

15 September 2022

Dear Members

## Meeting of the Sentencing Council – 23 September 2022

The next Council meeting will be held in the **Queens Building, Judges Conference Room, 1<sup>st</sup> Floor Mezzanine at the Royal Courts of Justice**. This will be a hybrid meeting, so a Microsoft Teams invite is also included below. **The meeting is Friday 23 September 2022 and will from 9:45 to 15:45.**

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

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

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

- |                                      |             |
|--------------------------------------|-------------|
| ▪ Agenda                             | SC(22)SEP00 |
| ▪ Minutes of meeting held on 22 July | SC(22)JUL01 |
| ▪ Underage sale of knives            | SC(22)SEP02 |
| ▪ Perverting the course of justice   | SC(22)SEP03 |
| ▪ Animal cruelty                     | SC(22)SEP04 |
| ▪ Blackmail                          | SC(22)SEP05 |
| ▪ Aggravated vehicle taking          | SC(22)SEP06 |

### 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

**23 September 2022**  
**Royal Courts of Justice**  
**Queen's Building**

09:45 – 10:00	Minutes of the last meeting and matters arising (paper 1)
10:00 – 11:00	Underage sale of knives - presented by Ruth Pope (paper 2)
11.00 - 11:15	Break
11:15 – 12:15	Perverting the Course of Justice and Witness intimidation presented by Mandy Banks (paper 3)
12:15 – 13:15	Animal cruelty - presented by Zeinab Shaikh (paper 4)
13:15 – 13:45	Lunch
13:45 – 14:45	Blackmail, kidnap, false imprisonment and threats to disclose private sexual images - presented by Mandy Banks (paper 5)
14:45 – 15:00	Break
15:00 – 15:45	Aggravated vehicle taking - presented by Zeinab Shaikh (paper 6)

# Sentencing Council

## **COUNCIL MEETING AGENDA**

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## MEETING OF THE SENTENCING COUNCIL

22 JULY 2022

### MINUTES

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<u>Members present:</u>	Tim Holroyde (Chairman) Rosina Cottage Rebecca Crane Rosa Dean Diana Fawcett Elaine Freer Max Hill Jo King Stephen Leake Juliet May Maura McGowan
<u>Apologies:</u>	Nick Ephgrave Beverley Thompson
<u>Representatives:</u>	Hanna van den Berg for the Lord Chief Justice (Legal and Policy Advisor to the Head of Criminal Justice) Claire Fielder for the Lord Chancellor (Director, Youth Justice and Offender Policy)
<u>Observers:</u>	Judith Seaborne, Criminal Appeal Office
<u>Members of Office in attendance:</u>	Steve Wade Mandy Banks Ruth Pope Zeinab Shaikh Ollie Simpson Jessie Stanbrook

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

- 1.1 The minutes from the meeting of 17 June 2022 were agreed.

## **2. MATTERS ARISING**

- 2.1 The Chairman welcomed Elaine Freer to her first meeting following her recent appointment as the academic member of the Sentencing Council.

## **3. DISCUSSION ON BLACKMAIL, THREATS TO DISCLOSE, KIDNAP AND FALSE IMPRISONMENT – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL**

- 3.1 The Council discussed a draft version of a new guideline for blackmail offences. The Council was broadly content with the proposed structure and factors, but made a number of suggestions for rewording. Recent blackmail cases were discussed, and it was agreed that consideration should be given to the various ways these offences were being committed, with particular reference to more recent examples.
- 3.2 The Council requested that a revised version be prepared for the next meeting. The Council also considered the scope of the rest of the project, and it was agreed that it should include kidnap, false imprisonment and the amendment to legislation to include threats to disclose private sexual images offences.

## **4. DISCUSSION ON MISCELLANEOUS AMENDMENTS – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**

- 4.1 The Council considered amendments to the Children and young people guideline resulting from changes to legislation and concluded that the required changes should be made without consultation as they were an inevitable result of that legislative change. It was also agreed that some minor amendments could be made for clarity and to reflect caselaw.
- 4.2 The Council agreed to remove the word ‘gang’ from the aggravating factor ‘Offence was committed as part of a group or gang’ in the bladed article/offensive weapons guidelines without consultation. This would bring it into line with other guidelines.
- 4.3 Consideration was given to a new step 3 in the Unlawful act manslaughter guideline to give guidance on the required sentence of life for manslaughter of an emergency worker and the Council agreed to consult on the proposed wording.
- 4.4 The Council agreed that the annual consultation on miscellaneous amendments should be published in September.

## **5. DISCUSSION ON SENTENCING COUNCIL MOJ FRAMEWORK DOCUMENT – PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL**

- 5.1 The Council considered a draft of the Sentencing Council - Ministry of Justice (MoJ) framework document. A revised draft will be returned to MoJ for consideration before being finalised in due course.
- 6. DISCUSSION ON AGGRAVATED VEHICLE TAKING – PRESENTED BY ZEINAB SHAIKH, OFFICE OF THE SENTENCING COUNCIL**
- 6.1 This was the second meeting to discuss the sentencing guidelines for aggravated vehicle taking without consent. The Council considered the sequencing of work to revise these alongside the public consultation on motoring offences guidelines, given the overlap between these offences.
- 6.2 The Council also discussed revisions to the sentencing tables and aggravating and mitigating factors for aggravated vehicle taking, with the aim of providing more detailed guidance to sentencers and to ensure proportionality with other similar offences.
- 7. DISCUSSION ON ENVIRONMENTAL OFFENCES – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**
- 7.1 The Council discussed a letter from the Herts Fly Tipping Group calling for changes to the Environmental offences guideline for individuals. The Council agreed that in tandem with the work being undertaken on the Imposition guideline the approach in the guideline to community sentences should be reviewed.
- 7.2 The Council considered a recommendation from the Environmental Audit Committee in the Water quality in rivers report for a review of the Environmental offences guideline for organisations.
- 7.3 The Council noted the 2021 prosecution of Southern Water Services Limited in which a fine of £90 million was imposed following guilty pleas and concluded that the guideline for organisations provides the sentencing court with all the tools and guidance required to impose appropriate sentences in serious cases involving very large organisations.
- 8. DISCUSSION ON IMPOSITION – PRESENTED BY JESSIE STANBROOK, OFFICE OF THE SENTENCING COUNCIL**
- 8.1 The Council considered the first scoping paper for the Imposition guideline project, and agreed all ten recommendations for current and new sections to be included in the review.
- 8.2 The Council agreed to review the sections on community requirements, pre-sentence reports, suspended sentence orders, thresholds and electronic monitoring, as well as exploring potential new sections on points of principle affecting sentencing specific cohorts of offenders, deferred sentencing and the five purposes of sentencing.

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

**23 September 2022**  
**SC(22)SEP02 – Sale of knives etc to  
persons under eighteen**

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

**Jo King**  
**Ruth Pope**  
**ruth.pope@sentencingcouncil.gov.uk**

## **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 The Council has received 32 responses to the consultation including from sentencers, retailers and prosecutors. A small scale road testing exercise was carried out with ten magistrates during the consultation period. A summary of the road testing is attached at **Annex A**.

1.3 The guidelines were developed with the assistance of the National Trading Standards and the Association of Chief Trading Standards Officers (ACTSO) and we have held a further meeting with trading standards officers since the close of the consultation to discuss some of the issues raised in the responses.

1.4 One further meeting was planned to consider the responses and finalise the definitive guidelines but depending on the progress made an extra meeting may be required.

## **2 RECOMMENDATION**

2.1 The Council is asked to consider the guideline for sentencing organisations and:

- Retain the scope of the guideline
- Amend the culpability factors
- Add a second level of harm
- Consider changes to aggravating and mitigating factors
- Make amendments to step 3
- Consider whether to remove the reference to compensation from step 7
- Consider whether any issues of equity and diversity can be addressed
- Consider the impact and risks associated with the guideline

### **3 CONSIDERATION**

#### *Background*

3.1 In 2020 the Council received a submission on behalf of the London Borough of Barking and Dagenham regarding the need for a sentencing guideline for the offence of selling knives to persons under the age of 18. The submission argued that sentences being passed for larger organisations did not adequately reflect the seriousness of the offence and the means of the organisation. The Council agreed to add this to the list of future guidelines to be developed when resources were available.

3.2 The offence is prosecuted by Trading Standards departments within local authorities and almost all prosecutions are as a result of test purchases. This means that the volume of prosecutions is very closely linked to the resources that Trading Standards departments are able to devote to this aspect of their work. It is low volume: around 70 individuals and nearly 90 organisations were prosecuted in the five-year period 2016 to 2020. The Council drew on the expertise of the National Trading Standards and the Association of Chief Trading Standards Officers (ACTSO) in developing the guidelines.

3.3 The offence of selling knives etc to persons under the age of 18 is a summary only offence; 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.

3.4 In developing the guideline we also spoke to police about the sale of knives to children through more informal channels (such as peer to peer and via social media) or directly or indirectly by websites that sell knives in bulk. The police voiced concerns that the proposed guideline would not sentence these cases effectively. However, the police also accepted that they do not use this offence to prosecute such offending. Therefore the Council decided to restrict the guideline to the type of offending that is actually coming before the courts. This is discussed further below.

#### *Responses to the consultation*

3.5 Many of the consultation responses have been supportive of the proposals, but several have suggested areas for improvement. Most of the areas of contention arise in relation to the guideline for organisations, so this paper concentrates on the factors in that guideline though many of the issues will be common to both guidelines. The sentence levels can be reviewed once decisions have been reached on the factors.

### *Scope of the guideline*

3.6 The consultation asked whether the wording relating to the scope of the guideline was clear:

This guideline applies to the unlawful sale in a single transaction of 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.

3.7 Most respondents found the wording to be clear – though some questioned what would amount to a small quantity of knives with some suggesting that it should specifically state that a ‘small quantity’ includes a single knife and others wanting it to make clear that it would include a set of kitchen knives even if there were a relatively large number in that set. In road testing the majority of the magistrates thought the introductory text was clear but again some commented on the interpretation of ‘a small quantity of knives’.

3.8 The question in the consultation related only to whether the scope was clear but several respondents questioned the Council’s decision to limit the scope of the guideline:

The Expert Panel of Age Restrictions believes that the wording is clear as far as it is drafted, but is too narrow in scope. The drafting wording appears to reflect a traditional retail environment, sometimes described as “bricks and mortar retail”. The retail environment, both formal and informal, is however markedly more diverse than that. Regardless of the circumstances of most prosecutions so far, the Expert Panel thinks that the Sentencing Council’s guidelines should reflect the wider range of circumstances and scenarios where knives are sold to children, including those situations where people over the age of 18 buy a knife and then sell it to a child under the age of 18 in a more informal community setting. **Office of Product Safety and Standards (OPSS)**

BRC members believe creating sentencing guidelines for test purchase convictions without also including associated guidelines for actual sales to underage purchasers is fundamentally flawed. The logical approach would be to produce a set of guidelines covering both circumstances, which would then aid the judiciary in understanding the true nature of the offence they are considering. The clear danger in not including such, is that the sentencing court projects the theoretical harm associated with a test purchase into an actual harm associated with an actual sale to an underage purchaser. It is essential for a court determining a test purchase sale to clearly differentiate between the two scenarios and therefore including both scenarios in the guidelines is the key starting point. **British Retail Consortium (BRC)**

We consider that the wording relating to the scope of the guideline is fairly clear, though we wonder what examples are envisaged for cases of a more serious nature such as those involving the sale of “large quantities of knives”.

We have no experience of a sale of a large quantity of knives to children being prosecuted before us. We wonder why such an offence should not be sentenced in accordance with this guideline. Indeed, we are curious why a sale of knives to children following reckless/deliberate marketing of those knives to children is also not included in this guideline. **Her Majesty’s Council of District Judges (Magistrates’ Courts).**

3.9 The explanation given in the consultation document for limiting the scope of the guideline was this:

When developing the guidelines, the Council noted that the offence could also, at least theoretically, be used to prosecute in cases of the deliberate sale of knives to children – perhaps through social media and/or for the sale of knives in large quantities. Consideration was given to expanding the scope of the guideline to cater for such cases, but the Council decided that the guideline should focus on the types of case that actually come before the courts.

3.10 In hindsight perhaps a fuller explanation of the difficulties of devising a guideline for theoretical cases would have been helpful, but having consulted on a guideline that is limited in scope it would not be practicable to broaden the scope without considerable extra work and further consultation even if it were felt to be useful to do so. We can make the rationale clear in the response to consultation.

3.11 As for clarifying the meaning of ‘a small quantity of knives’, this may be less of an issue in practice as test purchases will always follow a fairly similar pattern and are likely to involve either a single knife or a small set (e.g. three to six). They are highly unlikely to involve, for example, a set of 20 specialist chef’s knives. It is difficult to see how the wording could be improved.

