) would not be used, but if a prosecution did result from such circumstances, the existing factors would still apply i.e. to what extent did the offender fail to take the appropriate steps? Failure to seek ID documents is covered by existing high and medium culpability factors and allowing underage staff to sell knives would be covered by high culpability factors.

3.17 A trading standards officer considered that the culpability factors related more to the owners or managers of businesses and asked: 'does the same level of culpability apply to employees who do not have these responsibilities but are ultimately responsible for the sale?'.

3.18 The answer is that some culpability factors can apply regardless of the offender's role (such as 'Offender falsified documents', 'Offender failed to make appropriate changes following advice and/or prior incident(s)', or 'Offender disregarded clear measures put in place to prevent underage sales'). Others apply only to those in a position of responsibility (such as 'Offender in a position of responsibility failed to put in place appropriate measures to prevent underage sales' or 'Offender in a position of responsibility failed to act on concerns raised by employees or others'). No other respondents had any difficulty with this distinction and so no changes are proposed.

**Question 2: Does the Council agree to the proposed changes to the culpability factors in the guideline for individuals?**

*Harm*

3.19 The Council consulted on having only one level of harm:

**HARM**

The harm caused by this offence relates to the risks, both to themselves and to others as well as the wider community, associated with children and young people being in possession of knives. There is just one level of harm, as the same level of harm is risked by any such sale to a person aged under 18.

3.20 At the September meeting the Council considered and rejected calls for two levels of harm in the guideline for organisations. The same arguments apply to the guideline for individuals and so these are not repeated here.

**Question 3: Does the Council agree to keep one level of harm and to retain the wording consulted on?**

*Aggravating and mitigating factors*

3.21 There were only a limited number of aggravating and mitigating factors in the draft guideline reflecting the fact that most relevant factors are covered in culpability factors and the relatively narrow range of offending that is captured by this offence:

Factors increasing seriousness
<b>Statutory aggravating factors:</b>
<ul style="list-style-type: none"> <li>• Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction</li> </ul>
<b>Other aggravating factors:</b>
<ul style="list-style-type: none"> <li>• Obstruction of justice</li> </ul>

3.22 The Council agreed to remove the factor ‘obstruction of justice’ in the guideline for organisations and the same reasoning applies to the guideline for individuals. The Council considered adding other factors for the guideline for organisations but decided not to. There were no suggestions for factors relating to individuals that were not rejected in relation to organisations.

3.23 A few respondents made reference to the area in which the sale takes place, suggesting that the impact in a high crime area would be worse. Some larger retailers choose not to sell knives in certain stores where they consider the risk of knife crime to be high. However, the responsibility is on retailers to prevent the underage sale of knives in all locations (including online) and it does not seem appropriate to aggravate for the location of physical stores.

**Question 4: Does the Council agree to remove the ‘obstruction of justice’ aggravating factor and that no other aggravating factors are needed in the guideline for individuals?**

Factors reducing seriousness or reflecting mitigation
<ul style="list-style-type: none"> <li>• No previous convictions or no relevant/recent convictions</li> <li>• Evidence of steps taken voluntarily to prevent re-occurrence</li> <li>• High level of co-operation with the investigation <del>and acceptance of responsibility</del></li> <li>• Good record of compliance with Trading Standards (particularly in relation to age restricted sales)</li> <li>• Serious medical condition requiring urgent, intensive or long-term treatment</li> <li>• Age and/or lack of maturity</li> <li>• Mental disorder or learning disability</li> <li>• Sole or primary carer for dependent relatives</li> </ul>

3.24 The mitigating factors above are those consulted on with minor amendments to reflect the changes agreed to the guideline for organisations. The only responses relating to mitigating factors that are unique to the guideline for individuals relate to the ‘age and/or lack

of maturity' and' sole or primary carer' factors. The comments suggest clarification may be required, but as they are standard factors in (almost) all guidelines and have expanded explanations, no changes are proposed.

**Question 5: Does the Council agree to the proposed changes to the mitigating factors in the guideline for individuals?**

*Previous convictions in the guideline for organisations*

3.25 At the September meeting the Council considered a suggestion that the expanded explanation relating to previous convictions should be tailored in guidelines for organisations. The idea was agreed in theory subject to consideration of the content.

