Sentencing Council

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18 January 2023

Dear Members

Meeting of the Sentencing Council – 27 January 2023

The next Council meeting will be held in the **Queens Building Conference Suite, 2nd Floor Mezzanine** at the Royal Courts of Justice, on Friday 27 January 2023 at 9:45. This will be a hybrid meeting, so a Microsoft Teams invite is also included below**..**

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

The agenda items for the Council meeting are:

▪ Agenda	SC(23)JAN00
▪ Minutes of meeting held on 16 December	SC(22)JAN01
▪ Action log	SC(23)JAN02
▪ Immigration	SC(23)JAN03
▪ Miscellaneous amendments	SC(23)JAN04
▪ Animal cruelty	SC(23)JAN05
▪ Theft	SC(23)JAN06
▪ Perverting the course of justice	SC(23)JAN07
▪ Motoring offences	SC(23)JAN08
▪ Reduction in sentence for a guilty plea	SC(23)JAN09

The external communication evaluation for December is also included with the papers.

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

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

Best wishes

Steve Wade

Head of the Office of the Sentencing Council

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Sentencing Council

COUNCIL MEETING AGENDA

27 January 2023
Royal Courts of Justice
Queen's Building

09:45 – 10:00	Minutes of the last meeting and matters arising (papers 1 and 2)
10:00 – 10:45	Immigration - presented by Vicky Hunt (paper 3)
10:45 – 11:30	Miscellaneous amendments - presented by Ruth Pope (paper 4)
11:30 - 11:45	Break
11:45 – 12:30	Animal cruelty - presented by Vicky Hunt (paper 5)
12:30 – 13:00	Theft - presented by Mandy Banks (paper 6)
13:00 – 13:30	Lunch
13:30 -14:30	Perverting the course of justice - presented by Mandy Banks (paper 7)
14:30- 14:45	Break
14:45 – 15:45	Motoring offences - presented by Ollie Simpson (paper 8)
15:45 – 16:15	Reduction in sentence for a guilty plea - presented by Ruth Pope (paper 9)

COUNCIL MEETING AGENDA

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Sentencing Council

MEETING OF THE SENTENCING COUNCIL

16 DECEMBER 2022

MINUTES

Members present:	Bill Davis (Chairman) Tim Holroyde Rebecca Crane Rosa Dean Nick Ephgrave Diana Fawcett Elaine Freer Max Hill Jo King Stephen Leake Juliet May Maura McGowan Beverley Thompson Richard Wright
Representatives:	Claire Fielder for the Lord Chancellor (Director, Youth Justice and Offender Policy)
Members of Office in attendance:	Steve Wade Jessie Stanbrook Ruth Pope Ollie Simpson

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 18 November 2022 were agreed.

2. MATTERS ARISING

2.1 The Chairman noted that this was Maura McGowan's last meeting as a High Court member of the Sentencing Council. He thanked her for all her valuable contributions over the last six years.

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

3.1 The Council considered responses to the consultation on revisions to the child cruelty guideline. Given the balance of responses were in favour of the amendments to the guideline that were consulted on, the Council agreed to publish those amendments without making any changes.

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

4.1 The Council considered the responses to the consultation and noted that respondents were generally supportive of the proposals with some making helpful suggestions for changes.

4.2 In response to a suggestion, the Council agreed to amend the wording on disqualification in the drug driving guidance and the excess alcohol, unfit through drink or drugs (drive/attempt to drive) and fail to provide specimen for analysis (drive/attempt to drive) guidelines.

4.3 The Council considered suggestions for changes to the proposed wording obligatory disqualification guidance and agreed to make two suggested changes. The Council also agreed to some changes suggested by respondents to the wording on minimum terms.

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

5.1 The Council considered responses to the consultation on revised motoring guidelines, looking particularly at culpability elements and aggravating and mitigating factors.

5.2 A number of changes were made to the draft culpability factors for dangerous and careless driving offences, including some relating to drink and drug driving, driving being impaired as a result of medical conditions and the use of mobile phones and other devices. Refinements were also made to the wording of step two factors.

6. DISCUSSION ON IMPOSITION – PRESENTED BY JESSIE STANBROOK, OFFICE OF THE SENTENCING COUNCIL

6.1 The Council considered three potential new sections for inclusion in the Imposition of custodial and community sentences guideline: deferred sentencing, the five purposes of sentencing and points of principle on issues affecting specific cohorts of offenders.

6.2 The Council agreed to include reference to deferred sentencing at the beginning of the guideline, with more work to be done on the level of detail of the information to be included. It was also agreed to include reference to the five purposes of sentencing, with further consideration to be given to the information attached to each of these purposes.

6.3 Finally, it was agreed that the Imposition guideline should also include direct reference to the Equal Treatment Bench Book, a direct link to relevant overarching guidelines and points of principle on issues affecting sentencing female offenders, to be drafted at a later date.

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Sentencing Council

SC(23)JAN02 January Action Log

ACTION AND ACTIVITY LOG – as at 19 January 2023

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

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Sentencing Council meeting:	**27 January 2023**
Paper number:	**SC(23)JAN03 – Immigration**
Lead Council member:	**Stephen Leake**
Lead official:	**Vicky Hunt** **vicky.hunt@sentencingcouncil.gov.uk**

1 ISSUE

1.1 The Council is invited to consider commencing work on an Immigration guideline and, if in agreement, to consider the offences that should be in scope.

2 RECOMMENDATION

2.1 That the Council agree to commence work on an immigration guideline and the proposed scope.

3 CONSIDERATION

3.1 In May 2019 the Council commenced work on a package of guidelines which included modern slavery and immigration. In 2020 it was decided that the guidelines should be separated to prioritise the work on modern slavery and leave immigration until the end of the Brexit implementation period to see what changes might result for immigration offences. In addition, the Council was aware that new legislation was being proposed in this area under the, then named, Nationality and Borders Bill. However, the Council also indicated that it would not wish to delay unduly producing guidelines in this area.

3.2 As the Brexit implementation period has passed, the new legislation is largely in force and there is space within the work schedule, we consider that now is a good time to return to the immigration guidelines.

Question 1: Does the Council agree to start work on immigration guidelines?

3.3 Should the Council agree to commence work on immigration guidelines, the first issue to consider will be the scope of the package.

3.4 The scope was originally discussed and agreed back in May 2019 and confirmed in 2020. The table below shows the offences that were previously agreed, along with the volumes that were known at the time.