**Question 1: Does the Council wish to change the scope of the guidelines?**

**Question 2: Does the Council wish to change the wording on the scope of the guidelines?**

### *Culpability*

3.12 The culpability factors consulted on were:

<b>Culpability</b>
<b>A – High culpability</b> <ul style="list-style-type: none"><li>• Offender 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 failed to act on concerns raised by employees or others</li><li>• Falsification of documents</li><li>• Offender failed to make appropriate changes following advice and/or prior incident(s)</li></ul>
<b>B – Medium culpability</b> <ul style="list-style-type: none"><li>• Systems were in place but these were not sufficiently adhered to or implemented</li></ul>

- Other cases where the offender's culpability falls between the factors as described in A and C

### **C – Lesser culpability**

- Offender made significant efforts to prevent underage sales where not amounting to a defence

3.13 There was some uncertainty among magistrates in road testing as to whether all or just some of the standard measures listed needed to be present to show compliance.

3.14 Some respondents were supportive of the proposals:

The culpability factors set out in the draft sentencing guideline accurately reflect the types of age verification procedures we recommend convenience retailers have in place. ACS' Assured Advice on Preventing Underage Sales acknowledge the need for identifying restricted products, clear signage, age verification checks (best practice is Challenge 25 policy), staff training, maintaining refusals log and where possible till prompts. **Association of Convenience Stores**

3.15 Others had concerns:

The Criminal Justice Act 1988 does not specify what are referred to in the draft guideline as "standard measures" in the "High" culpability category. The draft guideline would therefore indirectly create a checklist by listing "standard measures".

This raises the question of what happens if retailers adhere to different guidance including, perhaps assured advice received from their Primary Authority?

In addition, it removes the element of discretion to creating an effective due diligence system, which is a more of an issue for online retailers. The law does not prescribe what steps should be taken to ensure that you have a defence of due diligence in the context of retail stores and we are not aware of any "standard measures" relating to online age verification.

It is also not clear whether the level of culpability would be "high" if only one or two etc of the "standard measures" was not in place.

For all of these reasons, we consider that the wording of the guideline would benefit from making it clearer that typical measures to prevent age restricted sale *may* include the various steps currently labelled as "standard measures". The Court should be invited to look at the *overall* system that was in place and particular circumstances relating to the offence in question.

The guideline will need to be kept under continuous review as the guidance and/or technology evolves, particularly in respect of online sales. **Womble Bond Dickinson LLP**

The indicators for high culpability seem tougher for in-store sales than on-line sales. There are several proposed measures for shops, many of which make little difference to the offence (e.g, refusal logs), and yet the on-line business does not need to indicate number of refused orders. Yet, relevant authorities, including the police, widely accept that there is a greater risk from on-line sales where it perceived

to be an easier purchase. It seems very easy to be highly culpable in the way the factors are described and that is a concern **British Independent Retailers Association**

The suggestion there is a standard list of due diligence requirements misunderstands the nature of such requirements. For example, not all retailers believe a refusals log serves much purpose even if they use one to please Trading Standards. The due diligence procedures should be seen as a suite of measures possibly based on Primary Authority advice not as a tick box list.

The measures for online sales should not refer to standard approaches. It should reflect the requirements of the Offensive Weapons Act and its statutory guidance including that age verification on delivery can be used as well as collect in store. **BRC**

### 3.16 The BRC suggested revised culpability factors:

Culpability
<p><b>A – High culpability</b></p> <ul style="list-style-type: none"> <li>• Offender failed to put in place <del>standard</del> <b>a suite of appropriate</b> measures to prevent underage sales -               <ul style="list-style-type: none"> <li>○ For in store sales <del>standard</del> measures <del>would normally</del> <b>could</b> include <b>some or all of the following or others appropriate to the business and as its Primary Authority might advise:</b> 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 <del>standard</del> measures would <b>follow the requirements of the Offensive Weapons Act statutory guidance including</b> <del>normally include:</del> identifying restricted products, <b>age verification on delivery</b> <del>use of a reliable online age verification tool and/or</del> collect in-store policy with checks on collection <b>or if available use of a reliable online age verification tool.</b></li> </ul> </li> <li>• Offender failed to act on concerns raised by employees or others</li> <li>• Falsification of documents</li> <li>• Offender failed to make appropriate changes following advice and/or prior incident(s)</li> </ul>
<p><b>B – Medium culpability</b></p> <ul style="list-style-type: none"> <li>• Systems were in place but these were not sufficiently adhered to or implemented <b>and there was evidence this was a pattern of behaviour rather than an isolated incidence</b></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 <del>significant</del> <b>every</b> efforts to prevent underage sales where not amounting to a defence</li> <li>• <b>The offence resulted from a Test Purchase which as such had no potential for harm or the Test Purchase was not in accordance with the Test Purchase Code and did not represent a pattern of behaviour</b></li> <li>• <b>The offence resulted from the sale of a type of knife that could not cause harm or injury such as a cutlery knife.</b></li> </ul>

3.17 The changes to the high culpability factors proposed by the BRC have been discussed with Trading Standards and they were broadly content with the suggested

changes. They accept that refusals logs are not appropriate in all situations and suggested reference might instead be made to 'a means of monitoring refusals' which in the case of larger retailers could be an automated function. They also accept that age verification on collection or delivery is the most robust method for online sales.

3.18 The 'primary authority' is the local authority that a retailer with multiple sites around the country works with to give advice on trading standards matters. This means that if a store in one local authority area fails a test purchase exercise and the primary authority for that retailer is elsewhere, the investigating local authority would liaise with the primary authority before proceeding to prosecution.

3.19 The proposed change to medium culpability is problematic because it could indicate that a single incident would always be low culpability – which may not always be appropriate. The proposed change from 'significant efforts' to 'every effort' seems to be setting the bar too high for lesser culpability and it is difficult to see what would amount to 'every effort' while not amounting to a defence of due diligence.

3.20 The suggestion that any sale resulting from a test purchase should be low culpability is misconceived. Prosecutions for many offences result from similar methods of investigation such as undercover police officers buying drugs or intelligence officers infiltrating terrorist organisations. The final suggestion regarding the type of knife may be better addressed under harm.

3.21 Other respondents made suggestions for additional culpability factors:

The MA would suggest that an organisation's failure to protect employees and to act on comments and fears from staff could be meaningfully counted in the suite of culpability factors **Magistrates' Association**

Should there be a direct comment on the following:

- The trader sold with no regard a knife to a minor
- The trader had no knowledge or understanding of preventative measures
- The trader had no regard to any preventative measures to stop underage sales
- How is "offender failed to act on concerns raised by employees or others" proved?

#### **Trading Standards Wales**

To make sure every reasonable step is being taken to prevent the sale of knives and other bladed articles to those under 18, we believe that a responsible organisation should not only establish an appropriate set of procedures to prevent underage sales but must ensure these procedures (i) continue to remain effective and (ii) are updated as necessary. We therefore propose that the following additional factors should be added under Medium and Lesser Culpability

#### *Medium Culpability*

- *Offender has failed to regularly quality check the systems and procedures they have in place (for example, by working with the Local Authority to arrange test purchases in-store and online).*
- *Offender has failed to regularly review and update the written documentation and procedures in place and the staff training programme, to make sure they continue to be fit for purpose.*
- *Offender has failed to review (and if necessary update) the documentation, procedures and training when there have been relevant statutory changes.*

#### *Lesser Culpability*

- *Offender has regularly quality checked the systems and procedures they have in place (for example, by working with the Local Authority to arrange test purchases in-store and online).*
- *Offender has regularly reviewed and updated the written documentation and procedures in place and the staff training programme, to make sure they continue to be fit for purpose.*
- *Offender has reviewed (and if necessary updated) the documentation, procedures and training when there have been relevant statutory changes.*

#### **West London Magistrates' Bench**

For online sales high culpability should include offender failed to make contractual arrangements with a delivery company to ensure knives are not handed over to people under the age of 18 when delivered. **London Borough of Tower Hamlets**

With regards the specifics of culpability factors relating to Online, the current text may be misinterpreted and needs to be in line with the Statutory Home Office Guidelines which sets out on Page 22 (Defence to sale of bladed articles to persons under 18: England and Wales)<sup>1</sup> the conditions that must be met to be able to deliver bladed items to residential addresses:

1. The seller has a system in place to verify the age of the purchaser and that they are not under 18, and that the system is likely to prevent purchases by under 18s;
2. The package when dispatched by the seller is clearly marked that it both contains a bladed article and that it can only be delivered and handed over to a person aged 18 or over (whether the purchaser or someone representing them);
3. The seller has taken all reasonable precautions and exercised all due diligence to ensure that when the package is delivered, it is handed over to a person aged 18 or over. This applies whether the seller delivers the package themselves or through a third party e.g. by staff at a collection point; and
4. The seller does not deliver the package, or arrange for it to be delivered, to a locker.

These conditions need to be factored into the culpability and should therefore influence its associated level. The Guidance also specifically states that the Home Office were not looking to endorse or prescribe any specific age verification systems so the direct reference to them in the guideline can be misleading. **Ocado Retail Ltd**

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<sup>1</sup> <https://www.gov.uk/government/publications/the-offensive-weapons-act-2019/statutory-guidance-offensive-weapons-act-2019-accessible-version#sale-and-delivery-of-knives-etc---offensive-weapons-act-2019-part-3>



3.22 Taking account of all of these suggestions and the comments of magistrates in the road testing, the following is proposed:

<b>Culpability</b>
<b>A – High culpability</b> <ul style="list-style-type: none"><li>• Offender failed to put in place appropriate measures to prevent underage sales<ul style="list-style-type: none"><li>○ For in-store sales measures could 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 <a href="#">Home Office guidance</a> including: identifying restricted products, age verification on delivery or collect in-store policy with age verification on collection</li></ul></li><li>• Offender failed to act on concerns raised by employees or others</li><li>• Falsification of documents</li><li>• Offender failed to make appropriate changes following advice and/or prior incident(s)</li></ul>
<b>B – Medium culpability</b> <ul style="list-style-type: none"><li>• Systems were in place but these were not sufficiently adhered to or implemented</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>

**Question 3: Does the Council agree to the proposed changes to the culpability factors in the guideline for organisations?**

*Harm*

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

<b>HARM</b>
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.

3.24 Magistrates in road testing and many respondents generally agreed with having only one level of harm. Concern was expressed by several respondents, in particular retailers, that the offence can be committed by the sale of any knife and that by having only one level of harm there was no way of distinguishing between the sale of, for example, a carving knife and a butter knife. Technically, the sale of any knife (even a plastic one) to a person under 18 could result in a prosecution. Some retailers we spoke to expressed a concern that an individual trading standards officer could bring a prosecution for sale of cutlery knives in situations where most would not. Trading standards have reassured us that any prosecution

has to be approved by multiple people and such a prosecution is unlikely to be considered in the public interest. Perhaps more realistically, there was a concern that trading standards might use previous sales of cutlery knives in test purchases that did not result in a prosecution as evidence of a poor record of compliance.

3.25 Retailers explained that in many stores kitchen knives would be kept in a locked cabinet and it would require two members of staff to unlock and approve the sale, whereas sets of cutlery would be on open display and staff would be less likely to appreciate the need for care when selling them even with the benefit of training and till prompts etc.

3.26 Some respondents went further:

[N]o harm whatsoever can arise from a test purchase sale as it is in controlled circumstances and the prosecution should acknowledge the fact that there is no harm if there is no evidence of any actual sales to minors by the retailer in question. This is vital to ensure the matter is considered in the correct context. Potential, and we stress potential, harm only arises from an actual sale and even then there may in fact be no harm arising unless one assumes ALL under- age sales are to people determined to use the item for a crime.

To suggest there is harm in a test purchase sale is to suggest that because the test was failed, there must inevitably be occasions in the past or future when a sale has or will be made and that sale will result in harm. This supposition without any evidence in fact seems a novel approach to law. **BRC**

[W]e propose there should be more than one level of harm. Purchases by minors which are test purchases under the control of adults from the local authority or other agencies can be placed in the lowest level, as there should be no harm caused here. Purchases other than test purchases should then be distinguished by both the type of bladed article sold and the number of bladed articles sold. We propose three levels of harm that should be assessed for a particular offence **West London Magistrates Bench**

3.27 All, or almost all, prosecutions for this offence are as a result of test purchases and the Council has already decided that the harm from the offence is the **risk** of knives falling into the hands of young people. Contrary to what the BRC suggests this approach is based in law. Section 63 of the Sentencing Code states:

Where a court is considering the seriousness of any offence, it must consider—

(a) the offender's culpability in committing the offence, and

(b) any harm which the offence—

(i) caused,

(ii) was intended to cause, or

(iii) might foreseeably have caused.

3.28 Several respondents thought that the age of the purchaser was relevant to the level of harm but the majority accepted that there was no clear correlation between the risk of harm and the age of the purchaser. One respondent thought that the age of the purchaser was relevant to culpability in that a sale to a younger child demonstrated deliberate or

reckless selling. In the context of how test purchases are carried out it is not recommended that the age of the purchaser should be a key factor in assessing seriousness. If it is relevant in a particular case it could be taken into account as an aggravating or mitigating factor.

3.29 Despite the fact that it is unlikely in practice that a prosecution would result from the sale of anything other than a sharp knife, in the light of the way the legislation is worded and the concerns raised by respondents, it is proposed to add a second level of harm. For example:

#### **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. Where the item(s) sold do not fit clearly into one category the court should consider the level of harm risked by the sale of such item(s)

#### **Higher risk**

- Any article with a blade that is capable of causing a serious injury to a person which involves cutting that person's skin
- An axe
- any other article which has a blade or which is sharply pointed and which is made or adapted for use for causing injury to the person.