3.26 The expanded explanation for the factor in all guidelines currently reads:

**Guidance on the use of previous convictions**

The following guidance should be considered when seeking to determine the degree to which previous convictions should aggravate sentence:

[Section 65 of the Sentencing Code](#) states that:

- (1) This section applies where a court is considering the seriousness of an offence (“the current offence”) committed by an offender who has one or more relevant previous convictions.
- (2) The court must treat as an aggravating factor each relevant previous conviction that it considers can reasonably be so treated, having regard in particular to— (a) the nature of the offence to which the conviction relates and its relevance to the current offence, and (b) the time that has elapsed since the conviction.
- (3) Where the court treats a relevant previous conviction as an aggravating factor under subsection (2) it must state in open court that the offence is so aggravated.

1. Previous convictions are considered at step two in the Council’s offence-specific guidelines.
2. The primary significance of previous convictions (including convictions in other jurisdictions) is the extent to which they indicate trends in offending behaviour and possibly the offender’s response to earlier sentences.
3. Previous convictions are normally **relevant** to the current offence when they are of a similar type.
4. Previous convictions of a type different from the current offence **may** be relevant where they are an indication of persistent offending or escalation and/or a failure to comply with previous court orders.
5. Numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary.
6. If the offender received a non-custodial disposal for the previous offence, a court should not necessarily move to a custodial sentence for the fresh offence.
7. In cases involving significant persistent offending, the community and custody thresholds may be crossed even though the current offence normally warrants a lesser sentence. If a custodial sentence is imposed it should be proportionate and kept to the necessary minimum.

8. The aggravating effect of relevant previous convictions reduces with the passage of time; **older convictions are less relevant** to the offender's culpability for the current offence and less likely to be predictive of future offending.
9. Where the previous offence is particularly old it will normally have little relevance for the current sentencing exercise.
10. The court should consider the time gap since the previous conviction and the reason for it. Where there has been a significant gap between previous and current convictions or a reduction in the frequency of offending this may indicate that the offender has made attempts to desist from offending in which case the aggravating effect of the previous offending will diminish.
11. Where the current offence is significantly less serious than the previous conviction (suggesting a decline in the gravity of offending), the previous conviction may carry less weight.
12. When considering the totality of previous offending a court should take a rounded view of the previous crimes and not simply aggregate the individual offences.
13. Where information is available on the context of previous offending this may assist the court in assessing the relevance of that prior offending to the current offence

3.27 The wording for use in guidelines specifically for organisations could have reference to custody and community orders removed and be amended slightly (point 5 has been moved and point 6 added):

1. Previous convictions are considered at step two in the Council's offence-specific guidelines.
2. The primary significance of previous convictions (including convictions in other jurisdictions) is the extent to which they indicate trends in offending behaviour and possibly the offender's response to earlier sentences.
3. Previous convictions are normally **relevant** to the current offence when they are of a similar type.
4. Previous convictions of a type different from the current offence **may** be relevant where they are an indication of persistent offending or escalation and/or a failure to comply with previous court orders.
5. Where information is available on the context of previous offending this may assist the court in assessing the relevance of that prior offending to the current offence.
6. When considering the number and frequency of previous convictions it **may** be relevant to consider the size of the offending organisation. For example, a large organisation with multiple sites may be more likely to have previous convictions than a smaller organisation with only one site.
7. The aggravating effect of relevant previous convictions reduces with the passage of time; **older convictions are less relevant** to the offender's culpability for the current offence and less likely to be predictive of future offending.
8. Where the previous offence is particularly old it will normally have little relevance for the current sentencing exercise.
9. The court should consider the time gap since the previous conviction and the reason for it. Where there has been a significant gap between previous and current convictions or a reduction in the frequency of offending this may indicate that the offender has made attempts to desist from offending in which case the aggravating effect of the previous offending will diminish.
10. Where the current offence is significantly less serious than the previous conviction (suggesting a decline in the gravity of offending), the previous conviction may carry less weight.
11. When considering the totality of previous offending a court should take a rounded view of the previous crimes and not simply aggregate the individual offences.

**Question 6: Does the Council agree to the proposed expanded explanation for previous convictions for organisations?**

*Sentence levels*

3.28 The sentence levels consulted on for individuals were:

<b>Culpability</b>		
<b>A</b>	<b>B</b>	<b>C</b>
<b>Starting point</b> Medium level community order or Band E fine	<b>Starting point</b> Low level community order or Band D fine	<b>Starting point</b> Band A fine
<b>Category range</b> Low level community order or Band D fine – High level community order or Band F fine	<b>Category range</b> Band B fine – Medium level community order or Band E fine	<b>Category range</b> Discharge – Band B fine

3.29 Most respondents who commented, agreed with the decision not to include custodial sentences for individuals. Some individuals took a different view: one compared the proposed sentences with those for possession of a bladed article and stated that ‘the starting point for selling a knife underage over the counter should be custody’. In road testing one magistrate made a similar comparison and suggested that the range should be expanded to include custody. Another respondent suggested that custodial options should be available for repeated offences and again this view was echoed by a magistrate in road testing.