LEGISLATION	Offence Legislation	2018	2019	2020
Immigration Act 1971 s25(1) and (6)	Do an act to facilitate the commission of a breach of UK immigration law by a non-UK national.	226	184	107
Immigration Act 1971 s24A(1)(a), s24A(1)(b) and (3)	Seek / obtain leave to enter / remain in UK by deceptive means - immigration. Secure avoidance of enforcement action by deceptive means	12	6	6
Immigration and Asylum Act 1999 s91(1)	Provide an immigration service in contravention of a prohibition. Provide an immigration service in contravention of a restraining order.	7	4	3
Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s2(1)	Entering the UK without a passport	1	0	0
Identity Documents Act 2010 s4	Possessing or controlling identity documents with intent	409	361	235
Identity Documents Act 2010 s6	Possessing or controlling a false or improperly obtained or another person's identity document	110	87	68

3.5 Two of the offences that were previously included in scope (as seen above) have very low volumes. The first is the offence of providing an immigration service in contravention of a prohibition, (s91(1) Immigration and Asylum Act 1999). This offence was included following a request from the Office of the Immigration Services Commissioner (OISC). However, it is understood that the OISC is content that our general guideline could be used to deal with these cases. The latest data (**Annex A**), shows that these offences continue to be very low in volume.

The second is the offence of entering the UK without a passport, (s2(1) Asylum and Immigration (Treatment of Claimants, etc.) Act 2004). This offence continues to be very low volume with zero cases sentenced since 2019. The CPS have said that this offence is not aimed at those entering the UK without a passport or identity document, but at those who fail to provide them at a leave or asylum interview. It is used to discourage people from destroying identity documents to increase their chances of an asylum claim or frustrate their removal. The CPS have indicated that there are challenges in prosecuting such cases which explains why volumes are so low.

3.6 It is, therefore, proposed that both of these two low volume offences are removed from the scope of this project.

Question 2: Does the Council agree to remove these two offences from the scope of the immigration project?

3.7 It is proposed that the remaining offences remain within scope as they are either key offences or have sufficient volume to justify a guideline.

Question 3: Does the Council agree to keep the remaining offences within scope?

Changes to Legislation

3.8 Since 2020, a number of changes have been made to the Immigration Act 1971 by the Nationality and Borders Act 2022 (NABA).

3.9 NABA increased the statutory maximum penalty for the section 25 (facilitating the commission of a breach of immigration law), and section 25A (facilitating entry by asylum seekers) Immigration Act 1971 offences raising them from 14 years to life imprisonment.

3.10 The Act also amended the offence of knowingly entering the UK in breach of a deportation order (section 24(1)(a) of the Immigration Act 1971), which was summary only, by splitting it into a number of new offences with statutory maximum penalties of 4-5 years.

- knowingly entering the UK in breach of a deportation order (maximum: 5 years' imprisonment); (section 24(A1))
- knowingly entering the UK without permission to do so (maximum 4 years' imprisonment); (section 24(B1))
- has only limited leave to enter or remain and knowingly remains beyond the time limited- Overstayers (maximum: 4 years' imprisonment); (section 24(C1))
- knowingly arriving in the UK without valid entry clearance (maximum 4 years' imprisonment); (section 24(D1))
- is required not to travel to the UK without an Electronic Travel Authorisation (ETA) and knowingly arrives without such an ETA (maximum 4 years' imprisonment); (section 24(E1)).

3.11 The Council had previously agreed not to include any offences that were summary only and so the pre-NABA offence had never been included within scope. However, as the

new offences set out above have a statutory maximum of 4-5 years the Council may wish to include some, or all of them.

3.12 Some of the s24 offences may be considered controversial as they focus on those seeking to enter the country rather than traffickers, and the s25A offence of assisting asylum seekers to enter the UK has been amended to remove the requirement that assistance be for gain.

3.13 The s24(E1) Immigration Act 1971 offence has not yet come into force (it is expected to do so later this year). The other s24 offences only came into effect in June 2022 and so data is very limited. The CPS have, however been able to share some data which shows the number of convictions from April 2022 to March 2023 for some of the offences.

Offence	**Convictions**
Knowingly enters the UK without leave **(s24(B1) Immigration act 1971)** Combined with Arrives in the UK without valid entry clearance **(s24(D1) Immigration act 1971)**	Total 86 (includes 23 small boat cases)
Knowingly entering the UK in breach of a deportation order **(s24(A1) Immigration act 1971)**	43
Overstayers **(s24(C1) Immigration act 1971)**	0

3.14 The CPS' have informed us that the number of convictions since NABA came into effect have risen significantly, mostly attributed to a greater response to the small boats' crisis. For this reason, the CPS say that they would welcome guidelines on all NABA offences.

3.15 The CPS also indicate that it would be useful to have guidelines for the two facilitation offences under section 25 (section 25 facilitating the commission of a breach of immigration law, and section 25A facilitating entry by asylum seekers) as they now both carry life imprisonment. The Council had previously agreed that s25 should be included in scope but not s25A (possibly due to low volume).

3.16 Including all of these offences (an additional 6) would significantly increase the size of the project. The Council could, however, choose to only include those offences with

sufficient volume: (s24(A1) Immigration act 1971, s24(B1) Immigration act 1971 and s24(D1) Immigration act 1971).

Question 3: Does the Council want to include all offences created/ amended by NABA namely, s24(A1) Immigration act 1971; s24(B1) Immigration act 1971; s24(C1) Immigration act 1971; s24(D1) Immigration act 1971; s24(E1) Immigration act 1971; and s25A immigration Act 1971?

Other Offences

3.17 In considering scope this time around we have obtained up to date statistics on a far wider set of immigration and associated offences. The table produced by the Analysis and Research team can be seen at **Annex A**. The offences that were previously agreed to be in scope have been highlighted.

3.18 As can be seen from the table, the offences of *Obstructing engines or carriages on railways* (s36, Malicious Damage Act 1861) and to a lesser extent, *Doing or omitting anything to endanger passengers by railway* (s34, Offences Against the Person Act 1861) have reasonably high volumes. Whilst both of these offences have in the past been treated as immigration offences, as they were used at a time when migrants were entering through the channel tunnel and disrupting Eurostar rail services, it seems that such offending is not as common anymore and so these volumes are likely to relate to non-immigration type offending. For this reason, it is not proposed that they be included in the scope of this project.

4 EQUALITIES

We will consider equalities issues in the usual way as part of guideline development and publish breakdowns of the demographics of offenders. We will consider the demographic data as part of the project.

5 IMPACT AND RISKS

5.1 We will consider the impact of the guidelines in the usual way, although existing trends in sentencing volumes may not be indicative of the future because of a change in enforcement strategy because of the new legislation.

5.2 In addition, as outlined above, some of these offences may be viewed as controversial and so the production of guidelines in this area will require careful handling.