#### **Lower risk**

- Any cutlery knife (excluding steak knives or similar)
- Any other knife which is not likely to be used as a weapon such as:
  - utility knives with small cutting blades
  - snap off cutters
  - pizza cutters
  - small cheese knives

3.30 The wording of the factors is based on [Home Office statutory guidance](#). The views of trading standards and industry representatives on any revised factors could be sought before they are finalised.

**Question 4: Does the Council agree to having two levels of harm?**

**Question 5: Are the proposed revised harm factors the right ones?**

*Aggravating and mitigating factors*

3.31 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**

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

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

**Other aggravating factors:**

- Obstruction of justice

3.32 The West London Magistrates' Bench were unsure what was meant by the aggravating factor 'Obstruction of justice'. They suggested rewording to: 'Obstruction of justice – including the hiding or destruction of evidence, blaming others, etc'. Alternatively they suggested two new factors: 'Poor level of co-operation with the investigation' and 'Limited or no acceptance of responsibility'. They also suggested adding: 'No evidence of any steps taken since the current offence to prevent recurrence'. A similar suggestion was made by a magistrate in road testing.

3.33 Womble Bond Dickinson LLP suggested that previous convictions should be considered in the context of the size of the defendant's retail operation by specifically taking into consideration the number of stores operated by the defendant organisation and/or volume of sales of age restricted products.

3.34 London Borough of Tower Hamlets suggested adding a factor relating to failing to adhere to assured advice given by a Primary Authority. The British Transport Police suggested having the age of the child as an aggravating factor as well as the sale occurring in a high violent crime area.

3.35 These suggestions should be considered in the context of the high culpability factors:

- Offender failed to act on concerns raised by employees or others
- Falsification of documents
- Offender failed to make appropriate changes following advice and/or prior incident(s)

3.36 These offences are fairly straightforward and on reflection, it is not entirely clear what conduct 'Obstruction of justice' is aimed at when 'Falsification of documents' is included at step 1. The other suggestions from the West London Magistrates' Bench are mirrors of mitigating factors and it could be argued that it would not be appropriate to aggravate for failure to take positive action/ steps.

3.37 Consideration could be given to providing more context to previous convictions. There is an existing expanded explanation for previous convictions but the content is aimed at individual offenders and has little relevance to organisations. If the Council thought it would be useful some wording could be added either on the face of the guideline or as an expanded explanation. In practice, larger organisations will be represented and these points will, no doubt, be made to the sentencing court whether or not they are in the guideline.

3.38 The only other suggestions not already covered by step 1 factors relate to the age of the purchaser (which was also mentioned by some magistrates in road testing) and the sale taking place in a high violent crime area. Magistrates in road testing also suggested the number of items sold could aggravate the sentence. It is not clear that any of these necessarily make the offence more serious in ways that are not already captured at step 1.

**Question 6: Does the Council wish to make any changes to the aggravating factors?**

**Specifically:**

- **adding information about how previous convictions should be considered;**
- **removing the obstruction of justice factor;**
- **adding any new factors**

**Factors reducing seriousness or reflecting mitigation**

- No previous convictions or no relevant/recent convictions
- Evidence of steps taken voluntarily to prevent re-occurrence
- High level of co-operation with the investigation and acceptance of responsibility
- Good record of compliance with Trading Standards

3.39 There were only a few comments on mitigating factors. The British Independent Retailers Association asked for clarity around ‘high level of co-operation with the investigation’. From their response it appears that they interpreted this as relating to making changes required by trading standards whereas that would be more relevant to ‘Evidence of steps taken voluntarily to prevent re-occurrence’. They make the point that for smaller retailers it is not always financially or physically possible to make changes requested by trading standards (e.g. changing store layout). This could perhaps be addressed by referring to ‘reasonable steps’ or ‘appropriate steps’.

3.40 West London Magistrates’ Bench suggested splitting the third factor into two factors:

- High level of co-operation with the investigation
- Acceptance of responsibility

3.41 The difficulty with this suggestion is that ‘acceptance of responsibility’ could be conflated with a guilty plea, whereas presumably it was intended to indicate pre-court admissions/ acceptance. This could perhaps be solved by rewording to ‘acceptance of responsibility from the outset’. However, in the context of this offence it may not be particularly relevant and could disadvantage larger organisations where there are several layers of decision making. Therefore it is recommended that this part of the factor be removed.

3.42 Womble Bond Dickinson LLP queried what was encompassed by ‘Good record of compliance with Trading Standards’ given the broad remit of Trading Standards. One

solution could be to limit that factor matters relating to age restricted products. They also proposed additional mitigating factors:

- previous test purchase record;
- the target audience – selling and marketing services to the trade creates less of a risk of than selling to consumers, especially those stores which appeal to children;
- engagement with community initiatives and/or the Police to reduce knife-related crime;
- additional efforts to tackle underage sales in areas with high-levels of knife crime;
- engaging in voluntary initiatives to reduce underage sales such as public pledges.

3.43 This last suggestion is echoed in part by the BRC who suggested that being a signatory to the Home Office Voluntary Agreement should be taken into account. However, signing up to various initiatives is not necessarily mitigation if it does not lead to compliance. As the list of mitigating factors is non-exhaustive there is no reason why any relevant matters (insofar as they are not covered elsewhere) could not be taken into account where appropriate.

3.44 The suggested reworded factors are:

- High level of co-operation with the investigation ~~and acceptance of responsibility~~
- Good record of engagement and compliance with Trading Standards (particularly in relation to age restricted sales)

#### **Question 7: Does the Council wish to make any changes to the mitigating factors?**

##### *Step 3 – adjustment of fine*

Having arrived at a fine level, 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 size and financial position of the offending organisation and the seriousness of the offence.

The fine must be substantial enough to bring home to both management and shareholders the need to operate within the law. Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.

In considering the ability of the offending organisation to pay any financial penalty the court can take into account the power to allow time for payment or to order that the amount be paid in instalments.

The court should consider whether the level of fine would otherwise cause unacceptable harm to third parties.

Below is a **non-exhaustive** list of additional factual elements for the court to consider.

The court should identify whether any combination of these, or other relevant factors, should result in a proportionate increase or reduction in the level of fine.

**Factors to consider in adjusting the level of fine**

- The value, worth or available means of the offender
- Impact of fine on offender's ability to implement effective compliance programmes
- Impact of fine on employment of staff, service users, customers and local economy (but not shareholders)

3.45 Respondents who commented generally agreed with this step. All but one magistrate in road testing thought it was useful though several found it quite complicated. The BRC suggested adding two further factors to consider in adjusting the fine:

- The potential reputational damage that the offender will suffer and be likely to deter any future offence
- Recognition that a fine for a test purchase should reflect only that purchase and not make suppositions that a single failed test purchase is a guide to future behaviour for which there is no evidence

3.46 Reputational damage could be relevant to deterrence – though the extent of the reputational damage may be linked to the amount of the fine.

3.47 West London Magistrates' Bench preferred this wording in the fines dropdown in the guideline for individuals:

When sentencing **organisations** the fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law. The court should ensure that the effect of the fine (particularly if it will result in closure of the business) is proportionate to the gravity of the offence.

To the wording in the guideline for organisations:

The fine must be substantial enough to bring home to both management and shareholders the need to operate within the law. Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.

3.48 Taking these suggestions into account some changes are proposed:

Having arrived at a fine level, 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 size and financial position of the offending organisation and the seriousness of the offence.

The fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law. The court should ensure that the effect of the fine (particularly if it will result in closure of the business) is proportionate to the gravity of the offence.

In considering the ability of the offending organisation to pay any financial penalty the court can take into account the power to allow time for payment or to order that the amount be paid in instalments.

The court should consider whether the level of fine would otherwise cause unacceptable harm to third parties.

Below is a **non-exhaustive** list of additional factual elements for the court to consider.

The court should identify whether any combination of these, or other relevant factors, should result in a proportionate increase or reduction in the level of fine.

#### **Factors to consider in adjusting the level of fine**

- The value, worth or available means of the offender
- Impact of fine on offender's ability to implement effective compliance programmes
- Impact of fine on employment of staff, service users, customers and local economy (but not shareholders)
- The effect of the reputational damage to the offender of the conviction and fine

### **Question 7: Does the Council wish to make the proposed changes to step 3?**

#### *Steps 4 to 8*

#### **Step 7 – Compensation and ancillary orders**

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

**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](#)



3.49 Two respondents queried the relevance of compensation for this offence, bearing in mind the nature of the offence and that in practice prosecutions result from test purchases.

#### **Question 8: Does the Council wish to retain the reference to compensation?**

### **4 EQUALITIES**

4.1 There were very few responses to the consultation questions relating to disparities in sentencing and issues of equality and diversity. The Northumbria Violence Reduction Unit commented:

In terms of operational responsibility, should further consideration be given on the expectations on Trading Standards to ensure the new guidelines when communicated to retailers are accessible and easily understood? We are aware that a significant number of small retailers are owned by people from minority communities and language may be a barrier for some. It is important that all retailers understand their responsibilities.

This is also relevant in considering how you ensure there is increased awareness and understanding of sentencing guidelines, there is a need to ensure the guidelines are also clearly understood by people from diverse cultures.

In future how do you ensure there is robust collection of demographic data (for instance, lack of data on ethnicity) where this data is absent it makes it difficult to understand disparity amongst certain groups.

4.2 We have not raised these issues with Trading Standards, but can do so before the next Council meeting to see if there are ways we can work with them (and the retail groups who have responded) to ensure awareness of the definitive guidelines when they are published including among retailers from ethnic minority backgrounds.

#### **Question 9: Aside from exploring how to raise awareness of the guidelines among retailers from ethnic minority backgrounds, are there any equality and diversity issues that we should be addressing?**

### **5 IMPACT AND RISKS**

5.1 Various respondents (especially retailers) have raised concerns that increased penalties for reputable retailers will lead to them withdrawing knives from sale:

If retailers believe they can do nothing more in terms of due diligence there is a danger that they will decide the potential reputational damage – and financial damage – is too great and withdraw from the market – as they have largely online – driving customers to less well organised or less reputable retailers or websites. **BRC**

Whilst the guideline will address inconsistency, the levels of fine will undoubtedly increase. The result is that retailers are being held increasingly accountable for knife crime which, as far as we are aware, is not substantiated with evidence. The real harm is caused by those retailers who deliberately or recklessly market knives to children, which are expressly excluded from the guideline. We therefore consider that a number of amendments can be made to the guideline to be more reflective of the

overall risk of harm in the context of bladed articles by national retailers who, in reality, are the primary target of test purchasing activities. **Womble Bond Dickinson LLP**

Independent retailers are responsible but not perfect. Mistakes are made by owners and employees but in general these business owners are practical, sensible and aware of their legal responsibilities. Since the legislation was introduced, many measures have been taken with regards to the sale of knives to ensure that it is safer.

These sentencing guidelines may well deter retailers from selling bladed articles altogether which would be a poor outcome. If shops, where the controls in place are visible and easily assessed, ordinary consumers and criminals will buy more and more on-line - a sales channel that is a far harder to control and regulate. In all our discussions with police forces, on-line sales have been an area of much more concern so these guidelines may well make it even harder to effectively regulate the sale of knives. **British Independent Retailers Association**

5.2 The Council is limited in what it can do or say in this regard. The guideline can only address the sentencing of cases that are successfully prosecuted (as discussed earlier in this paper).

5.3 A slightly different concern has been raised by some respondents:

The Expert Panel considers that publication of these guidelines may, possibly inadvertently, lead to an increase in the number of large organisations being taken to court more frequently, given it may lead to an increase in test purchasing programmes where some sales are identified as a result of a single failure of human judgement in verifying age rather than systemic failure of age restricted sales policies or abuse. **OPSS Expert Panel**

We are concerned that issuing this Guideline to increase fines on large organisations will send the wrong message – that more test purchasing of large retailers is the key to solving the problem. **BRC**

5.4 It is important to note that an increase in fine levels will not increase the resources of trading standards departments and they have pointed out that there was no increase in the number of prosecutions correlating to the maximum fine increase from £5,000 to unlimited in 2015.

5.5 Some respondents welcomed the improvement in consistency that the guidelines would bring:

We believe these guidelines will result in a more consistent approach from the Courts and sentences that better reflect the detriment and harm caused by these type of offences. **ACTSO**

The draft sentencing guideline will address the significant degree of inconsistency in the approach to sentencing which is welcome. It is this inconsistency which has, in our experience, resulted in the better known national retail brands being disproportionately punished when compared with less reputable businesses that may

often present a greater risk from the perspective of allowing under 18s access to knives. **Womble Bond Dickinson LLP**

I welcome the Council's intention to ensure the courts take a consistent approach to sentencing this offence and, in the case of organisations, impose fines linked to turnover to make penalties proportionate to the size of organisation. **Sarah Dines MP  
Parliamentary Under-Secretary of State for Justice**

5.6 Before the guidelines are signed off consideration will be given to how best to communicate with sentencers, prosecutors, retailers and other interested parties on publication of the definitive guidelines to ensure that the aims of the guidelines (consistent and proportionate sentences for the offences coming before the courts) are understood and implemented.