3.30 The British Independent Retailers Association thought that the level of fines seemed very high. They also suggested that there should be a distinction between online and in-store sales (though they did not identify which they thought should be sentenced more severely).

3.31 One magistrate respondent noted that the culpability C sentence levels are considerably lower than those for A and B and suggested that the sentence levels should be distributed more evenly. Two magistrates in road testing made a similar point. This imbalance in the distribution was deliberate, reflecting the fact that culpability C cases are only just above the threshold for prosecution.

3.32 Other magistrates in road testing either thought that the sentence levels were about right or, in the case of one, that they were too high.

3.33 In road testing the sentences (before guilty plea but after adjustment at step 3) varied, with some imposing community orders (low or medium level) and others fines (varying from £450 to £2,000). While one aim of the guideline is to aid consistency, it is perhaps understandable that in the context of a theoretical exercise, sentencing an unfamiliar offence with only limited information and without the benefit of discussion with

colleagues or any input from the Probation Service, that magistrates would arrive at a fairly wide range of final sentences. That said, as the guideline specifically provides for fines or community orders in the range for culpability A, all of the sentences were within the category range (allowing for adjustment of fines at step 3) and the magistrates were generally satisfied with the final sentence they arrived at.

3.34 Taking into account the various comments and the need for flexibility in the guideline to allow for the different circumstances of offenders, no changes to the sentence levels of individuals are proposed.

**Question 7: Does the Council agree to retain the sentence levels consulted on in the guideline for individuals?**

3.35 The sentence levels consulted on for organisations were:

**Very large organisation**

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

**Large organisation – Turnover or equivalent: £50 million and over**

Culpability		
A	B	C
<b>Starting point</b> £400,000	<b>Starting point</b> £200,000	<b>Starting point</b> £50,000
<b>Category range</b> £200,000 – £1,000,000	<b>Category range</b> £100,000 – £400,000	<b>Category range</b> £12,000 – £100,000

**Medium organisation – Turnover or equivalent: between £10 million and £50 million**

Culpability		
A	B	C
<b>Starting point</b> £200,000	<b>Starting point</b> £100,000	<b>Starting point</b> £20,000
<b>Category range</b> £100,000 – £400,000	<b>Category range</b> £50,000 – £200,000	<b>Category range</b> £5,000 – £50,000

**Small organisation – Turnover or equivalent: between £2 million and £10 million**

Culpability		
A	B	C
<b>Starting point</b> £50,000	<b>Starting point</b> £25,000	<b>Starting point</b> £6,000
<b>Category range</b> £25,000 – £100,000	<b>Category range</b> £12,000 – £50,000	<b>Category range</b> £3,000 – £12,000

**Micro organisation – Turnover or equivalent: not more than £2 million**

Culpability		
A	B	C
<b>Starting point</b> £12,500	<b>Starting point</b> £6,000	<b>Starting point</b> £1,500

<b>Category range</b> £6,000 – £25,000	<b>Category range</b> £3,000 – £12,000	<b>Category range</b> £500 – £3,000
-------------------------------------------	-------------------------------------------	----------------------------------------

3.36 The Magistrates' Association (MA) suggested six size categories of organisation by adding a category with a turnover equivalent to £1 billion or over at the top end and adding category at the bottom for an organisation with a turnover of not more than £500,000. They considered that a significant portion of offences involve smaller retailers with turnovers of around £150,000 - £200,000 and that there is scope for more guidance for sentencers for this size of business.

3.37 In making this assertion (about the proportion of smaller businesses) the MA seem to have included sole traders who would be more likely to be prosecuted as individuals. However, the point they make about the difficulty of the micro organisation category encompassing businesses with turnovers of less than £100,000 up to £2 million is valid.

3.38 In road testing some magistrates made similar comments: suggesting a category below micro and/or more guidance for very large organisations. These comments reflected the scenarios that were used in road testing.

3.39 The four categories of size of organisation are used across other guidelines for organisations (for example health and safety, environmental, food safety) and there is merit in keeping to consistent categorisation across guidelines (as was recognised by some respondents). The adjustment of fine at step 3 is provided to address the potential problem of grouping together a wide range of organisation sizes in each category.

3.40 The British Retail Consortium felt that the fines for culpability C in particular were too high. They also stated:

The BRC believes that the decision to publish a Guideline with fines of £1million plus for large organisations potentially misunderstand the problem. There is no evidence either in the consultation or elsewhere that the under-age sale of knives in large stores is behind knife crime. [...] The BRC is concerned that the mere publication of the Guideline with increased sentences will encourage enforcers to ignore a lack of evidence that retailers are a source of underage sales to minors and increase their enforcement activity in the wrong place instead of focussing on the actual source of most purchases because that is much more difficult to enforce. [...]