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Sentencing Council

Sentencing Council meeting:	**27 January 2023**
Paper number:	**SC(23)JAN04 – Miscellaneous Amendments**
Lead Council member:	**Jo King**
Lead official:	**Ruth Pope**
	Ruth.pope@sentencingcouncil.gov.uk

1 ISSUE

1.1 This is the sign off meeting for the miscellaneous amendments for 2022-2023. A response document setting out the changes will be published in March and the changes will be made to the digital guidelines on 1 April 2023.

2 RECOMMENDATION

2.1 The Council is asked to consider the remaining issues arising from the consultation and agree any changes for publication.

3 CONSIDERATION

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

Disqualification from driving

3.2 At the December meeting the Council agreed revised wording on disqualification in the drug driving guidance and the excess alcohol, unfit through drink or drugs (drive/attempt to drive) and fail to provide specimen for analysis (drive/attempt to drive) guidelines. The agreed wording is:

- Must endorse and disqualify for at least 12 months
- Must disqualify for at least 2 years if offender has had two or more disqualifications for periods of 56 days or more **imposed** in the 3 years preceding the **commission** of the current offence – refer to disqualification guidance and consult your legal adviser for further guidance
- Must disqualify for at least 3 years if offender has been **convicted** of a relevant offence in the 10 years preceding the **commission** of the current offence – refer to disqualification guidance and consult your legal adviser for further guidance
- Extend disqualification if imposing immediate custody

3.3 Changes to the obligatory disqualification guidance were also agreed as set out below:

1. Obligatory disqualification

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

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

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

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

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

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

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

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

3.4 At the December meeting a query was raised as to whether a non-UK disqualification would be relevant under section 34(4)(b) which raises the minimum disqualification to two years. The only non-UK disqualifications that are recognised in courts in England and Wales are those from Ireland. There are also provisions for mutual recognition of disqualifications between Great Britain and Northern Ireland, the Isle of Man, Gibraltar and the Channel Islands. A British driving licence can be endorsed with a disqualification imposed in these jurisdictions and in those circumstances the disqualification would presumably be relevant under 34(4)(b). It seems that any other evidence of previous convictions or disqualifications would not be caught by the mandatory requirements to impose a longer disqualification but courts would be justified in taking them into account when deciding the length of the disqualification.

3.5 However, I have not been able to find an authoritative source for what exactly the legal implications of non-UK disqualifications or convictions are and so am unable to propose suitable wording to add to the guidance. If the Council wishes to add a note on this issue, further work could be done and the results circulated by email. If uncontroversial the note could be added this year, if not, it could be consulted on for the next round of miscellaneous amendments.

Question 1: Does the Council wish to add a note regarding non-UK disqualifications?

3.6 The Council agreed to retain the consultation versions of the discretionary and 'totting up' disqualification guidance.

> **'Totting-up' guidance:**
>
> Incurring 12 or more penalty points means a minimum period of disqualification must be imposed (a 'totting up disqualification') – s.35 Road Traffic Offenders Act (RTOA) 1988. Points are **not** to be taken into account for offences **committed** more than three years before the **commission** of the current offence – s.29 RTOA 1988.
>
> […]
>
> The court should first consider the circumstances of the offence, and determine whether the offence should attract a discretionary period of disqualification. But the court must note the statutory obligation to disqualify those repeat offenders who would, were penalty points imposed, be liable to the mandatory "totting" disqualification and, unless the court is of the view that the offence should be marked by a period of discretionary disqualification in excess of the minimum totting up disqualification period, **the court should impose penalty points rather than discretionary disqualification** so that the minimum totting up disqualification period applies.
>
> **Discretionary disqualification guidance:**
>
> In some cases in which the court is considering discretionary disqualification, the offender may already have sufficient penalty points on his or her licence that he or she would be liable to a 'totting up' disqualification if further points were imposed. In these circumstances, unless the court is of the view that the offence should be marked by a period of discretionary disqualification in excess of the minimum totting up disqualification period, the court should impose penalty points rather than discretionary disqualification so that the minimum totting up disqualification period applies *(*see 'totting up'*).*

3.7 The only issue that remained to be resolved was raised by a judge who suggested replacing 'he or she' with 'they and 'his or her' with 'their'. This ties in with a suggestion we have had for being more consistent and inclusive in the use of personal pronouns in guidelines.

3.8 A search through guidelines and associated materials has shown that gendered pronouns are used in various circumstances. In some cases the guidelines are quoting from

legislation. For example, in the Bladed articles and offensive weapons - possession guideline it states:

> *NB an offensive weapon is defined in legislation as 'any article made or adapted for use for causing injury, or is intended by the person having it with him for such use'. A highly dangerous weapon is, therefore, a weapon, including a corrosive substance (such as acid), whose dangerous nature must be substantially above and beyond this. The court must determine whether the weapon is highly dangerous on the facts and circumstances of the case.

3.9 Where the guidelines are using statutory language, no change is proposed.

3.10 In other situations using 'they' or 'their' may be preferable. A selection of examples are provided below:

Wording	**Where found**
• Where the investigation has been hindered and/or other(s) have suffered as a result of being wrongly blamed by the offender, this will make the offence more serious. • This factor will **not** be engaged where an offender has simply exercised his or her right not to assist the investigation or accept responsibility for the offending. When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and lack of maturity when considering the significance of such conduct.	Expanded explanation for aggravating factor 'Blame wrongly placed on others' This is used in around 20 guidelines.
The order requires the offender to report to a police station within five days, may require the offender to surrender his or her passport, and may impose requirements on the offender in relation to any regulated football matches.	Explanatory materials on Football banning orders in MCSG
Where the offender's living expenses are substantially lower than would normally be expected, it may be appropriate to adjust the amount of the fine to reflect this. This may apply, for example, where an offender does not make any financial contribution towards his or her living costs. … Where there is reason to believe that an offender's potential earning capacity is greater than his or her current income, the court may wish to adjust the amount of the fine to reflect this	Explanatory materials on assessment of income in MCSG

Confiscation A confiscation order may be made by the Crown Court in circumstances in which the offender has obtained a financial benefit as a result of, or in connection with, his criminal conduct.	Offences with a Terrorism connection-Guidance Additional guidance – dropdown

3.11 In other situations it may be preferable to revise the wording to avoid the need for a pronoun at all. Some suggested examples are:

Wording	Where found
• Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation) or transgender identity (or presumed transgender identity) • Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)	In around 20 sexual offences guidelines
The assessment of psychological harm experienced by the victim beyond this is for the sentencer. Whilst the court may be assisted by expert evidence, such evidence is not necessary for a finding of psychological harm, including severe psychological harm. A sentencer may assess that such harm has been suffered on the basis of evidence from the victim, including evidence contained in a Victim Personal Statement (VPS), or on his or her observation of the victim whilst giving evidence.	In an expanded explanation for the harm factor 'Severe psychological or physical harm' in 11 sexual offences guidelines
Victim forced to commit criminal offences (whether or not he/she would be able to raise a defence if charged with those offences), where not taken into account at step 1.	Aggravating factor in the Slavery, servitude and forced or compulsory labour/ Human trafficking guideline

3.12 In the first and third example it might be preferable to replace 'his or her' with 'the victim's' and in the second example with 'the sentencer's'.