**Question 10: Are there any issues relating to the risks and impact of the guideline for organisations (not covered elsewhere in this paper) that the Council should address?**

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

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

**23 September 2022**  
**SC(22)SEP03 - Perverting the Course of  
Justice and Witness intimidation**  
**Juliet May**  
**Mandy Banks**  
[Mandy.Banks@sentencingcouncil.gov.uk](mailto:Mandy.Banks@sentencingcouncil.gov.uk)  
**0207 071 5785**

## **1 ISSUE**

1.1 This is the first meeting following the consultation on the draft perverting the course of justice (PTCJ) and revised witness intimidation guidelines. This meeting will focus on responses regarding culpability factors, subsequent meetings will look at the responses regarding the rest of the draft guidelines, harm factors, sentence levels and so on.

## **2 RECOMMENDATION**

2.1 At today's meeting the Council is asked:

- To consider the responses regarding culpability

## **3 CONSIDERATION**

3.1 The consultation ran from 30 March to 22 June this year. In total 48 consultation responses were received, a list of respondents is attached at **Annex A**. The reaction to the draft guidelines was generally positive, subject to points of detail which are discussed below. Road testing of the guidelines was also carried out. A summary of the findings from this is attached at **Annex B**.

3.2 Starting with culpability factors for PTCJ, (**Annex C**) a number of respondents were concerned with the factors '*underlying offence very serious*' in high culpability, and '*underlying offence was not serious*' in lower culpability. The Justice Committee (JC) felt that it could be problematic: that they recognise that the seriousness of the underlying offence is an established factor for the courts to take into account, but that if the factors are to be included it would be beneficial to offer more guidance. For example, whether summary offences should be considered not serious? Without further guidance there may be unintended consequences when sentencers decide what constitutes a very serious offence, they suggest.

3.3 Professor Alisdair Gillespie from Lancaster University was also concerned with the wording of the factors and suggested that mode of trial could be used to decide seriousness.

He suggests that, as a general principle, indictable only offences should be considered the most serious, with summary offences the least serious, with either way offences falling in between the two. Failing that he suggests adding the medium culpability factor the Council considered but discounted of '*underlying offence reasonably serious*'. The Justices' Clerks' Society (JCS) however felt that the wording as is in medium culpability is better than asking courts to decide whether the offence is somewhat or reasonably serious.

3.4 In devising these factors the Council had felt they were self-explanatory, but a small number of respondents felt additional guidance was needed. The Council could add the additional medium culpability factor of '*underlying offence reasonably serious*' or revise the factors completely and use mode of trial instead so high culpability would be '*underlying offence an indictable only offence*', medium culpability would be '*underlying offence an either way offence*' and lower culpability would be '*underlying offence a summary only offence*'.

3.5 However, using the mode of trial could be misleading, as it is the seriousness of the offence committed, rather than the type of offence that is important. For example, a case involving a minor street robbery (indictable only) might be less serious than a highly planned burglary (either way), but under this categorisation the robbery offence would be deemed more serious than the burglary offence. The Council has not previously assessed the seriousness of cases using mode of trial before, and it is quite an arbitrary way of assessing cases. Further, only one respondent made this suggestion so it is proposed that this idea is not practical.

***Question 1: Does the Council wish to reword the underlying offence factors? If so, how would the Council wish to reword? Or just add the additional medium culpability factor?***

3.6 A small number of respondents felt that there should be a culpability factor of an offender holding a position within the justice system. The absence of such a factor was also raised by some road testing participants (page 4 of **Annex B**.) Professor Gillespie suggested that committing the offence is more serious if the person is involved within the justice system or has an equivalent position of authority, he suggests the office holder is choosing to pervert the course of justice despite having a legal or moral obligation to facilitate justice. Similar comments were made by the Criminal Law Solicitors' Association (CLSA). Professor Gillespie goes further to suggest that where the act is linked to their job, such as a police holder deliberately changing a witness statement, this should go into high culpability, where the act is not linked, such as a Judge giving false details in a speeding offence, that should be in lower culpability.

3.7 The Council may recall that the merits of adding such a factor to step two were debated during guideline development, with the decision ultimately being not to include the factor. Given the comments made during consultation the Council may wish to revise this decision, although perhaps the subdivision of the purpose of the act into two factors suggested by Professor Gillespie is not necessary.

***Question 2: Does the Council wish to add a factor of ‘Offender holds a position of responsibility within the criminal justice system’? If so, as a culpability factor or an aggravating factor?***

3.8 A solicitor and Professor Gillespie felt that the proposed factors within medium culpability were too vague and asked if more could be added. As noted above Professor Gillespie suggested that there should be a factor relating to the underlying offence within medium culpability, he also suggests that ‘*some planning*’ is added to medium culpability. The Council may recall that during development the possibility of adding additional medium culpability factors was discussed, including ‘*underlying offence reasonably serious*’ and ‘*conduct was somewhat sophisticated*’ but it was decided against including them. However, a small number of consultees thought that at least two additional factors would be helpful, so the Council may wish to rethink including them. Road testing participants offered mixed views on medium culpability, with one saying they didn’t like how medium culpability is treated, and two others saying that they did (page 4 of **Annex B**).

***Question 3: Does the Council want to add any additional medium culpability factors? Such as ‘some planning’?***

3.9 Women against rape and the Centre for Women’s Justice (CWJ) felt there needed to be better recognition of victims of domestic abuse, predominantly women, who are charged with this offence, and that a history of abuse may make their offending less serious. Some of the concerns they raised are more of a charging issue than a sentencing issue, (whether PTCJ should have been charged or wasting police time, the respondents raising questions of racial and gender discrimination.) The CWJ feel that the lower culpability factor of ‘*involved through coercion, intimidation or exploitation*’ needs to deal more explicitly with the dynamics of domestic abuse. They suggest that a court may look at this factor and think it doesn’t apply in cases where an offender has not been expressly coerced into committing the offence. They suggest adding the words ‘*or as a result of domestic abuse*’ to this lower culpability factor.

3.10 When used as a mitigating factor the [expanded explanation](#) for this factor does

reference domestic abuse, but this additional explanation is only present for the mitigating factor, not the culpability factor.

**Question 4: Does the Council wish to make any changes as a result of the issues raised about victims of domestic abuse, such as adding the wording suggested to the lower culpability factor?**

*Witness Intimidation guideline*

3.11 Turning now to the culpability factors in the witness intimidation guideline, **(Annex D)** a small number of respondents commented on the '*breach of bail conditions*' high culpability factor. The Chief Magistrate raised a concern that as worded it could result in a disproportionate number of cases falling into culpability A. He asked whether a distinction could be drawn between those cases where the breach of bail is a breach of a condition expressly imposed to prevent an offence of witness intimidation, such as non-contact with named witnesses etc, and those cases where the breach occurs incidentally to the offence. He suggests the former type might fall into culpability A, and the latter into categories other than A. Professor Gillespie and a magistrate also raised similar concerns.

3.12 The Chief Magistrate also suggests that the words '*and/or protective order and/or after Police warning re conduct*' should be added, whichever category the factor is placed in. The factor as worded is in the current MCSG guideline and presumably was intended to cover situations where the offender breached specific bail conditions such as not to contact the witness, rather than a breach of any bail condition. So the high culpability factor could be reworded to '*breach of specific bail conditions imposed to prevent witness intimidation*'. It is suggested that it is not necessary to have a breach of other bail conditions in medium culpability- it is the breach of the bail conditions specific to the offence that indicate higher culpability.

**Question 5: Does the Council wish to reword the bail conditions factor in high culpability in the way suggested? Does the Council wish to add the additional wording suggested by the Chief Magistrate re protective orders/police warnings?**

3.13 A number of respondents including the Chief Magistrate were unhappy with the lower culpability factor '*unplanned and/or limited in scope and duration*.' The Chief Magistrate said that many such offences are short, but are extremely serious, so are not lower culpability. Two magistrates queried whether the offence could ever truly be 'unplanned' and that the wording should be removed. West London Magistrates Bench suggested instead that it should be reworded to '*contact with witness unplanned and/or limited in scope and duration*'.



With respect to the Chief Magistrate there does need to be a lower culpability factor- some incidents could be chance encounters and/or brief incidents, which are not as serious as the types of offence in high culpability. Alternatively, the factor could be reworded with the 'or' removed, so it would only fall into lower culpability if unplanned **and** limited, so '*contact with witness unplanned **and** limited in scope and duration*'. The rewording suggested may help clarify the factor and resolve some of the concern.

**Question 6: Does the Council wish to reword the lower culpability factor in the way suggested?**

3.14 Some respondents, including road testing participants (page 9 of **Annex B**) were concerned with the factors relating to violence or threats of violence. The Chief Magistrate feels that there is a tension regarding the meaning of violence within the guideline, that as worded the high culpability factor of '*actual or threat of violence to witnesses and/or their families*' could include a remote, as opposed to in-person threat of violence, and the medium factor of '*non-violent conduct amounting to a threat*' can include in-person intimidation, as long as it isn't actual violence. He asks if remote and actual contact should be treated equally? He suggests that instead only actual violence should be in high culpability, followed by threats of violence and threats of non-violence, and perhaps a factor of a threat calculated to have a particularly adverse impact on the victim.

3.15 The Council of HM Circuit Judges were also concerned with the wording of these factors, particularly the medium culpability factor, and suggested that it is instead reworded to '*non-violent conduct amounting to a threat which falls short of violence*'. The JC also felt that the distinction between the high and medium culpability factors relating to threats could lead to difficulties for sentencers and asked if the factors could be made clearer. They said that as drafted it is unclear whether an implied threat of violence would be captured within high or medium culpability. West London Magistrates Bench suggested that an additional factor in lower culpability would help to make it clear that there must be no direct or implied threat of violence to the witness or their family for the offence to fall into that category. They propose '*no direct or implied threat of physical violence to the witness or their family*' as a new lower culpability factor.

3.16 Taking all these suggestions into account, the factors could be reworded so that in high culpability there is '*actual violence to witnesses and/or their families*', in medium culpability there is '*threat of violence towards witnesses and/or their families*' and then in lower culpability there is '*no direct or implied threat of physical violence to the witnesses*'.

**Question 7: Does the Council wish to reword the factors relating to violence /threats**

***in the way suggested?***

3.17 HM Council of District Judges also queried this factor but asked whether ‘families’ needed to be extended to friends and associates, saying that as worded it opens the door to arguments about who is a member of a family - e.g, is a girl/boyfriend family? Absent a rationale to restricting the factor to families they think it should be extended to friends and/or associates.

3.18 They also query whether the reference should be to ‘witnesses’ in the plural - for this factor and the other factor in high culpability of ‘*deliberately seeking out witnesses*’ or should be in the singular - stating that any offences involving multiple witnesses would be charged as multiple offences. West London Magistrates Bench queried whether the reference should be to both a witness/juror, and the Council of HM Circuit Judges made a similar point- saying that perhaps a more neutral term of ‘person’ should be used than ‘witness’. This is because the legislation covers witnesses, potential witnesses, jurors, potential jurors or others who assist in an investigation. Or, ‘witness’ should be used but it should be made clear that this is intended to cover all persons protected by legislation.

***Question 8: Does the Council wish to extend the factor to include friends and associates?***

***Question 9: Should ‘witnesses’ be changed to ‘witness’? Or should the reference be to witness/juror, or ‘person’?***

3.19 HM Council of District Judges also suggest that the high culpability factor of ‘*deliberately seeking witnesses*’ may capture too many cases- that with ‘*unplanned*’ within lower culpability there does not seem to be a situation between these two possibilities which would fall clearly into medium culpability. Potentially then any confrontation with a witness which is not unplanned is likely to be raised into high culpability. A magistrate also made a similar point and some participants in road testing also raised concerns about the wording of this factor (page 9 of **Annex B**). To mitigate against this HM Council of District Judges propose a new high culpability factor of ‘*offender goes to significant effort and lengths to seek out witness*’, with a new medium culpability factor of ‘*deliberate effort to find witness falling short of (A)*’. As discussed above it is proposed that the lower culpability factor would be revised to ‘*contact with witness unplanned **and** limited in scope and duration*’.

***Question 10: Does the Council wish to reword the high culpability regarding seeking out the witness, and create a new medium culpability version of this factor?***

3.20 Professor Gillespie and West London Magistrates Bench both queried whether the reference to a vulnerable victim should be moved from an aggravating factor to a culpability factor. One road testing participant also stated that they didn't think the vulnerability of the victim was sufficiently emphasised (page 10 of **Annex B**). Professor Gillespie also queries whether the age of the victim, if it is children or the elderly, should be a relevant factor in assessing culpability. He argues that with a significant disparity in age between the victim and the offender, the offender is deliberately exploiting the victim's vulnerability and arguably using it as an additional threat. There could be a new culpability factor of '*targeting victim on the basis of their vulnerability*'.