*Against that background we believe the Guideline should*

1. Take into account in setting the fine the reputational damage a business will suffer.
2. Set the starting point for a fine for a test purchase sale for a large organisation (which actually includes many organisations that are relatively small given the category is set at £50 million) with low culpability lower. It should not be a massive increase of 500% on the existing mean level of £10,000

3. Reduce the disparity in fines for large organisations - the high end of the sentencing range is more than 50% of the starting point which unfairly penalises larger organisations

3.41 The first of the numbered points above was considered and rejected by the Council in September as a suggested addition to step 3. The Council has also rejected the idea that test purchases should automatically be deemed low culpability. The third point is a little puzzling; presumably they mean that the top of the range in culpability A for large organisations is more than *twice* the starting point (SP £400,000 range £200,000 to £1,000,000), whereas elsewhere the top of the range is exactly twice the starting point.

3.42 The British Independent Retailers Association repeated the comments they made in relation to the guideline for individuals. The West London Magistrates' Bench agreed with using the same type of format for organisations as with other guidelines. They suggested a helpful minor clarification: using 'annual turnover' rather than 'turnover'.

3.43 One magistrate said that the penalties for micro organisations provide too little deterrent. The Association of Chief Trading Standards Officers supported the fine levels consulted on.

3.44 In road testing there were mixed views on the starting points and ranges in the sentencing table for organisations: while some felt the ranges and starting points were appropriate another felt they were too high. One felt that while they were right for larger companies they were too high for smaller companies. Another agreed that for smaller companies the starting points were high. There was also concern that the ranges were large and one magistrate noted that there was a big drop between big companies and the smaller ones.

3.45 The fine levels consulted on were set with reference to fine levels in other guidelines for organisations. The Council compared the proposed levels with what might be considered equivalent levels of offending in other guidelines (see **Annex B**).

3.46 Two scenarios were road tested with magistrates, one involving a very large company and one a micro company (at the lower end of that range). There was some inconsistency in the sentences arrived at, although for the micro organisation there was a cluster of pre guilty pleas sentences of £6,000 (i.e. the bottom of the range for culpability A) which was in line with expectations. The points made above about the limitations of the road testing exercise apply here too. Several magistrates in road testing felt out of their depth sentencing a case involving a very large company but in reality, as has been pointed out by Stephen Leake, cases involving very large organisations are likely to be allocated to a district judge.



3.47 While the sentence levels for larger organisations appear to be more severe, as a proportion of turnover they are lower than those for smaller organisations. In summary it is difficult to see how the fine levels could be amended to address the various points raised unless the Council wishes to create more categories of size of organisation. The Council could, of course, revisit the fine levels across the board. One possibility would be to lower the bottom of the ranges in the light of the information considered in September about the range of items that are classified as a knife and the decision not to create two levels of harm.

**Question 8: Does the Council agree to change the reference to ‘turnover’ to ‘annual turnover’ in the sentence tables for organisations?**

**Question 9: Does the Council wish to make any other changes to the sentence tables for organisations?**

#### *Step 3 – adjustment of fine*

Where the sentence is or includes a fine, the court should consider whether there are any further factors which indicate an adjustment in the level of the fine including outside the category range. The court should ‘step back’ and consider the overall effect of its orders.

The fine ought to achieve:

- the removal of all gain (including through the avoidance of costs)
- appropriate punishment, and
- deterrence

The fine may be adjusted to ensure that these objectives are met in a fair way. The court should consider any further factors relevant to the setting of the level of the fine to ensure that the fine is proportionate, having regard to the financial position of the offender and the seriousness of the offence.

See the Fines dropdown above for more information

3.48 Only a few respondents commented on this step for individuals and they generally agreed with the wording. In road testing eight magistrates were positive about step 3, with one suggesting we “highlight the phrase ‘the court should step back and consider the overall effect of its orders’ [as] it makes you think about equal opportunities, different cultures, ways of life etc”. One noted the step should “perhaps look at adjustment of CO as well as it is unfair to talk about adjusting one type of punishment but not the other”, and one magistrate said that the step “doesn’t add anything”.

**Question 10: Does the Council wish to make any changes to step 3?**

#### *Steps 4 to 8*

3.49 In the guideline for organisations the Council agreed to remove reference to compensation from step 7 as it is not relevant to this guideline. The same point was raised regarding the guideline for individuals and respondents also suggested that the guideline should mention forfeiture and destruction orders.