3.13 The suggested changes would not alter the meaning of guidelines and so could be made without consultation. The changes would be logged and notified to publishers in accordance with our minor revisions policy. Reference to the changes could also made in the response to consultation to the miscellaneous amendments.

Question 2: Does the Council wish to avoid gendered pronouns in guidelines and associated materials?

Question 3: If so, should gendered pronouns be retained where they reflect statutory language?

Question 4: In other cases does the Council agree with the approach outlined at 3.10 and 3.12 above?

Question 5: Should any changes be made without consultation?

Minimum sentences

3.14 At the December meeting the Council agreed to some changes suggested by respondents to the wording on exceptional circumstances across the affected guidelines:

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

3.15 It was pointed out to us in December that the wording on the website did not reflect the statutory wording for all the offences. Specifically, in the domestic burglary guideline it said 'the court is of the opinion that there are exceptional circumstances that relate to the offence or to the offender' where it should say 'the court is of the opinion that there are exceptional circumstances that relate to **any of the offences** or to the offender' (emphasis added). This error has been corrected on the website and care will be taken to ensure that the revised versions reflect the statutory wording in all cases.

3.16 There were a few additional comments from respondents on the proposed wording in specific guidelines. A magistrate commented on the Bladed articles and offensive weapons (possession and threats) - children and young people guideline. He asked: 'Has consideration been given, in the exceptional circumstances section, to the young person under controlling or cohesive (sic) behaviour from adults or gang-related pressures?'

3.17 The guideline (both currently and in the proposed version) contains a list of matters to have regard to when considering the welfare of the child in deciding whether to impose the minimum term:

- any mental health problems or learning difficulties/disabilities;
- any experiences of brain injury or traumatic life experience (including exposure to drug and alcohol abuse) and the developmental impact this may have had;

- any speech and language difficulties and the effect this may have on the ability of the young person (or any accompanying adult) to communicate with the court, to understand the sanction imposed or to fulfil the obligations resulting from that sanction;
- the vulnerability of young people to self harm, particularly within a custodial environment; and
- the effect on young people of experiences of loss and neglect and/or abuse.

3.18 The mitigating factors in the guideline include 'Participated in offence due to bullying, peer pressure, coercion or manipulation'. It could, therefore, be argued that this type of situation is covered by factors in the guideline.

3.19 A barrister responding to the consultation queried the use of the word 'arbitrary' in the test for exceptional circumstances saying, 'The sentence is not arbitrary if it is in accordance with the law and Wednesbury reasonable'. The wording we consulted on was:

> Circumstances are exceptional if the imposition of the minimum term would result in an arbitrary and disproportionate sentence.

3.20 This wording is used across all the guidelines that currently have the 'exceptional circumstances' test and is taken from case law relating to firearms (R v Rehman [2005] EWCA Crim 2056) which in turn reflects human rights case law under article 5 of the ECHR. No other respondents questioned the use of the term and no change is proposed.

3.21 An individual respondent questioned the reference to 'a significant period of time between the offences' in the Bladed articles and offensive weapons (possession and threats) - children and young people guideline saying:

> 'Where there has been a significant period of time between the offences' is not an exceptional circumstance within the meaning of the legislation in my view. Furthermore, a 'significant period of time' is not specific enough and may lead to serious inconsistencies in sentencing. As this guideline applies to offenders aged 16 or 17 only (spanning just 2 years), it is difficult to see how an 'exceptionally significant period of time' could arise in such cases anyway.
>
> It should be removed from the guideline, particularly in the context of offences that cause high levels of harm and concern among young people and adults alike.
>
> Where exceptional circumstances are found in relation to the young person, if a further offence is committed, the presumption should be that the previous exceptional circumstance is no longer exceptional and the minimum sentence should be imposed, wording should be added to this effect.

3.22 The respondent repeated the point in relation to adult guidelines saying:

> Again, what period of time between the offences would be so exceptional as to justify not imposing the minimum sentence? Again it should not usually be relevant as a consideration. Perhaps the guideline should give an idea as to what period of time may constitute exceptional circumstances, or remove it from the guideline. If

parliament had intended for there to be a maximum period of time after which the minimum sentence for a further offence shouldn't apply, it would have legislated to that effect.

3.23 The point made about the guideline for children and young people spanning just two years is slightly misconceived. While the minimum term provisions only apply to those aged 16 and over, the previous conviction could predate the offender's sixteenth birthday. The Council may feel that particularly for children and young people the passage of time is a very relevant consideration.

3.24 More generally, it should be noted that the proposed wording does not say that a gap between offences will amount to exceptional circumstances – it says that it will be a relevant consideration along with the seriousness of the previous offence.

3.25 The point about exceptional circumstances having been found once leading to a presumption that the same circumstances are not exceptional for a subsequent conviction is valid. However, the Council may feel that this is implicit in the wording agreed in December for exceptional circumstances in the adult guidelines:

> **Principles**
>
> The circumstances must truly be exceptional. Circumstances are exceptional if the imposition of the minimum term would result in an arbitrary and disproportionate sentence.
>
> It is important that courts adhere to the statutory requirement and do not too readily accept that the circumstances are exceptional. A factor is unlikely to be regarded as exceptional if it would apply to a significant number of cases.
>
> The court should look at all of the circumstances of the case taken together. A single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances. The seriousness of the previous offence(s) and the period of time that has elapsed between offences will be a relevant consideration.
>
> The mere presence of one or more of the following should not **in itself** be regarded as exceptional:
>
> - One or more lower culpability factors
> - One or more mitigating factors
> - A plea of guilty

Question 6: Is the Council satisfied with the wording relating to the previous offence(s)?

4 EQUALITIES

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

5 IMPACT AND RISKS

5.1 The consultation stated:

> Impact
> The Council anticipates that any impact on prison and probation resources from the majority of the changes proposed in this consultation will be minor. Where changes may be more substantial, these impacts would be attributable to the legislative changes and not to the guidelines. In view of the nature of the consultation, a separate resource assessment has not been produced but a brief discussion on impact has been included in relation to each proposal.