**Question 11: Does the Council wish to move the factor 'vulnerable victim' from step two to become a culpability factor?**

3.21 The Magistrates Association (MA) suggest that there should be an additional high culpability factor of '*hire or commission of a group or gang to intimidate witnesses*', as they feel this goes beyond deliberately seeking out witnesses or planned nature of conduct. This would add to a fairly substantial list of high culpability factors, so it may be better placed as an aggravating factor, albeit reworded as we no longer use the term 'gang'. There is already an aggravating factor of '*offender involves others in the conduct*', perhaps it might be better instead to have the standard aggravating factor of: '*offence was committed as part of a group*'.

**Question 12: Does the Council wish to add a new high culpability factor as suggested by the MA? Or add the standard 'group' aggravating factor?**

## **4 EQUALITIES**

4.1 The consultation asked specific equality and diversity questions-this was also covered during the road testing interviews, this information will be considered at a later meeting.

## **5 IMPACT AND RISKS**

5.1 There have been no risks identified at this time.

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# Sentencing Council

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

**23 September 2022**  
**SC(22)SEP04 – Animal Cruelty**  
**Rosa Dean**  
**Zeinab Shaikh**  
**zeinab.shaikh@sentencingcouncil.gov.uk**

## **1 ISSUE**

1.1 This is the first meeting to discuss the animal cruelty guidelines following the public consultation earlier this year. The Council is invited to consider feedback on the revised animal cruelty sentencing guideline (covering sections 4-8 of Animal Welfare Act: unnecessary suffering, mutilation, poisoning and animal fighting). The proposed guideline, as consulted on, is included at Annex A.

1.2 Responses on the standalone welfare guideline (covering section 9 of the Act, on the breach of duty of person responsible for animal to ensure welfare) and wider equalities issues will be brought to the Council for consideration at a following meeting, with the aim of publishing the definitive guidelines in spring 2023.

## **2 RECOMMENDATIONS**

2.1 That the Council:

- agrees to minor revisions to the harm and culpability factors in the guideline;
- approves the amended sentencing table for animal cruelty;
- agrees to include a small number of additional aggravating factors at step two of the guideline.

## **3 CONSIDERATION**

### Background

3.1 In 2021, Parliament increased the statutory maximum penalty for animal cruelty from six months' to five years' custody. The change covered s.4-8 offences and made these triable either way.

3.2 In recognition of this, the Council agreed to revise the sentencing guideline for animal cruelty. A [public consultation](#) ran from 10 May to 1 August and proposed a number of changes to the existing guideline. These included splitting the guideline into two, with the first covering all s.4-8 offences impacted by the increase in statutory maximum, and a

separate guideline for s.9, which remains a summary only offence with a six month maximum penalty.

### Consultation responses

3.3 103 respondents, from a range of backgrounds, provided feedback to the consultation. Over a third of respondents were members of the public, and 28 responses were received from sentencers. 17 responses came from the major animal charities or welfare activists/lobby groups, with remaining responses coming from the Justices' Clerks' Society (JCS), the CPS, the National Farmers' Union, Mike Radford, an academic specialising in animal law, and others. A full summary of respondents can be found at Annex B.

3.4 A brief cross-Government response was also received, agreeing with the Council's overall approach, and a response from the CPS, with a few suggestions for changes to aggravating factors and culpability. We are still awaiting a formal response from the Justice Select Committee.

3.5 Road testing exercises were also carried out during the consultation period, with 14 sentencers (seven Circuit Judges and seven magistrates) asked to consider two hypothetical scenarios (A and B) involving causing unnecessary suffering, one in a domestic context and the other involving a poultry farmer. Following consideration of scenario A, brief additional information was shared with sentencers to assess the impact of further factors on the final sentence. A report of the findings can be found at Annex C.

### Culpability

3.6 88 respondents answered this question. 30 agreed with the revised factors (including the Criminal Sub-Committee of the Council of Circuit Judges).

3.7 12 respondents (including the RSPCA and the JCS) called for the medium culpability factor of "ill treatment in a commercial context" to be upgraded to high culpability, largely in recognition of the financial gain involved in these cases. West London Magistrates' Bench also suggested that factors across the table reflect differing degrees of financial gain involved in the offending, while the CPS called for an additional high culpability factor of "organised criminal activity". While we believe these aspects are sufficiently covered in the proposed culpability factors, we have considered a new aggravating factor (at paragraph 3.39) to try to capture instances where substantial financial gain is involved, but which might not otherwise fall under the proposed culpability factor.

3.8 Two respondents suggested moving "use of a weapon" from aggravating factors and into high culpability, and called for it to be widened to include weapon equivalents. During road testing, one sentencer also suggested moving the factor. There is a risk, however, that

widening this factor will inflate sentences, particularly if cases such as kicking an animal while wearing heavy boots, or throwing an object at an animal, could be considered the equivalent of a weapon. The parameters of what could be considered a “weapon” in relation to animals may also already be quite broad, covering anything from a hammer to implements otherwise used in the everyday handling of animals, such as cattle prods or riding whips. Retaining this as an aggravating factor, with the wording as proposed in the consultation, retains nuance and will allow sentencers to use more discretion in how they apply the factor and to what extent they aggravate for it.

3.9 The Chief Magistrate argued for all factors focused on force to be removed, and for the culpability table to instead focus on the specific action involved, to avoid double counting with harm. However, it is unclear where the risk of double counting arises, particularly as consideration of the level of force the offender intentionally used seems an important factor in determining their intention to inflict cruelty/suffering to an animal. By contrast, Mike Radford wanted the wording of factors to be limited to causing suffering, removing mentions of cruelty entirely, to focus on the language of the legislation alone. We are not limited to adhering to the wording of the legislation so closely, and believe the cruelty involved is an important consideration in determining the offender’s culpability.

3.10 A number of respondents from animal charities and the legal sector, and sentencers, called for clarification of wording used in the factors, with some asking for examples to be included, to spell out what counts as a commercial context and to set out the difference between “significant force” and “very significant force”, or citing the difficulty in establishing what would be gratuitous cruelty as opposed to sadistic behaviour. In road testing, sentencers also flagged the subjectivity of the language used, singling out the factors on force. While there was a clear push for specific definitions and examples to be added, we do not feel that these would have the intended effect, given how broad the guideline is intended to be. An example that focuses on pets or larger animals might cause sentencers to downgrade cases involving multiple smaller animals such as poultry, for example, and it is not feasible to provide exhaustive examples.

3.11 In recognition of respondents’ and road testers’ comments about the subjectivity of the wording of medium and high factors, we have suggested simplifying some of the medium culpability factors so that these sit apart more clearly from their high culpability counterparts. We recommend removing “gratuitous” from medium culpability, so that that factor simply reads “deliberate attempt to cause suffering”, and have suggested removing mention of prolonged incidents in medium culpability, so that the factor simply reads “repeated incidents of cruelty or neglect”. In addition, to prevent confusion in how high culpability factors are applied, we have suggested splitting the factor of “prolonged and/or repeated incidents of

serious cruelty and/or sadistic behaviour” into two, so that “sadistic behaviour” stands alone. With the other suggested changes, this factor would be still be clearly distinct from anything in medium culpability, and from incidents of prolonged/repeated serious cruelty.

3.12 Six respondents, including Battersea and the Dogs’ Trust, argued for a new high culpability factor to be added, where the offender has coerced, intimidated or exploited others to offend, to mirror the low culpability factor for offenders who have been coerced/exploited, such as victims of domestic abuse or children. As this has been considered a common enough aspect of animal cruelty offending to be included in low culpability, we have suggested adding a mirroring factor to high culpability.

<b>Culpability demonstrated by one or more of the following</b>	
<b>A High culpability</b>	<ul style="list-style-type: none"> <li>● Prolonged and/or repeated incidents of serious cruelty</li> <li>● <b>Sadistic behaviour</b></li> <li>● Use of very significant force</li> <li>● Leading role in illegal activity</li> <li>● <b>Involvement of others through coercion, intimidation or exploitation</b></li> <li>● Category B offence may be elevated to category A by:               <ul style="list-style-type: none"> <li>○ the extreme nature of one or more medium culpability factors</li> <li>○ the extreme impact caused by a combination of medium culpability factors</li> </ul> </li> </ul>
<b>B Medium culpability</b>	<ul style="list-style-type: none"> <li>● <del>Deliberate or gratuitous attempt</del> to cause suffering</li> <li>● <del>Prolonged or Repeated</del> incidents of cruelty or neglect</li> <li>● Use of significant force</li> <li>● Ill treatment in a commercial context</li> <li>● Deliberate disregard for the welfare of the animal (including failure to seek treatment)</li> <li>● Other cases that fall between categories A or C because:               <ul style="list-style-type: none"> <li>○ Factors are present in A and C which balance each other out, and/or,</li> <li>○ The offender’s culpability falls between the factors as described in A and C</li> </ul> </li> </ul>
<b>C Lower culpability</b>	<ul style="list-style-type: none"> <li>● Well-intentioned but incompetent care</li> <li>● Momentary or brief lapse in judgement</li> <li>● Involved through coercion, intimidation or exploitation</li> <li>● Mental disorder or learning disability, where linked to the commission of the offence</li> </ul>

**Question 1: Do you agree to amend the culpability factors as recommended?**

Harm

3.13 85 respondents answered this question in the consultation. 16 agreed with the harm factors as proposed, including the Criminal Sub-Committee of the Council of Circuit Judges.



3.14 Four respondents (including the RSPCA, Battersea and IVC Evidensia, a veterinary organisation) called for the aggravating factor on a significant number of animals to be considered within harm rather than at step two of the guideline, with some suggesting alternative wording of “multiple animals harmed”, and one sentencer proposed “substantial” rather than “significant” during road testing. In road testing, when assessing harm in a scenario where significant number of animals were injured (scenario B), four out of the 14 sentencers interviewed explained that they felt the case belonged in high harm due to this aspect of the offence rather than solely because of the injuries or condition caused, even though this is included later as an aggravating factor. However, as with the aggravating factor on the use of a weapon, we do not feel there is sufficient cause to move this into harm factors. To do so would fix this within a particular level of harm, limiting sentencers’ ability to apply the factor to cases of varying severity.

3.15 12 respondents (including major animal charities) argued for a new factor to be added on the psychological or emotional harm caused to the animal, even though this is included in the wording on distress within the table. West London Magistrates’ Bench called for more consideration of the suffering caused to humans, whether this was emotional distress or financial loss caused to the owners, or where the offence was committed in front of children. More broadly, the JCS wanted consideration of cases where distress has deliberately been caused to those who witness the cruelty within harm rather than in aggravating factors. While emotive, it seems more appropriate to limit the harm table to focus on the animal(s) in question; we have already proposed an aggravating factor that recognises the distress caused to owners and so do not believe there is justification to add this as a new harm factor. We feel there is value, however, in clarifying, across the harm table, that the pain and suffering intended to be covered is that caused to the animal, rather than to the owners or others, in line with a suggestion from West London Magistrates’ Bench. We have suggested adding the wording “to animal(s)” across the table to remove any ambiguity on this point.

3.16 As with the culpability factors, respondents made a number of suggestions to clarify the wording used in the harm table, either by rewording certain factors or by adding examples or definitions. Many of these responses focused on the inclusion of pain and suffering in the harm table, with calls for clarification of how pain and distress would be measured. Some respondents, including the Chief Magistrate, wanted further detail on the difference between substantial levels of pain/suffering (in medium harm) and very high levels of pain/suffering (in high harm).

3.17 The issue of subjectivity in categorising harm was also raised in road testing interviews, particularly for factors on pain/suffering and the effect of an injury or condition

caused to the animal. This was reflected by the variation in how sentencers categorised harm for one of the scenarios (A) provided, with just under half of sentencers choosing either high or low harm, rather than medium as expected. These sentencers expressed uncertainty about whether the level of pain was “substantial” or “very high” or were unsure how to place the offence as they felt it sat on the borderline between categories. One sentencer was swayed to place the offence in lower harm due to the full recovery of the animal.

3.18 It is difficult to see how the harm table could be amended to address these concerns short of adding examples, which would bring other risks. The very nature of pain and suffering is that it is subjective, and the language proposed in the consultation was intentionally broad, to allow sentencers to use their discretion. One solution could be to pare the language back to remove these terms altogether, keeping medium harm as a catch all. This would, however, go against recent efforts to always try to include some descriptive factors in this category, after a previous review of guidelines showed that sentencers struggled to place cases in medium harm when it was simply a catch all. If this encourages sentencers to avoid medium harm altogether, there is a risk of sentence inflation if cases are placed in high harm instead. Another approach may be to provide descriptors of the length of time over which the pain has been endured, alongside the intensity of the suffering, though, as some respondents explained, intense pain over a short period of time may be just as cruel, or may cause just as much suffering to the animal, as moderate pain over an extended period of time. This wording may also risk overlapping with the proposed culpability factors on repeated incidents of cruelty/neglect.

3.19 Two respondents, including the League Against Cruel Sports (the League), cited concern about the intensifiers used in the table, arguing that these might create gaps between medium and high harm or cause confusion over how to categorise an offence. Rewording the factor on life threatening injuries to remove the intensifier “particularly”, so that it simply reads “grave or life-threatening injury or condition caused”, may aid in removing ambiguity, and the simplified wording still stands apart from medium harm factors.

3.20 Two respondents also suggested changing the medium harm factor on mutilation so that it mentions “ear cropping”, rather than “ear clipping”, in reflection of the more commonly used term for this type of animal mutilation. As there is nothing in the Act that limits us to specific wording in this regard, we have recommended correcting this in the harm table.