3.50 Trading Standards have confirmed that they do not apply for forfeiture and destruction orders for this offence as the knife has been test purchased rather than seized. The proposed revised wording (for both guidelines) at step 7 is:

#### Step 7 – Confiscation and ancillary orders

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

**Confiscation orders** under the Proceeds of Crime Act 2002 may only be made by the Crown Court. The Crown Court must proceed with a view to making a **confiscation order** if it is asked to do so by the prosecutor or if the Crown Court believes it is appropriate for it to do so.

Where, following conviction in a magistrates' court, the prosecutor applies for the offender to be committed to the Crown Court with a view to a confiscation order being considered, the magistrates' court must commit the offender to the Crown Court to be sentenced there (section 70 of the Proceeds of Crime Act 2002). This applies to summary only and either-way offences.

Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation). (See Proceeds of Crime Act 2002 sections 6 and 13)

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

#### **Question 11: Does the Council agree to remove compensation from step 7 but otherwise leave it unchanged?**

#### **4 IMPACT AND RISKS**

4.1 The draft resource assessment (prepared for the consultation) is attached at **Annex C**. The final resource assessment will incorporate any changes needed as a result of the decisions made at this meeting and will be circulated to members for approval. Due to the low volumes and the limited ranges of disposals, the final resource assessment is unlikely to differ greatly from Annex C.

4.2 As referenced at the September meeting it will be important to work with Trading Standards and retailer organisations to ensure that the guidelines are widely disseminated and understood by prosecutors and retailers. We will also work with the Judicial College to communicate with sentencers to ensure that the aims of the guidelines (consistent and proportionate sentences for the offences coming before the courts) are understood and implemented.

#### **Question 12: Is the Council content to sign off both guidelines for publication?**

<b>Sentencing Council meeting:</b>	<b>18 November 2022</b>
<b>Paper number:</b>	<b>Unnumbered – External communication evaluation</b>
<b>Lead Council member:</b>	<b>N/A</b>
<b>Lead official:</b>	<b>Phil Hodgson</b> <b>020 7071 5788</b> <b>Phil.hodgson@sentencingcouncil.gov.uk</b>

## External communication evaluation

The Council engages in a range of activities to meet its communication objectives:

- supporting effective implementation of guidelines across the criminal justice community;
- promoting confidence in sentencing by improving awareness and understanding of sentencing, the sentencing guidelines and how they work among practitioners and the public, including victims, witnesses and offenders; and
- reinforcing the reputation of the Sentencing Council and sentencing guidelines across the criminal justice system, government, the public and voluntary sectors and academia, and among the wider public.

The Communication and Digital team compile a range of measures each month to record and evaluate our external communication activities and, where possible, how our intended audiences have responded.

These evaluations cannot tell us precisely how far we have achieved our objectives, for example they cannot tell us whether we have promoted public confidence in sentencing per se. However, the measures we use are a good proxy. We know that, for example, by placing articles on the Judicial Intranet, we can inform judges and magistrates about new guidelines, and our research suggests that we can help to improve confidence in sentencing by providing the public with information about how sentencing works via the website, our media coverage and Twitter.

### Request

Attached to this paper are evaluation reports for September and October 2022. My intention is to include these reports in future in your bundle of Council meeting papers.

I would be grateful to know (by email, phil.hodgson@sentencingcouncil.gov.uk):

- whether these reports are useful to you, and
- if so, whether you have any suggestions for other measures I might include.

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Sentencing  
Council

# External communication evaluation

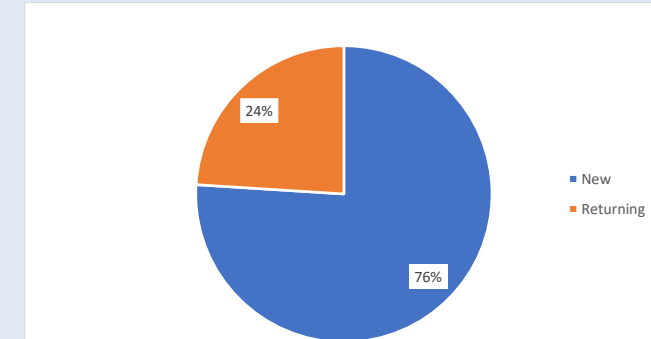
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**October 2022**

### Visits to [www.sentencingcouncil.gov.uk](http://www.sentencingcouncil.gov.uk)

	This month	Last month
Users*	236,828	200,931
Sessions per user	1.84	1.84
Pages per session	2.54	2.59
Ave time on site	04:13	04:24
Bounce rate**	56.26%	55.20%