5.2 The 'brief discussion' in relation to each proposal was either a statement that the proposals would not affect sentence levels or that the proposals were necessitated by legislative changes. The revisions agreed to the proposals post-consultation have not altered the anticipated impact of the proposals.

5.3 The response document will include a similar note.

Question 7: Is the Council content to sign off the changes for publication in March and to come into effect in April?

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Sentencing Council

Sentencing Council meeting:	**27 January 2023**
Paper number:	**SC(23)JAN05 – Animal Cruelty**
Lead Council member:	**Rosa Dean**
Lead official:	**Vicky Hunt (taking over from Zeinab Shaikh)** **Vicky.hunt@sentencingcouncil.gov.uk**

1 ISSUE

1.1 This is the final meeting to discuss the animal cruelty guidelines post-consultation. The guidelines will be published in spring, to come into force in late summer.

1.2 The Council will be asked to sign-off the Animal cruelty and Failure to ensure animal welfare guidelines, and to consider the resource assessment. The consultation response document will be circulated to Council members via email in due course.

1.3 The Council will also be asked to consider revisions to the explanatory guidance on disqualification and deprivation orders.

2 RECOMMENDATIONS

2.1 That the Council:

- signs off the Animal cruelty and Failure to ensure animal welfare guidelines (as included at Annexes A and B) for publication in spring
- considers the revised resource assessment included at Annex C
- agrees to add further detailed guidance to the explanatory materials on disqualification from ownership of animals and on deprivation from keeping animals (as included at Annex D).

3 CONSIDERATION

Animal cruelty (s.4-8 offences)

3.1 Following the increase in the statutory maximum sentence for particular animal cruelty offences, from six months' to five years' custody, the Council agreed to revise the Animal cruelty guideline. A standalone guideline has been created for s.4-8 offences (covering unnecessary suffering, mutilation, poisoning and animal fighting), as these are all impacted by the change in the statutory maximum sentence. The revised guideline is included at Annex A. The revisions detailed below have been agreed by the Council in previous post-consultation meetings.

Culpability

3.2 The revised culpability table includes detailed factors in high culpability, reflecting Parliament's focus on the most serious cases when deciding to increase the statutory maximum. Factors in high culpability cover serious, intentional violence such as sadistic behaviour, or cases where the offender either had a leading role in illegal activity or had coerced others. This also includes a mechanism to upgrade medium culpability offences if they are extreme.

3.3 To reflect the significant increase in statutory maximum, many factors in medium culpability have been brought down from high culpability in the existing guideline. Medium culpability factors cover intentional, but less severe, acts of cruelty, including using significant force or ill treatment in a commercial context. These also include a catch all to cover cases where factors in low and high culpability balance each other out, or where a case otherwise falls between the low and high categories.

3.4 By contrast, low culpability factors are focused on cases where the offender did not necessarily intend to cause harm, such as by caring for the animal in a well-intentioned but incompetent way, or where the offender was coerced or exploited into committing the offence.

Harm

3.5 The revised guideline uses a three-tier harm table to reflect the significant increase in statutory maximum and the resulting need for more detailed guidance for sentencers. The table is focused solely on harm caused to animals, with the impact on owners and others considered within aggravating factors instead.

3.6 Category 1 is focused on fatal or life-threatening injuries, or injuries otherwise causing severe pain to the animal. Category 2 factors focus on substantial pain or where the effect of the injury is lasting. We have specifically mentioned s.5-6 offences under this harm category (mutilation including tail docking and ear cropping) as they fall under this general grouping of injuries that are long-lasting but not life-threatening. Category 3 includes a catch-all for all other levels of pain or suffering, as well as a factor for instances where little or no harm is caused.

Sentence table

3.7 Following the public consultation, the Council agreed to raise the top of the offence range to 3 years 6 months' custody, and to raise the starting point for the most serious offences to 2 years' custody. This is substantially higher than the current guideline, which only goes to six months. The bottom end of the range for category 1 harm offences was also

brought up slightly, to a low level community order, and the gaps between boxes 1B and 1C narrowed to aid sentencers when dealing with borderline cases.

3.8 We have kept the ranges and starting points for low culpability offences close to current sentence levels in recognition of the fact that these cases may involve well-intentioned but misguided care, rather than active cruelty.

3.9 As discussed in the November meeting, we can expect to face some criticism that we are not raising the top of the table to mirror the new statutory maximum. However, the Council has agreed that there is a need for proportionality when viewing animal cruelty alongside assaults against human beings. In the consultation response document, we will carefully explain our rationale for capping the top of offence range at 3 years and 6 months to pre-empt some of this criticism.

Aggravating and mitigating factors

3.10 The list of non-statutory aggravating factors covers factors that are often present in animal cruelty cases, such as where the offender is under the influence of alcohol or offending involving a significant number of animals.

3.11 The existing factor on use of technology has been expanded to specifically refer to the circulation of photographs or videos of abuse on social media. The factor on the offender being in a position of responsibility has also been clarified so that it is more relevant to the offences in question.

3.12 We have added new factors on the offence being committed in presence of children, and on the offending being motivated by significant financial gain, to reflect the greater harm caused and the greater culpability of the offender respectively.

3.13 To relevant factors, we have added caveats to ensure these are not double counted alongside animal fighting offences themselves (where the offence and aggravating factor are the same), or alongside the culpability factors included at step 1 of the guideline.

3.14 Distress caused to the owner has also been moved to the bottom of the list of aggravating factors, to mirror the focus placed on animals within the harm table.

Question 1: Are you content to sign off the Animal cruelty guideline for publication?

<u>Failure to ensure animal welfare (s.9 offence)</u>

3.15 This guideline covers the remaining summary only s.9 offence (of failure of duty of person responsible for animal to ensure welfare), which retains a six-month maximum sentence. The revised guideline, at Annex B, is similar to the current Animal cruelty

guideline, but has been tailored to focus on this offence alone. The revisions detailed below have been agreed by the Council in previous post-consultation meetings.

Culpability

3.16 The culpability table has been amended in places to mirror the revised Animal cruelty guideline for consistency. To high culpability, we have added a factor on involving others through coercion. The catch-all wording in medium culpability has been expanded to cover cases where factors balance each other out, or where factors fall between the high and low categories.

3.17 A low culpability factor on a momentary or brief lapse in judgment has also been added, in line with the revised Animal cruelty guideline and other, similar guidelines.

Harm

3.18 We have retained the two-tier harm table as in the current guideline, for the purposes of simplicity for sentencers. The table uses wording from the existing guideline, with death, serious injury or a high level of suffering all placed in greater harm. Harm category 3 acts as catch all for all other cases.

3.19 We have also retained the starting points and category ranges in the sentence table as under the current guideline, as the statutory maximum for this offence has not changed.