**Harm demonstrated by one or more of the following**

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the ~~victim~~ animal(s).

Category 1	<ul style="list-style-type: none"> <li>• Death (including injury necessitating euthanasia)</li> <li>• <b>Particularly Grave</b> or life-threatening injury or condition caused</li> <li>• Very high level of pain and/or suffering caused <b>to animal(s)</b></li> </ul>
Category 2	<ul style="list-style-type: none"> <li>• Offence results in an injury or condition which has a substantial and/or lasting effect (including cases of tail docking, ear <b>clipping cropping</b> and similar forms of mutilation)</li> <li>• Substantial level of pain and/or suffering caused <b>to animal(s)</b></li> </ul>
Category 3	<ul style="list-style-type: none"> <li>• Little or no physical/developmental harm or distress <b>to animal(s)</b></li> <li>• All other levels of pain and/or suffering <b>to animal(s)</b></li> </ul>

**Question 2: Do you agree to revise the harm factors as suggested?**

Sentencing table

3.21 There were 85 responses to the proposals for the sentencing table. 23 respondents agreed, including the various magistrates' benches that responded to the consultation, Mike Radford, the Legal Committee of the Council of District Judges and the Criminal Sub-Committee of the Council of Circuit Judges. As anticipated, however, the majority of respondents disagreed with our proposals, either regarding the table as a whole or specific aspects of it. Five respondents (including the Magistrates' Association and major animal charities) provided alternative sentencing tables for consideration (included at Annex D).

3.22 25 respondents, including the RSPCA, the Chief Magistrate and the Criminal Law Solicitors' Association, called for an increase to the top of the offence range, arguing that it should go to four or five years. A further 23 respondents wanted increases to sentences across the table as a whole.

"The sentence maximum is now 5 years. The maximum suggested sentence in the guideline is 18m. Many cases (especially on a g plea) will therefore be within the increased powers of the Magistrates' Court, leaving a reduced number of cases that will reach the Crown Court. Whilst there may be practical benefits to this in the current climate, the sentencing range Parliament intended to be available could be under-utilised."

*Chief Magistrate*

"...the category range for 1A offences should be changed to 52 weeks to 4 years. As Magistrates now have the powers to give longer sentences we feel there should be a higher category range for the most serious offences. The starting point for category 1A offences could then be increased proportionally."

*RSPCA*

3.23 By contrast, two respondents working in the justice system called for sentences to either be lowered across the board (in line with the existing guideline) or to be kept proportionate with assaults on human beings. This was a consideration reflected in road testing interviews, with many sentencers citing a broader need for proportionality with cruelty against humans, and drawing comparisons between animal cruelty and assault guidelines. Some sentencers commented that the starting points felt high when cross-referenced with offences of assault against the person.

“You [are] still sentencing more severely than if we'd seen a section 47 domestic violence attack that had resulted in a fractured skull and or, you know, fractured [pelvis]”;

“there is an element of public horror and opprobrium [in relation to animal cruelty], which I think one shouldn't be led by, but ... be conscious of. It is well known; I mean people do get very upset about cruelty to animals”.

#### *Sentencers in road testing interviews*

Two respondents in the charity sector argued in favour of alternatives to custody for less severe offences to help rehabilitate and prevent reoffending.

3.24 On balance, despite some strength of feeling, respondents did not provide new or compelling evidence to justify an increase to the top of the offence range, beyond points the Council has already considered. To maintain proportionality with s.47 actual bodily harm (which has a statutory maximum of five years, and where the offence range is capped at four years) and grievous bodily harm - unlawful wounding (which also has a statutory maximum of five years and where the offence range is capped at 4 years 6 months), and to keep the worst cases of animal cruelty distinct from the worst cases of these types of assault on human beings, the three-year cap for animal cruelty would need to be retained. While we anticipate further criticism on this point, we can use the formal consultation response to robustly set out our rationale for not making a change in this area, and reiterate the need for proportionality against assault offences directed at human beings.

3.25 Anecdotal evidence suggests that, where sentencers have not regularly dealt with an offence (as is likely with animal cruelty, both in magistrates' courts and the Crown Court), they may be more inclined to categorise a case in high or low severity, rather than placing it in the medium category. This lends further weight to the argument to avoid further increasing starting points and ranges in the sentencing table, as sentences may otherwise be inflated.

3.26 In road testing interviews on the animal cruelty guideline, multiple sentencers noted that the type of animal impacted was not accounted for within the guideline. One sentencer

stated, “there is a difference between turkeys and killing 100 dogs”, implying that there should be consideration of whether the animal is domesticated or a farm animal. While the proposed guideline does not mention specific species of animal, the factors do account for whether the offending occurred in a commercial context, which is phrased broadly enough to capture cases as varied as poultry farms or puppy mills. Adding factors weighting specific types of animal more heavily than others would be highly subjective and likely lead to criticism.

3.27 The JCS recommended narrowing the gap between category ranges for boxes 1B and 1C on the sentencing table, to aid in the sentencing of borderline cases. To avoid sentence inflation for these cases, and acknowledging the point flagged by the JCS, we have suggested raising the starting point for box 1C by one degree (from a low to a medium community order) and doing the same for the top of the category range, changing it from a medium to a high level community order. We have also suggested lowering the bottom of the category range for box 1B, dropping it from 18 weeks’ custody to a high level community order, so that the ranges meet.

3.28 To tighten up sentence severity for high harm offences somewhat, we have also suggested increasing the bottom of the category range for 1C by one degree, to a low level community order, to remove fines from scope of these offences. Given the sorts of cases that are likely to fall under high harm, involving death/euthanasia and very high levels of pain/suffering to the animal, this seems justified, even in cases of low culpability. This change may have a small impact on probation resource, though no impact on prison places.

3.29 During road testing exercises, there was more variation in final sentences than anticipated. This is largely thought to be due to the subjectivity of the harm and culpability factors on pain/suffering and sadistic/gratuitous behaviour, particularly in the threshold between medium and high categories, and we have recommended changes earlier in this paper to try to address some of this potential ambiguity. It should be noted that, while half of the sentencers surveyed did not have previous experience of sentencing animal cruelty offences, no particular differences were observed between how these sentencers categorised cases in comparison to those who had dealt with these offences before. This may be due to the fact that sentencers, as a whole, are not likely to have seen many animal cruelty cases.

3.30 Among sentencers that did have previous experience of animal cruelty cases, there was general agreement that the guideline reflected the level of seriousness of cases seen within courts as well as a suggestion that, for the more serious cases, sentencing severity

could increase following the introduction of the guideline. Sentencers did not, however, expect a large increase in the number of cases committed to the Crown Court.

	<b>High culpability</b>	<b>Medium culpability</b>	<b>Lower culpability</b>
<b>Category 1</b>	<b>Starting point</b> 1 year 6 months' custody	<b>Starting point</b> 26 weeks' custody	<b>Starting point</b> <del>Low</del> <del>Medium</del> level community order
	<b>Category range</b> 26 weeks' custody – 3 years' custody	<b>Category range</b> <del>18 weeks'</del> <del>High level</del> community order – 1 year's custody	<b>Category range</b> <del>Band B fine</del> <del>Low level</del> community order – <del>Medium</del> <del>High level</del> 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

### **Question 3: Do you agree to revise the sentencing table as recommended?**

#### Aggravating and mitigating factors

3.31 There were 86 responses to proposals for aggravating and mitigating factors. 34 respondents, including the Criminal Sub-Committee of the Council of Circuit Judges, agreed with the factors as drafted, with some citing the aggravating factors on the use of social media to promote cruelty and offending in front of children as being particularly welcome.

3.32 Refuge and the JCS argued for the aggravating factor on distress caused to the owner to be amended to more clearly reflect where this was intentional and part of the motivation for the offending, such as in cases of domestic abuse. We do not recommend amending this factor as these cases would already be captured under the wording proposed in the guideline.

3.33 There were also calls to clarify or define terms used in the aggravating factors, including questions around how many animals would count as a “significant number”, who would be considered to have “professional responsibility” for animals, and what would count as a “significant intervention” required for an animal to recover from an injury or illness. However, as elsewhere, adding examples or definitions may narrow these factors when it is not the Council’s intention for them to be applied in a limited way.

3.34 Following a suggestion from the Legal Committee of the Council of District Judges, and points raised in road testing interviews, we have added a caveat to the factor on professional responsibility, to avoid double counting alongside the medium culpability factor of “ill treatment in a commercial context”.

3.35 The Chief Magistrate also suggested amending factors on the use of technology to record, publicise or promote animal cruelty, and use of another animal to inflict injury/death, to include a caveat to avoid the risk of double counting with the wording of the s.8 offence on animal fighting. This section of the Act explicitly mentions keeping or training an animal for use in connection with an animal fight, and supplying, publishing or showing a recording of an animal fight. However, given that the guideline is framed around the cruelty inflicted on, and the harm suffered by, the animal, and that this is more likely to be exacerbated in cases of animal fighting, it could be argued that there is not an inherent risk of double counting, and, rather, that this is the guideline working as intended.

3.36 The CPS called for a new factor on the deliberate trapping or restraint of an animal, similar to a suggestion from the RSPCA to include a factor on cruelty to wildlife. We have considered these suggestions and feel that it is difficult to justify this addition when the harm experienced by the animal will be the same regardless of whether it is a domesticated or wild animal. Including this as an aggravating factor would suggest a hierarchy, where cruelty inflicted on a rat that has been caught in a trap, for example, would seemingly be worse than an offender who purchases a hamster with the intention of inflicting suffering. On balance, we do not recommend including this as a new aggravating factor.

3.37 More generally, respondents made a number of suggestions for new aggravating and mitigating factors for the guideline, including adding consideration of training animals for fighting even where this was not for commercial purposes, or where an animal professional was registered as such, to reflect a greater breach of trust. The majority of these suggestions are already captured in the broad list of harm or culpability factors and so we do not recommend creating new aggravating or mitigating factors to address these specific scenarios. In the formal response, we will reiterate that the list is not intended to be exhaustive, and sentencers have discretion to consider other factors where they feel these will increase the seriousness of the offence.

3.38 Five respondents, including West London Magistrates’ Bench and the RSPCA, wanted sexualised offending (whether the cruelty was motivated by sexual gratification or involved sexual abuse of the animal) to be added, with some citing the link to child abuse in the context of extreme pornography. Despite the emotive nature of this specific type of cruelty, we do not believe it warrants a standalone aggravating factor. Cases of bestiality will

be charged separately, while cruelty motivated by sexual gratification is likely to be captured by existing factors, chiefly the high culpability factor of sadistic behaviour and the aggravating factor on recording abuse for the purpose of publicising or promoting cruelty. The RSPCA has also explained that they see very few cases of this kind in reality.

3.39 Four respondents, including the League and Mike Radford, called for a factor to be added on offending motivated by commercial/financial gain, with the League citing that the existing culpability factor of “ill treatment in a commercial context” would not necessarily capture activities leading up to an organised animal fight, such as the breeding or sale of dogs for fighting, and betting. The League also flagged that parliamentarians raised the issue of large sums of money changing hands at dog fighting events during the passage of the Act. In light of this, we have suggested a further aggravating factor, “Motivated by significant financial gain (where not already taken into account at step 1)”, to cover cases that may not strictly count as occurring within a commercial context, but where the offender stands to gain a substantial amount of money through the offending behaviour. Adding the caveat at the end ensures that this will not be double counted where it has already been considered at step one of the guideline.

3.40 In road testing exercises, aggravating and mitigating factors were broadly applied to the scenarios as anticipated, with sentencers feeling that the lists of factors were appropriate. The majority of sentencers stated that they believed that “offender under the influence of alcohol” should appear in the guideline, though acknowledged that the lists were not intended to be exhaustive. Though this may have been influenced somewhat by one of the scenarios (A) provided to sentencers, where the offender had been drinking heavily before hitting their dog, it is likely to be a common aspect of animal cruelty cases. We have therefore suggested including it in the list of factors.

#### **Factors increasing seriousness**

##### *Statutory aggravating factors*

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the owner/keeper of the animal: religion, race, disability, sexual orientation or transgender identity

##### *Other aggravating factors*

- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Significant number of animals involved



- Use of a weapon
- Allowing person of insufficient experience or training to have care of animal(s)
- Use of technology, including circulating details/photographs/videos etc of the offence on social media, to record, publicise or promote cruelty
- Ignores warning/professional advice/declines to obtain professional advice
- Use of another animal to inflict death or injury
- **Motivated by significant financial gain (where not already taken into account at step 1)**
- **Offence committed while under influence of alcohol or drugs**
- Offender in position of professional responsibility for animals **(where not already taken into account at step 1)**
- Offence committed in the presence of other(s), especially children
- Animal requires significant intervention to recover
- Animal being used in public service or as an assistance dog
- Distress caused to owner where not responsible for the offence

#### **Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- Serious medical condition requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity
- Mental disorder or learning disability, where not linked to the commission of the offence
- Sole or primary carer for dependent relatives
- Offender has been given an inappropriate level of trust or responsibility
- Voluntary surrender of animals to authorities
- Cooperation with the investigation
- Isolated incident

#### **Question 4: Do you agree to amend the aggravating factors as suggested?**

#### **4 IMPACTS AND RISKS**

4.1 The suggested revisions to the animal cruelty guideline may have some impact on probation resource, though are not expected to have an impact on prison places beyond what was outlined in the original consultation (where it was anticipated that sentence severity would increase for the most serious cases, but was unlikely to result in increased custodial sentences across the board). A full resource assessment will be shared with the Council alongside the finalised guidelines for sign off.