### Visitors: new and returning



### Announcements

5th	Reviewing the Totality guideline - consultation
27th	Reappointment of non-judicial member of the Council

### Top referring sites

<a href="http://cps.gov.uk">cps.gov.uk</a>
<a href="http://judiciary.sharepoint.com">judiciary.sharepoint.com</a> (Judicial Intranet)
<a href="http://yahoo.com">yahoo.com</a>
<a href="http://elite.law.ac.uk">elite.law.ac.uk</a> (University of Law)

\*Users: Number of people who have visited the website at least once within the date range

\*\*Bounce rate: Percentage of people who land on a page on the website, then leave

Most visited pages	Pageviews	Unique Pageviews
Magistrates' court guidelines search page	189,646	85,183
Crown Court guidelines homepage	41,022	27,436
Website homepage	39,030	30,852
Magistrates' court homepage	30,819	21,558
/fine-calculator/	25,909	17,657
/offences/magistrates-court/item/common-assault-racially-or-religiously-aggravated-common-assault-common-assault-on-emergency-worker/	24,257	20,517
/outlines/	17,262	10,365
/offences/magistrates-court/item/excess-alcohol-driveattempt-to-drive-revised-2017/	16,896	13,769
/offences/magistrates-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/	15,283	13,213
/outlines/assault/ *	14,121	12,753

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

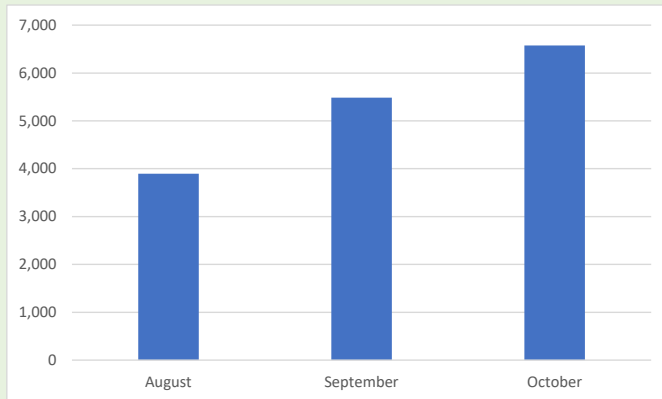
Top search terms used
Sentencing guidelines
Sentencing Council guidelines
Magistrates' Court sentencing guidelines
Fail to stop guidelines

\* Outlines: offence descriptions on the public-facing pages of the website: [www.sentencingcouncil.org.uk/outlines/](http://www.sentencingcouncil.org.uk/outlines/)

## Subscribers

**+16 = 1,193**

## Video views per month



## Most watched video



How offenders are sentenced in England and Wales

## Watch time average

**02:26**

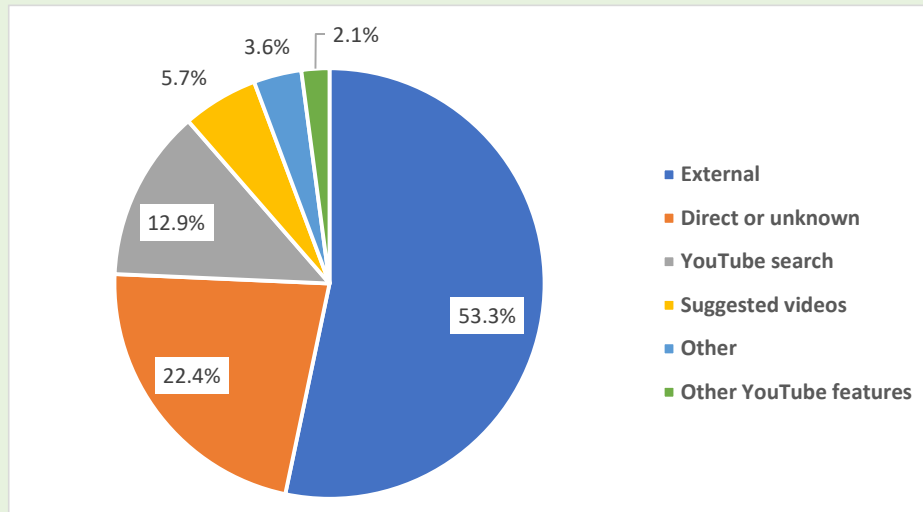
## Impressions\*

**25,237**

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



### How viewers find our videos



### YouTube search: terms used

1	how offenders are sentenced in England and Wales
2	Crown court
3	magistrates court UK
4	uk court sentencing
5	crown court sentencing uk