Aggravating and mitigating factors

3.20 The main change to the list of non-statutory aggravating factors has been to remove factors that are not relevant to the s.9 offence, such as the use of a weapon or technology. Given the focus of the s.9 offence, on neglect rather than on active violence, these factors are unlikely to apply to these cases.

3.21 Otherwise, the list of aggravating factors has been amended in line with many of the changes to the s.4-8 guideline, such as including caveats to avoid double counting with culpability factors at step 1, and a new factor on involving a significant number of animals. We have also mirrored the new factor for instances where the offender was motivated by financial gain.

Question 2: Are you content to sign off the Failure to ensure animal welfare guideline for publication?

<u>Resource assessment</u>

3.22 The final resource assessment at Annex C discusses the anticipated impacts of the revised guidelines in detail.

<u>Animal cruelty guideline (s.4-8)</u>

3.23 The revised guideline is expected to increase sentence severity in a small number of cases involving the most serious types of offending, and may have a small impact on prison and probation places. More broadly, any impact is anticipated to be limited due to the small volumes involved for the majority of these offences and the low proportion of immediate custodial outcomes currently. There may be an impact on the proportion of cases committed to the Crown Court for sentencing, due to the change from summary only to either way offences and increase to the top of the offence range, although the majority of cases are still expected to remain within the threshold of magistrates' sentencing powers.

3.24 For the most serious offences, sitting within category 1 harm and high culpability, an increase in sentence severity is anticipated. While the starting point for these offences sits just above the threshold for a suspended sentence, at two years' custody, once the impact of any reduction for a guilty plea is taken into account, it is anticipated that a large proportion of cases of the highest severity will still be eligible for suspension, limiting the impact on prison places.

Failure to ensure animal welfare guideline (s.9)

3.25 As this guideline retains much of the existing Animal cruelty guideline and the statutory maximum sentence is unchanged, we do not anticipate that this will lead to a change in sentencing practice.

3.26 Given the low volume of offenders sentenced for this offence, and the small proportion that receive a custodial sentence, it is anticipated that the revisions to the guideline will have a limited impact on prison and probation places.

Question 3: Do you have any comments and/or questions on the final resource assessment?

Explanatory materials on disqualifications

3.27 In the November meeting, the Council agreed to update the explanatory materials on disqualification, rather than amending the wording on the face of the guidelines. We have revised this wording (included at Annex D) to provide more detailed guidance to sentencers.

3.28 This includes wording to clearly set out the purpose of disqualifications and to refer to relevant parts of the Animal Welfare Act 2006. We have also reiterated that, while sentencers can order a disqualification in addition to, or instead of, dealing with the offender in other ways, the most appropriate sentence is likely to sit within the sentence table as set out in the relevant guideline.

3.29 We have also mirrored any relevant changes in the explanatory materials on deprivation, signposting to underlying legislation and directing sentencers to the guidelines for sentence levels.

Question 4: Do you agree to these revisions to the explanatory materials on disqualification and deprivation orders?

4 EQUALITIES

4.1 As animal cruelty offences were summary only until the legislative change in 2021, limited demographic data are available on these cases, particularly for ethnicity (this was either not recorded or not known for 81 per cent of offenders sentenced in 2021 for s.4 offences and 86 per cent for offenders sentenced for s.9 offences). However, the data available on sex and age do not suggest any disproportionate impacts in relation to the guidelines.

4.2 As discussed in the November meeting, a small number of consultation respondents highlighted a potential disproportionate impact on vulnerable offenders, particularly those who are financially vulnerable. We believe, however, that there are sufficient safeguards in place on the face of the guidelines, either in the form of mitigating factors or in terms of the guidance we provide as standard on fines and in considering the wider means of the offender.

4.3 A handful of respondents also raised the potential impact of the guidelines on offenders from Gypsy, Roma or Traveller backgrounds, but the Council agreed that the limited demographic data available makes it difficult to understand what more needs to go on the face of the guidelines, beyond the standard signposting to the Equal Treatment Bench Book.

5 IMPACTS AND RISKS

5.1 The likely impact of the revised guidelines on prison and probation places is discussed in the resource assessment.

5.2 There is a risk that the Council may face criticism from major animal charities and other high-profile stakeholders regarding sentence levels for the s.4-8 guideline, where it may be perceived as ignoring the will of Parliament. We will, however, use the consultation response to show that we have raised sentence levels at the top end of the table, in recognition of the views of consultation respondents, but will reiterate the need to keep proportionality between these offences and those involving attacks on human beings.

Sentencing Council

Sentencing Council meeting:	**27 January 2023**
Paper number:	**SC(23)JAN06 - Theft**
Lead Council member:	
Lead official:	**Mandy Banks** **Mandy.Banks@sentencingcouncil.gov.uk**

1 ISSUE

1.1 To update the Council on the further work that has been carried out post the publication of the evaluation of the definitive guideline in 2019.

2 RECOMMENDATION

2.1 At today's Council meeting the Council are asked:

- To note the results of the further work that has been carried out following the initial evaluation in 2019
- To indicate what course of action, if any, it wishes to take after considering the results of this further work

3 CONSIDERATION

Definitive Theft Guideline

3.1 The definitive guideline was published in October 2015 and came into force in February 2016, and is comprised of guidelines for: shop theft, handling stolen goods, abstracting electricity, going equipped, making off without payment and general theft (for all s.1 Theft act offences except shop theft). The resource assessment stated that the approach taken with the new guideline was not intended to change the average severity of sentencing, but to ensure consistency of approach to sentencing of theft offences.

3.2 The evaluation of the guidelines was published in February 2019. For all theft offences, it was found that sentencing increased beyond the upper boundary of what might have been expected at some point in the year after the guideline was introduced. However, for most offences there was no clear-cut evidence that the guideline caused the uplift. For example, for some offences the increase happened some months after the guideline was introduced, rather than immediately, as would normally be expected if the guideline caused the uplift. For two low volume offences (abstracting electricity and going equipped for theft or burglary) there did appear to be an increase in sentencing severity as a result of the guideline.

3.3 The evaluation found that the effect of the guideline on sentencing severity varied by individual offence. When considering the overall theft picture, sentence severity did exceed the upper limit of where it was expected sentencing would be had the guideline not been introduced but only by a very small amount: less than one severity score point from a scale of 1-100. To put this into context, a community order has a severity score of around 15 and a SSO of around 31. Additionally, the trend then returned to the expected sentencing severity region by the end of 2017 for all theft offences combined.