4.2 There is a risk of criticism from stakeholders and the public as we are not recommending increasing sentences to meet the new statutory maximum. This can be addressed through including careful, thorough wording in the Council's formal response to the consultation, setting out our rationale and reiterating the need for proportionality.

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

**23 September 2022**  
**SC(22)SEP05- Blackmail, kidnap, false imprisonment and threats to disclose private sexual images**

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

**Juliet May**  
**Mandy Banks**  
**Mandy.Banks@sentencingcouncil.gov.uk**  
**0207 071 5785**

## **1 ISSUE**

1.1 This is the third meeting to discuss the offences and will focus on draft guidelines for kidnap and false imprisonment offences. The draft blackmail guideline has also been revised following the discussion at the last meeting.

## **2 RECOMMENDATION**

2.1 At today's meeting the Council are asked:

- To consider the draft kidnap and false imprisonment guidelines
- To consider the changes made to the draft blackmail guideline

## **3 CONSIDERATION**

### *Blackmail*

3.1 The changes that were discussed at the last meeting have been made and can be seen in track changes within the draft guideline at **Annex A**. The Council also asked at the last meeting for the proposed sentence ranges to be looked at again, as it was thought they were too low. During the discussion the Council stated that for this guideline the Council should depart from the usual practice of seeking to replicate current sentencing practice. This is because existing case law doesn't reflect recent trends of increasing seriousness of offending, and the changing nature of offending. The ranges have been looked at again and as a result ranges A1, B1, A2, B2, A3 and C1 have been slightly increased, as shown below. The range in A1 is now proposed as 4-12 years with a starting point of 8 years. This allows for a small amount of headroom to the statutory maximum of 14 years.

As discussed at the last meeting increasing the sentence ranges would likely increase the severity of sentencing for this offence. The mean average custodial sentence length (ACSL) in 2020 was three years eight months (estimated pre-guilty plea) and two years ten months (post-guilty plea). Tab 5.4a of **Annex B** also shows us that 90 per cent of offenders sentenced to immediate custody received an estimated pre-guilty plea custodial sentence of

six years or less. Only two offenders received a post-guilty plea sentence over 10 years' custody within the last five years, with the longest determinate sentence in 2020 of 12 years.

Harm	Culpability		
	A	B	C
<b>Category 1</b>	<b>Starting Point</b> 7-8 years' custody <b>Category Range</b> 4 – 12-0 years' custody	<b>Starting Point</b> 4 years' custody <b>Category Range</b> 2 -6-8 years' custody	<b>Starting Point</b> 2 years' custody <b>Category Range</b> 1 -4-5 years' custody
<b>Category 2</b>	<b>Starting Point</b> 4 years' custody <b>Category Range</b> 2 -6-8 years' custody	<b>Starting Point</b> 2 years' custody <b>Category Range</b> 1 -4-5 years' custody	<b>Starting Point</b> 1 years' custody <b>Category Range</b> 6 months' - 2 years' custody
<b>Category 3</b>	<b>Starting Point</b> 2 years' custody <b>Category Range</b> 1 -4-5 years' custody	<b>Starting Point</b> 1 years' custody <b>Category Range</b> 6 months' - 2 years' custody	<b>Starting Point</b> 6 months' custody <b>Category Range</b> High level Community order – 1 years' custody

Although volumes of this offence are small there could still be an impact on prison and probation resources as a result.

**Question 1: What is the Council's view of the revised draft sentence ranges?**

*Kidnap and false imprisonment offences*

3.2 There are currently no guidelines for these offences. False imprisonment consists of the unlawful and intentional or reckless restraint of a victim's freedom of movement from a particular place. It is unlawful detention which stops the victim from moving away as he or she would wish to move. This can be in a prison, a house or even forcibly detaining a person in the street.

3.3 Kidnap offences are comprised of four elements:

- A) The taking or carrying away of one person by another;

- B) By force (or the threat of force, as in the hijacking of a car with its driver): or fraud;
- C) Without the consent of the person so taken or carried away; and
- D) Without lawful excuse.

3.4 There must be some deprivation of the liberty of the person taken or carried away (so cannot be committed by a person who by fraudulent means induced another to go unaccompanied from one place to another). Both kidnap and false imprisonment are common law offences, with a statutory maximum of life imprisonment, and indictable only.

3.5 Both are specified violent offences listed in the Sentencing Act 2020 Sch.18, Pt 1 (meaning that an extended sentence can be imposed if the offender is 'dangerous' and is listed in Sch.19 (meaning that a life sentence can be imposed if the offender is 'dangerous')). They are both also listed in Schedule 5 of the Sexual Offences Act 2003 meaning that a SHPO is potentially available on conviction. The statutory aggravating factor of an offence committed against an emergency worker acting in the exercise of functions as such a worker applies to kidnap.

3.6 Volumes of kidnap offences sentenced each year are low, 69 in 2020 and 98 in 2019, as can be seen on tab 1.1 of **Annex B**. The vast majority of offenders are sentenced to immediate custody (74 per cent in 2020) with 7 per cent given a suspended sentence. In 2020, the mean ACSL estimated pre-guilty plea was 7 years 3 months, with a mean ACSL post guilty plea of 5 years 9 months.

3.7 Volumes of false imprisonment offences are also low, 82 in 2020 and 113 in 2019. Around 85 per cent of offenders were sentenced to immediate custody in 2020, with 6 per cent given a suspended sentence. In 2020, the mean ACSL estimated pre-guilty plea was 4 years 8 months, with a mean ACSL post guilty plea of 3 years 7 months.

3.8 The case of *R v Gibney (AG's reference no 92 of 2014)* gave general guidance on sentencing and said that close analysis of the facts and circumstances was required.

Relevant factors included:

- the length and circumstances of the detention, including the location and any method of restraint,
- the extent of any violence used,
- the involvement of weapons,
- whether demands were made of others,
- the effect on the victim and others,
- the extent of planning,
- the number of offenders involved,
- the use of torture or humiliation,
- whether what was done arose from, or was in furtherance of, previous criminal

behaviour, and

- any particular vulnerability of the victim (by reason of age or otherwise).

3.9 In *AG's Ref (nos 102 and 103 of 2014) (R V Perkins)* it was said that cases involving hostage taking and ransom demands will attract a starting point of close to 16 years for an adult: others, where such behaviour is absent, will still attract double figures, regardless of the degree of violence.

3.10 In *Jones [2020] EWCA Crim 1870* the court held that any kidnapping incident in which individuals or groups embark on vigilante action is a matter of grave concern and they should anticipate deterrent punishment; long custodial sentences are required in almost every case. The court, having reviewed the authorities, attempted to identify an open list of features that may be relevant to the sentencing of kidnap, namely:

- the degree of preparation and planning;
- the number of offenders working as a group;
- involvement of weapons;
- the infliction of actual or serious injury;
- the presence of torture or threat thereof;
- the degree of fear engendered in the victim;
- the offender's motivation for what was done;
- the specific role the offender played;
- whether there was any provocation;
- whether demands for a ransom were made;
- how the initial capture was effected and how long the false imprisonment extended;
- the conditions under which the captive was held; and
- any particularly personal vulnerabilities of the victim as well as the antecedent history of offenders.

3.11 The offences of kidnap and false imprisonment seem to be similar in nature and are quite interlinked, so much so that it is proposed that we have one guideline for both offences. However, there would be two separate sentence tables, one for kidnap and one for false imprisonment. This is because current sentencing practice shows that kidnap offences are sentenced more severely than false imprisonment offences, so the risk with one sentence table for both offences is that sentencing severity could increase for false imprisonment. The alternative would be to have two separate guidelines, but with near identical factors in. An advantage of having two separate guidelines is that there could be no confusion of using the wrong sentence table, as each guideline would have its own sentence table, unlike one

guideline for both offences with two different sentence tables in.

3.12 The draft guideline for both offences is attached at **Annex C** and reflects the factors set out in *Gibney* and *Jones*. Some of the factors can be seen within culpability, some in harm, and some appear as aggravating factors. Sentencing transcripts of around 60 cases have also been examined to assist in the development of the draft guideline.

***Question 2: In principle, does the Council agree with the idea of one guideline for both offences with two separate sentence tables? Or would the Council prefer to have two separate guidelines?***

Starting with the culpability factors on page two, the proposed draft high culpability factors are: *'detention over a substantial period of time,' 'sophisticated and/or planned nature of conduct,' 'offence was committed as part of a group,' 'deliberate targeting of particularly vulnerable victim'* and *'use of violence and/or use of a weapon'*. These factors are designed to capture only the most serious cases. It is a balance to design factors which capture the most serious types of offending but without having too many factors which mean too many cases will fall into this category. The factor of *'offence was committed as part of a group'* is often an aggravating factor but for this offence it is argued that it should be a high culpability factor. Cases often refer to offences committed by a group as being more serious- the involvement of a number of offenders making the experience all the more terrifying for the victim. It is also suggested that there should be a factor in high culpability relating to a vulnerable victim, whether that is due to age, pregnancy or some other vulnerability that the offender is exploiting in furtherance of the crime.

***Question 3: Are the Council content with the proposed high culpability factors?***

3.13 The medium culpability factors include *'threat of violence to victim and/or others'* and the 'balancing' wording which is often used in guidelines. The lower culpability factors are standard ones used within guidelines.

***Question 4: Are the Council content with the proposed medium and lower culpability factors? Are there any other offence specific factors that should be included?***

3.14 The proposed harm factors are designed to try and capture the different types of harm that can be caused to victims of this offending, separated out into three categories.

The harm caused can vary considerably, so the proposed factors try to reflect this, without too bluntly 'ranking' the gradations of harm.

**Question 5: Are the Council content with the proposed harm factors?**

3.15 Turning now to the sentence tables, as stated earlier- it is proposed to have two sentence tables, one for kidnap, and one for false imprisonment, due to the differences in sentencing levels between the two offences. Starting with kidnap, the proposed sentence table is on page 3. Current sentencing data for this offence can be seen on tabs 1.1-1.4b of **Annex B**. As noted earlier, the mean ACSL (estimated pre-guilty plea) is 7 years 3 months. As only a handful of offenders get a fine or community order each year (less than 5 per cent), it is proposed not to have any non-custodial options within the table. The large majority of sentences have been 10 years or less in recent times (88 per cent in 2020, post-guilty plea). The longest determinate sentence ranges from 12 to 21 years in recent years-in 2020 the longest sentence imposed was 13 years (post-guilty plea). The proposed top of the range in A1 is 16 years. Thinking about proportionality with other offences that are comparable (to some extent), the top of the range in robbery in a dwelling is 16 years, in aggravated burglary it is 13 years, for GBH (s.20) it is 16 years and for rape it is 19 years.

**Question 6: What are the Council's views on the draft sentence ranges for kidnap?**

3.16 The sentence table for false imprisonment can be seen on page 4. Sentencing data can be seen on tabs 2.1-2.4b of **Annex B**. The mean ACSL (estimated pre-guilty plea) is 3 years 8 months. Again there is no non-custodial option within the table as only a handful of offenders receive a fine or community order each year (less than 5 per cent in recent years). The large majority of sentences have been 8 years or less in recent times (93% in 2020). The longest sentence in 2020 was 14 years (post-guilty plea). The proposed top of the range is 13 years. Maximum sentence lengths for other broadly comparable offences are noted in the paragraph above.

**Question 7: What are the Council's views on the draft ranges for false imprisonment?**

3.17 The draft aggravating factors can be seen on page 5. The proposed offence specific ones are: '*offence committed in context of/in connection with other criminal activity*' and '*detention in an isolated location*'. The latter is proposed as arguably it is worse to be held in an isolated location with little chance of being able to attract attention to call for help- the victim is entirely dependent on the offender freeing them.

**Question 8: What are the Council's views on the aggravating factors?**

3.18 A number of offences occur within a domestic context- so it is important to have the aggravating factor of: '*offence committed in a domestic context*' as the factor links to the



domestic abuse guideline. *Spence and Thomas (1983) 5 Cr.App.R.(S) 413 CA* first gave general guidance on kidnapping and false imprisonment and discussed the scale of offending, stating that cases arising out of family tiffs or lovers' disputes would seldom require more than 18 months custody. *Gibney* later stated that *Spence and Thomas* no longer provided guidance for cases at the higher end of the scale, but in *Abbas [2017] EWCA Crim 2015* the court said that *Spence* still provides useful guidance as to the spectrum of offending, and that offences arising from 'family tiffs or lovers disputes' will be likely to fall at the lower end of the scale.