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

### Subscribers

**+275 = 4,816**

### All bulletins

Sent	4
Delivered	95.7%
Opened	30.1%
Engagement rate*	4.7%

### Most clicked-through links

Minutes of Sentencing Council meeting September 2022  
Totality explained – blog post  
Effectiveness of sentencing options on reoffending – news item  
Effectiveness of sentencing options on reoffending – report  
Reappointment of non-judicial member of the Council

### Highest engagement\*

Totality consultation/ Effectiveness report

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

## Followers

**+2 = 6,035**

## Highlights

Tweets	Impressions	Mentions	Profile visits
2	2,216	19	512

## Top tweet

What happens when an offender commits more than one imprisonable offence? How do the courts reach a just and proportionate sentence? Our blog explains how the Totality guideline works and what judges and magistrates need to think about

Impressions: 450

Total engagements: 20

## Top mention

Nearly every sentencing guideline includes a short prison sentence as viable sentencing option. Deterrence is a key justification for criminal sanctions. But new research from [@SentencingCCL](#) says there's no evidence to support short sentences or deterrence

**@PenelopeGibbs2**

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

### Launches

Date	Topic	Handling	Outcome
5th	Totality consultation launch	CJS channels only	New Law Journal article published 6/10 Messages published in internal CJS channels, eg Judicial Intranet, Magistrates' Matters, Magistrates' Assn eNews bulletin, CPS Infonet

### Media enquiries handled

Date	Title/ channel	Topic	Issue	Outcome
5th	Sunday Times	Totting up	Claims that magistrates' confusion over totting up enables motorists to avoid disqualification. Acknowledged our current consultation and the changes we made in 2020 to clarify "exceptional hardship"	Article published 9/10. Critical of "the courts" but not specifically of the Council. Also covered 15/10 by Daily Express. Both articles available from Comms Team
27th	Law in Action	Guilty pleas	Request for Council to respond to Fair Trials report claiming young adults feel pressured to plead guilty	Interview with Chairman broadcast on Tues 1 November: <a href="https://www.bbc.co.uk/sounds/play/m001dn90">https://www.bbc.co.uk/sounds/play/m001dn90</a>

Sentencing  
Council

# External communication evaluation

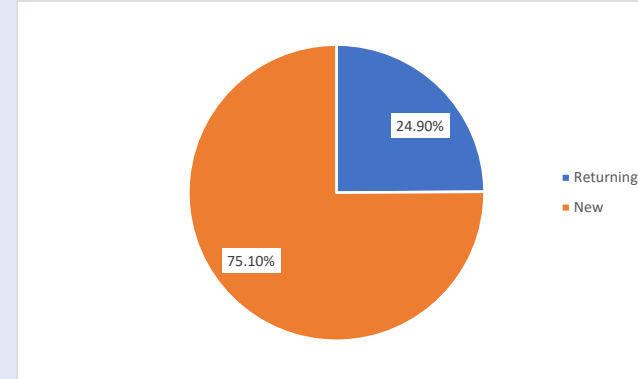
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**September 2022**

## Visits to [www.sentencingcouncil.gov.uk](http://www.sentencingcouncil.gov.uk)

	This month	Last month
Users*	200,931	195,670
Sessions per user	1.84	1.93
Pages per session	2.59	2.63
Ave time on site	04:24	04:31
Bounce rate**	55.20%	54.57%

## Visitors: new and returning



## Announcements – September 2022

7th	Miscellaneous amendments to sentencing guidelines consultation
9th	Statement on the death of her Late Majesty Queen Elizabeth II
30th	Effectiveness of sentencing literature review published

## Top referring sites

<a href="http://cps.gov.uk">cps.gov.uk</a>
<a href="http://judiciary.sharepoint.com">judiciary.sharepoint.com</a> (Judicial Intranet)
<a href="http://judiciary.uk">judiciary.uk</a>

\*Users: Number of people who have visited the website at least once within the date range

\*\*Bounce rate: Percentage of people who land on a page on the website, then leave

Most visited pages	Pageviews	Unique Pageviews
Magistrates' court guidelines search page	179,647	80,662
Crown Court guidelines homepage	31,032	20,866
Website homepage	29,956	24,025
Magistrates' court homepage	30,073	20,576
Fine-calculator/	24,418	16,835
Offences/magistrates-court/item/common-assault-racially-or-religiously-aggravated-common-assault-common-assault-on-emergency-worker/	22,592	19,110
Offences/magistrates-court/item/excess-alcohol-driveattempt-to-drive-revised-2017/	16,401	13,359
Outlines*	14,648	8,603
Outlines*/assault†	12,895	11,568
Offences/magistrates-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/	11,544	10,329