3.4 For shop theft, sentencing severity increased beyond what would be expected by a small amount, six months after the introduction of the guideline. This was driven by small increases in the use of immediate custody (23 to 25 per cent) and suspended sentence orders (SSOs) (10 to 12 per cent) between July 2016 and August 2016. Sentencing severity was higher than expected had the guideline not been introduced. Whilst sentencing severity fluctuated in and out of the expected levels until the end of 2017 there was a drop at the end of the period back into the expected region. This meant that sentencing severity returned to around the same level as it had been before the sudden increase. Further analysis using data collected through the magistrates' courts data collection exercise in 2015/16 suggested that the increase in severity could be related to previous convictions and value of goods being more influential post-guideline, however this does not explain why this increase was delayed by six months.

3.5 It was concluded that it did not seem likely that the increase in severity was caused by an external change that affected sentencing severity more widely, as we did not see a similar shift in severity at this point across comparable offences. Because the shift was particular to the offence of shop theft, the increase may have been related to the introduction of the guideline, given there were no other known factors which may have impacted this offence alone.

3.6 Given that the overall trend returned to the sentencing severity region only at the end of 2017 the Council at the time of the evaluation decided to continue to monitor the trend over time before deciding on whether or not to revisit the guideline. Accordingly the A&R team have kept the guidelines, and in particular the offence of shop theft under review and now the latest sentencing data for shop theft is being presented to the Council for consideration.

3.7 The A&R team have considered the latest sentencing data from the Court Proceedings Database (CPD) covering the calendar year 2021. This analysis included updating volumes, sentence outcomes, average custodial sentence lengths (ACSL) and custodial sentence distributions for shop theft. Since the guideline came into force in June

2016, the number of offenders sentenced each year for this offence has continued to decrease steadily each year; in 2015 around 62,300 offenders were sentenced, which has decreased to 17,800 in 2021.

3.8 There have been some small shifts in the proportions of sentencing outcomes since the guideline came into force, most notably a reduction in the proportion of offenders receiving a discharge from 25 per cent in 2015 to 16 per cent in 2021. The proportion of offenders receiving immediate custody has remained relatively stable, however the ACSL (mean) has continued to increase. This had been decreasing before the guideline came into force but since 2015 has increased each year and in 2021 was 2.1 months, a 30 per cent increase from 1.7 months in 2015. This increase is driven by a reduction in the proportion of offenders receiving an immediate custodial sentence of up to one month, and an increase in the proportion of those receiving sentences between two and six months.

3.9 It should be noted that while some of these trends have been observed to occur from 2016 onwards, we cannot say for sure that the guideline is the cause of these changes. Regression analysis conducted for the evaluation showed that where an offender had a lot of previous convictions (20+) this was most strongly associated with a change in sentencing severity out of all factors. It was theorised this could be because the information on previous convictions had more of an effect on sentencer behaviour in the new guideline than previously. This guidance states:

‘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

Relevant recent convictions **may** justify an upward adjustment, including outside the category range. In cases involving significant persistent offending, the community and custodial thresholds may be crossed even though the offence otherwise warrants a lesser sentence. Any custodial sentence must be kept to the necessary minimum.’

The previous 2008 theft guideline stated:

‘Any recent previous convictions for theft and dishonesty offences will need to be taken into account in sentencing. Where an offender demonstrates a level of ‘persistent’ or ‘seriously persistent’ offending, the community and custody thresholds may be crossed even though the other characteristics of the offence would otherwise warrant a lesser sentence’.

The difference being that the wording in the new guideline stated that previous convictions may justify an upward adjustment, including outside the category range. We are not aware of any other changes in relation to the weighting of previous convictions during this period.

3.10 However, these impacts were only seen six months after the guideline came into force, which is contrary to the immediate effect normally seen when a guideline is seen to have changed sentencing practice. It has not been possible to conduct any further regression analysis yet, although the data collection between January- June this year does include the offence of shop theft, which may offer us the ability to conduct further analysis.

3.11 Given that the findings from the further monitoring of the guideline show a continuation of the trend seen in the initial evaluation, regarding the increase in ACSL and sentencing severity for shop theft, beyond what was anticipated, there are a number of courses of action for the Council now to consider.

Option one

3.12 As the reasons for the increasing sentence severity seen in shop theft are still not clear, the Council may wish to wait for the results of the ongoing data collection (which includes the offence of shop theft) to be analysed before deciding whether or not any work to revise the guideline should be undertaken. However, it cannot be guaranteed that this further set of data will provide any clearer explanation for why sentence severity increased in 2016 and continues to increase beyond what was anticipated. There is also a question of the priority to be afforded to the analysis of data from the data collection, given the available resource in the team.

3.13 There are other guidelines that have had no evaluation conducted on them, such as domestic abuse, and data that has been collected and yet to be analysed from previous collections, such as criminal damage. It may be difficult to justify prioritising any further Theft work over and above these guidelines given the relatively small increase and given that Criminal Damage and Domestic Abuse offences continue to have some degree of topicality and, to date, no evaluation has yet been carried out on them at all. Therefore, unless Council felt so strongly that this work should be prioritised above the evaluations of the other guidelines, any further evaluative work on theft would need to be added to the workplan to be considered more in the medium term.

Option two

3.14 The Council may feel that it has enough information now to make a decision about whether any revision of the guideline is necessary. Although there have been increases in sentence severity for some theft offences, we cannot be sure that these are attributable to the guideline as they occurred some months after the guideline was introduced, rather than immediately afterwards which would generally happen if the guideline was responsible.

3.15 And, even if the guideline is thought to be responsible, the Council may feel that the consequences can be tolerated. The evaluation found that the severity score increased by only less than one severity score point in a scale of 1-100, and the increases since have been of a similar size. And if the findings of the evaluation continue to be relevant and the continued increases within shop theft are driven at least in part by the effect of an offender's previous convictions, Council may conclude that the guideline is working as intended, even if the full nature of the impact was not anticipated. The text in the guideline outlined at para 3.9 was developed due to the very high proportion of shop theft offenders with previous convictions, which can present sentencers with particular difficulty, no means to pay fines, community orders may be impractical due to difficulty with complying with requirements, and so on.

3.16 The guideline did try to assist courts with this difficult cohort of offenders- often shop theft offenders have drug and/or alcohol and/or mental health problems which lie behind the offending, so there is guidance on these points. There is also the text that says: 'previous diversionary work with an offender does not preclude the court from considering this type of offending again'. It may be that some of the increases seen recently reflect the particular cohort of offenders coming before the courts post-covid: perhaps they represent the more serious instances of shop theft.

Therefore, one course of action may be to decide, based on the available information, and the fact that the change is relatively small that it is not necessary to conduct any further analysis or revise the guideline.