3.19 Reading a number of sentencing remarks of cases that have a domestic context they seem to reflect this guidance, with sentences often lower than cases that don't have a domestic context. This raises a question as to whether the sentences are reflecting the guidance in the [domestic abuse](#) guideline, which states that *'the domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship'* and *'domestic abuse offences are regarded as particularly serious within the criminal justice system'*. If the Council feels that for this guideline greater prominence should be given to the guidance on domestic abuse, the domestic abuse guideline could be signposted at the start of the guideline – with wording such as *'where the offence is committed in a domestic context, also refer to Overarching principles- domestic abuse'*. Some other guidelines have this wording, such as the arson/criminal damage with intent to endanger life or reckless as to whether life endangered guideline. Having the wording at the start of the guideline rather than hidden within the aggravating factors at step two might give it greater prominence.

***Question 9: Does the Council wish to give the guidance on domestic abuse greater prominence within this guideline?***

3.20 The proposed mitigating factors are standard ones used within guidelines- there did not seem to be any offence specific ones required.

***Question 10: Is the Council content with the proposed mitigating factors? Are there any offence specific ones that should be included?***

## **4 EQUALITIES**

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

## **5 IMPACT AND RISKS**

5.1 It is anticipated that the development of these new guidelines will be welcomed by stakeholders. Blackmail, kidnap and false imprisonment are some of the few remaining serious offences without a guideline, so producing a guideline ends that gap.

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

**23 September 2022**  
**SC(22)SEP06 – Aggravated vehicle taking**  
**Rebecca Crane**  
**Zeinab Shaikh**  
**zeinab.shaikh@sentencingcouncil.gov.uk**

## **1 ISSUE**

1.1 Following discussions on the aggravated vehicle taking guidelines in May and July, the Council is invited to consider further revisions to step one factors for the offence of causing vehicle/property damage. The Council is also asked to consider how information on ancillary orders can be presented across all aggravated vehicle taking guidelines. Further discussions will be scheduled once the consultation on revisions to the motoring guidelines closes.

## **2 RECOMMENDATIONS**

2.1 That the Council:

- Agrees revisions to the harm factors and sentencing table for aggravated vehicle taking causing vehicle/property damage;
- Approves the wording of guidance on disqualifications across the aggravated vehicle taking guidelines;
- Agrees to include a signpost in the guidelines reminding sentencers of their discretionary power to order extended driving tests.

## **3 CONSIDERATION**

### Background

3.1 There are currently two guidelines for aggravated vehicle taking offences and these have been in place since 2008. The first guideline covers [vehicle/property damage](#), while the other combines [injury and dangerous driving](#). With the exception of vehicle/property damage of under £5,000, which is a summary only offence, aggravated vehicle taking offences are triable either way. Following a larger piece of work to revise guidelines for motoring offences, the Council also agreed to update the guidelines for aggravated vehicle taking.

3.2 In May, the Council agreed to split aggravated vehicle taking offences into four separate guidelines:

- Causing vehicle or property damage
- Causing injury
- Causing death

- Involving dangerous driving

3.3 Given the overlap with the revised motoring guidelines that are currently out for consultation (due to close in late September), the Council agreed to await the outcome of that consultation before considering the timing of the consultation on aggravated vehicle taking. The Council also provisionally agreed to step one and two factors (at Annex A) across the four guidelines, with the aim of reconsidering these in the round at a later date.

Causing vehicle/property damage

3.4 There are two variations of the offence of causing vehicle/property damage. Lower value damage (of up to and including £5,000) is a summary only offence, with a statutory maximum of six months' custody, while higher value damage (of over £5,000) is triable either way and has a statutory maximum of two years' custody.

3.5 The Council previously agreed to combine both variations of this offence into a single guideline, for simplicity and in recognition of magistrates' increased sentencing powers. It was agreed that lower value damage would be limited to harm category 3, while the high value variation would be split across the other harm categories.

3.6 While the Council has provisionally agreed to step one factors for this offence, a revision to the harm table is suggested for clarity. Currently, the proposed table reads as follows:

Harm	Factors
Category 1	<ul style="list-style-type: none"> <li>• High value damage</li> </ul>
Category 2	<ul style="list-style-type: none"> <li>• Cases that fall between categories 1 or 3 because:               <ul style="list-style-type: none"> <li>○ Factors are present in categories 1 and 3 which balance each other out, and/or,</li> <li>○ The harm caused falls between the factors as described in categories 1 and 3</li> </ul> </li> </ul>
Category 3	<ul style="list-style-type: none"> <li>• Total damage caused no more than £5,000</li> </ul>

3.7 While harm category 2 is intended to be a catch all, we recommend removing the first sub-bullet point ("Factors are present in categories 1 and 3 which balance each other out, and/or") as the harm factors in categories 1 and 3, being based on the value of the damage caused, cannot cancel each other out. This would leave a single factor in category 2, which we suggest simplifying to "Value of damage falls between categories 1 and 3".

**Question 1: Do you agree to the suggested change to the category 2 factors in the harm table?**

3.8 The provisional wording for harm category 1 (“high value damage”) was agreed by Council as it mirrors factors used in the criminal damage guidelines. However, there is a risk that this may result in some sentence inflation due to the broad wording used, particularly if sentencers interpret this widely. In 2020, 165 adults were sentenced for causing damage of over £5,000, with 27 per cent sentenced to immediate custody and an estimated pre-guilty plea average custodial sentence length (ACSL) of 13.1 months (mean).<sup>1</sup> By contrast, 42 per cent received a community order (full data from 2020 is included at Annex B). If the majority of offenders sentenced for this offence were to be placed in harm category 1 under the draft guideline, the proportion of offenders receiving custodial sentences may rise, with an increase to the average custodial sentence.

3.9 An alternative approach may be to provide examples of the kinds of damage that would fall under harm category 1, to make clear that this category is intended to cover extreme damage, such as crashing into a building and causing extensive structural damage or causing a heavy goods vehicle to be written off. This brings its own issues, however, and could warn sentencers away from using this top category of harm as the examples provided cannot be exhaustive. Similar issues arise if we try to provide an approximate figure for the value of the damage caused at the upper end of the harm table, and this is made more challenging as court transcripts often do not refer to the overall value of the damage caused. On balance, it is recommended that the proposed wording in high harm, of “high value damage”, is retained, and explicitly testing the impact of this as part of road testing exercises during consultation.

**Question 2: Do you agree to retain the proposed wording in harm category 1 and to test the impact of this in road testing exercises?**

3.10 In July, the Council provided a steer to lower starting points and ranges for cases of category 2 and 3 harm in the sentencing table for vehicle/property damage, citing that rising costs would mean more cases would be categorised as causing damage of over £5,000. We have therefore looked at the table again and have reduced sentence levels accordingly, lowering the bottom of the offence range to a band B fine:

<i>Rubric: Where the total damage caused is valued at no more than £5,000, the offence is summary only with a statutory maximum penalty of six months’ custody. This is reflected in the starting points and ranges for harm category 3 in the sentencing table below.</i>			
Harm/culpability	High culpability A	Medium culpability B	Lower culpability C
Harm category 1	Starting point: 1 year’s custody	Starting point: 18 weeks’ custody	Starting point: High level community order
	Category range:	Category range:	

<sup>1</sup> The ACSL, post-guilty plea, was 9.5 months (mean).

	18 weeks' custody – 2 years' custody	High level community order – 1 year's custody	Category range: Medium level community order – 12 weeks' custody
Harm category 2	Starting point: 12 weeks' custody  Category range: High level community order – 1 year's custody	Starting point: High level community order  Category range: Medium level community order – 12 weeks' custody	Starting point: Medium level community order  Category range: Low level community order – High level community order
Harm category 3	Starting point: High level community order  Category range: Medium level community order – 18 weeks' custody	Starting point: Medium level community order  Category range: Low level community order – High level community order	Starting point: Low level community order  Category range: Band B fine – Medium level community order

3.11 We have departed, at times, from the diagonal approach to setting starting points and category ranges. This can be justified as the table is aiming to cover two variations of the same offence and intended to cover a wide range of cases. Low culpability, for example, may include cases where a hire car is driven for a day longer than agreed, while high culpability may include cases of egregious driving or a police chase.

3.12 In line with the Council's previous steers, the starting points and ranges for harm category 3 are largely non-custodial (with the exception of box 3A, where the top of the range is 18 weeks' custody), to allow for gradation up to category 2. In 2020, 29 per cent of offenders charged with lower value damage received a custodial sentence (13 per cent received a suspended sentence and 16 per cent were sentenced to immediate custody). For those sentenced to immediate custody, the estimated pre-guilty plea ACSL was 4.0 months (mean).<sup>2</sup> There is a risk, therefore, that these changes may lead to a change in sentence outcome for this offence, with up to around a third of offenders receiving a community order where they would have previously received a custodial sentence. The rest of the table is not likely to have a significant impact on sentencing practice for cases involving damage of over £5,000.

3.13 In the July meeting, some Council members queried the potential impact of lower starting points for harm categories 2 and 3, given that data on sentencing outcomes is that after any guilty plea reductions have been applied. We have used the Crown Court Sentencing Survey (CCSS) to analyse the limited data available for aggravated vehicle

<sup>2</sup> The ACSL, post-guilty plea, was 3.0 months (mean).

taking offences<sup>3</sup> and did not find any evidence to suggest that sentencers drop a threshold, from a custodial to community sentence, due to the presence of a guilty plea.<sup>4</sup>

**Question 3: Are you content to approve changes to the sentencing table for vehicle/property damage, with the ensuing impact on sentencing practice for cases of lower value damage?**

Disqualifications

3.14 We have generally sought to align the aggravated vehicle taking guidelines with the revised guidelines on motoring offences, particularly as these offences share many similarities in terms of harm and culpability.

3.15 The revised motoring guidelines provide guidance on how to calculate periods of disqualification from driving, tailored to each offence. This is set out in a drop-down box within the section on ancillary orders. The guidance includes a step-by-step guide to working out any interactions with custodial periods for different offences.

3.16 Given the overlap between these offences, we recommend mirroring the approach to disqualification guidance taken in the motoring guidelines, tailored to aggravated vehicle taking offences as necessary. As with the motoring guidelines, it seems most appropriate to include these as a dropdown at the ancillary orders step of the guidelines. Suggested wording for this guidance is included at Annex C.

**Question 4: Do you agree to mirror the wording used in the motoring guidelines on guidance for calculating disqualifications?**

Extended driving tests

3.17 While dangerous driving offences require sentencers to order disqualification from driving until an extended test is passed, aggravated vehicle taking offences do not require this. Sentencers do, however, have discretion to order an extended test, as set out in s.36 of the Road Traffic Offenders Act 1988. Operational colleagues have flagged that there may be a benefit in reminding sentencers of this discretionary power, particularly for aggravated vehicle taking causing dangerous driving, as there is a perception that this is not used as often or as consistently as it could be.

3.18 Research commissioned in 2017 by the Department for Transport (extract included at Annex D) found similar inconsistencies, reporting low levels of awareness among sentencers of their discretionary powers. There was also a perception, particularly among magistrates,

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<sup>3</sup> The data analysed covered the period January – December 2014, as this is the last full year of CCSS data available.

<sup>4</sup> It should be noted that this finding is based on Crown Court data only, and so may not be indicative of sentencing in magistrates' courts.

that extended tests were rarely ordered in the courts. Despite this, the research found that just over a third of all discretionary driving tests ordered between 2011-2015 were related to aggravated vehicle taking offences.

3.19 Transcripts from the Crown Court for aggravated vehicle taking offences seem to show that sentencers are exercising this discretion at times, with 18 of the 50 cases involving an extended driving test. Of the different offences, cases of lower value vehicle/property damage were most likely to attract an extended retest, though it is difficult to draw firm conclusions as they are likely to be the more extreme cases of lower value damage by virtue of being sent to the Crown Court. We do not know how often magistrates are likely to use this discretionary power.

3.20 As such, there may be value in including a reminder to sentencers of their discretionary power at the ancillary orders step of the aggravated vehicle taking guidelines. If the Council is minded to take this approach, we would suggest wording based on the [explanatory materials for road traffic offences on the Sentencing Council's website](#):

For aggravated vehicle taking offences, the court has discretion to disqualify until an extended driving test is passed. The discretion to order an extended re-test is likely to be exercised where there is evidence of inexperience, incompetence or infirmity, or the disqualification period is lengthy (that is, the offender is going to be 'off the road' for a considerable time).

3.21 This approach would add more information to the guidelines overall, and would be placed at a step of the guideline that perhaps does not draw as much attention as earlier steps. However, there may be a benefit in explicitly reiterating sentencers' discretionary powers in this regard, to prevent confusion or inconsistency.

**Question 5: Do you agree to adding a reminder on sentencers' discretionary powers across the guidelines?**

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

4.1 As discussed earlier in this paper, lowering starting points and category ranges for the offence of vehicle/property damage under £5,000 is likely to have an impact on sentencing practice, potentially lowering sentences for the 29 per cent of offenders that would have previously received a custodial sentence. There is also a risk that cases of vehicle/property damage of over £5,000 may attract a higher sentence than previously, based on the wording of the harm table for this offence. These are both points we can set out to examine as part of road testing exercises with judges and magistrates during the public consultation on the guidelines.



4.2 Once draft guidelines for aggravated vehicle taking have been finalised, a resource assessment will also be drafted and circulated to the Council for sign off.

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