### Most visited guidelines

<b>Magistrates</b>	Common assault / Racially or religiously aggravated common assault/ Common assault on emergency worker
<b>Crown Court</b>	Causing grievous bodily harm with intent to do grievous bodily harm / Wounding with intent to do GBH
<b>Other pages</b>	About assault (offence outline)

### Top search terms used

<b>Sentencing guidelines</b>
<b>Sentencing Council guidelines</b>
<b>Magistrates' Court sentencing guidelines</b>
<b>Fail to stop guidelines</b>

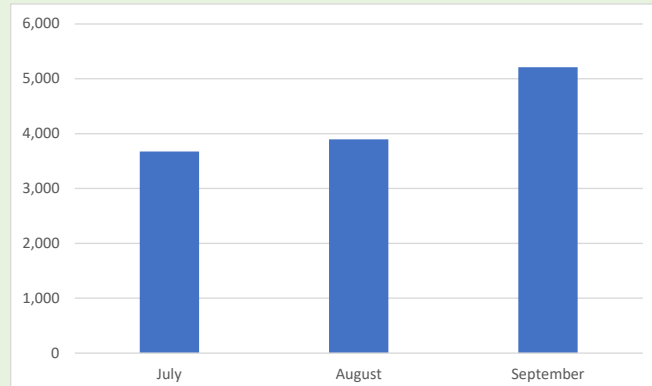
\* Outlines: offence descriptions on the public-facing pages of the website: [www.sentencingcouncil.org.uk/outlines/](http://www.sentencingcouncil.org.uk/outlines/)



### Subscribers

**+15 = 1,175**

### Video views per month



### Most watched video



How offenders are sentenced in England and Wales

### Watch time average

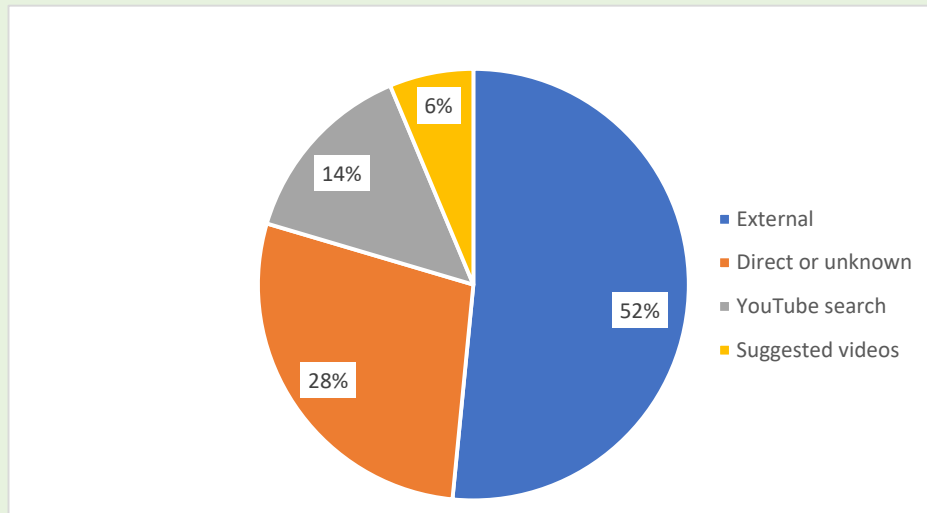
**02:31**

### Impressions\*

**19,500**

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

## How viewers find our videos



## YouTube search: terms used

1	how offenders are sentenced in England and Wales
2	magistrate
3	magistrates court UK
4	abh
5	can sentence

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

### Subscribers

**+303 = 4,527**

### Most clicked-through links

Statement on the death of Her Late Majesty Queen Elizabeth II  
Minutes of Sentencing Council meeting July 2022  
Miscellaneous amendments consultation – news item  
Reappointment of non-judicial Member (Diana Fawcett)  
Miscellaneous amendments consultation – consultation page

### All bulletins

Sent	4
Delivered	95.3%
Opened	31.8%
Engagement rate*	4.7%

### Highest engagement\*

Miscellaneous amendments consultation

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

### Followers

**+11 = 6,033**

### Highlights

Tweets	Impressions	Mentions	Profile visits
3	12,800	39	2,108

### Top tweet

We're consulting on proposed changes to motoring, criminal damage, bladed article, drug, burglary & manslaughter guidelines. Our miscellaneous amendments consultations allow us to update, clarify and bring consistency without revising entire guidelines

**Impressions: 2,397**

**Total engagements: 46**

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