Option three

3.17 The Council may feel on the basis of the available information that it can take the decision now that the guideline should be revised. However, the Council would need to be clear what the aim in revising the guideline would be – is it to revise the shop theft guideline to try to reduce the increase in sentence severity? If so, the Council would need to be clear that the unanticipated increase was undesirable and that sentences ought to be returned, insofar as it is possible, to their pre-2016 levels. This of course may cause handling issues but if the Council felt current levels were too high it is a course of action it could take. It would also not be the most straightforward piece of work for the Council to undertake, the guideline took over two years to produce and the shop theft guideline was particularly difficult to develop and required balancing a number of different concerns in an appropriate way. It is hard currently to see how the guideline could be constructed differently. Revising the guideline is likely to be resource intensive across both policy and analytical teams (further analysis would still be likely required as per Option 1 in order to assist in any

redrafting) and a decision would need to be made as to what priority to give it, given the other projects waiting. As noted earlier there are other guidelines waiting for initial evaluation. These are not reasons of course to stop the Council deciding to revise the guideline if it was felt the reasons for revisiting it were pressing.

Question 1: Which option does the Council prefer?

Question 2: If option 1, or Option 3 does the Council agree that any further work on theft would be added to the work plan to be considered in the medium term rather than given priority over any current or other already prioritised projects on the work plan?

4 EQUALITIES

4.1 Any equality issues will be considered in light of whichever option the Council chooses to proceed with.

5 IMPACT AND RISKS

5.1 Depending on the answers to the questions above-there may be an impact on workload/other priorities. A decision to prioritise further analysis and/or revision of this guideline carries the impact from a resource perspective of needing to deprioritise other work. Depending on what that work is, the Council may need to rationalise why the work on theft has been viewed as a higher priority.

Sentencing Council

Sentencing Council meeting:	**27 January 2023**
Paper number:	**SC(23)JAN07 - Perverting the Course of Justice and Witness intimidation**
Lead Council member:	**Juliet May**
Lead official:	**Mandy Banks**
	Mandy.Banks@sentencingcouncil.gov.uk
	0207 071 5785

1 ISSUE

1.1 This is the second 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 harm factors, subsequent meetings will look at the responses regarding the rest of the draft guidelines, sentence levels, aggravating and mitigating factors and so on.

2 RECOMMENDATION

2.1 At today's meeting the Council is asked:

- To consider the information on orders/police warnings in relation to witness intimidation
- To consider the consultation responses regarding harm

3 CONSIDERATION

3.1 The changes agreed at the last meeting to the culpability factors have been made and can be seen in track changes with the PTCJ and witness intimidation guidelines, attached at **Annexes A** and **B** respectively. An issue was raised on the witness intimidation guideline during the discussion last time on the high culpability factor of 'breach of bail conditions'. The Chief Magistrate and others had raised a concern that as drafted this factor could cause too many cases to fall into culpability A. They suggested that a distinction needs to be drawn between cases where it is a breach of a condition expressly imposed to prevent an offence of witness intimidation, and cases where the breach occurs incidentally to the offence. The Chief Magistrate also suggested that the words 'and/or protective order and/or after Police warning re conduct' be added to the factor. The Council debated what types of police warnings there are, and their status, and wanted further information before making a

decision. Nick and his colleagues have kindly looked into this issue for the Council and have provided information attached at **Annex C**.

3.2 The Council can see that there are a number of orders and notices available. The high culpability factor could be reworded to 'breach of specific bail conditions imposed to prevent witness intimidation' to deal with the concern that otherwise too many cases could fall into culpability A. Or the factor could be reworded to 'breach of specific bail conditions imposed to prevent witness intimidation and/or protective order and/or after Police warning re conduct'.

Question one: How does the Council wish to reword this high culpability factor?

3.3 Turning now to the consideration of consultation responses regarding harm factors. The proposed harm factors were generally agreed with by respondents, subject to some points of detail discussed below. During the road testing of guidelines sentencers felt the draft guidelines helped them determine which harm category to apply. Starting with the witness intimidation guideline **(Annex B).** A considerable number of respondents including the Magistrates Association (MA), the Justice Committee (JC), the Chief Magistrate, Council of HM Council of District Judges, and the Justices' Clerks' Society (JCS) all suggested that place of work should be added to the first harm factor in category one. This factor currently is 'contact made at or in vicinity of victim's home'. As this is a location in which victims can easily be found, respondents argued that contact at a victim's workplace is also common, particularly in cases with a domestic abuse context, and that this can be very distressing for victims. However, the risk with doing this is that contact at most places a victim could be found could end up falling into category one harm. There is an argument for identifying 'home' within category one as contact there, a place people are entitled to feel safe, is particularly intrusive and threatening, but less so for other places. Therefore, it is suggested that the Council do not reword this factor.

Question two: Does the Council agree not to reword the first category one harm factor to include reference to place of work?

3.4 A number of respondents suggested that there should be a reference to the families or children of victims within the harm factors. Professor Alisdair Gillespie from Lancaster University and the JC both suggested that there should be a reference to harm caused to the family or children of the victim within category one harm. HM Council of Judges suggest that there should be a reference to the impact on family members/children if the contact occurs in

their presence either at step one, or if not, as an aggravating factor. If the Council wish to incorporate harm caused to the victim's family/children this could be done at step one or two. The second factor within category one harm could be reworded to 'serious distress caused to the victim and/or their family and/or children'. Or there could be an aggravating factor of 'contact made in the presence of the victim's family and/or children'. As with the discussion above, the risk in broadening the category one factors is that many more cases will fall into the top category, with far fewer cases captured by the other categories. So, it is recommended that if the Council wish to include a reference to families and children, it is done as a step two factor. If of course contact is made at home in their presence then this will be captured by category one in any case.

Question three: **If the Council wishes to include a reference to families and children, does it agree it should be as a step two factor?**

3.5 A small number of individual magistrates, one magistrates' bench and the JCS commented on the 'limited effects of the offence' factor in category three harm. The JCS said that this factor is unclear and proposed instead 'harm which falls below categories one and two'. One magistrate disliked the factor saying there were never just 'limited' effects of the offence, another magistrate said that it left too much judgement to the sentencer so instead suggested 'no effect'. One magistrate said this factor needed to be more specific. The magistrates bench suggested instead rewording to 'minimal distress and/or harm caused to the victim'. The JC said that generally additional guidance was needed to distinguish between category two and three harm.

3.6 The proposal by the JCS to reword it as 'harm which falls below categories one and two' is perhaps an attractive one as it avoids the need to use a descriptive word of either 'little', 'limited', or 'minimal', terms people often object to as it can be seen to minimising the harm caused to victims. Although some respondents call for more guidance, the use of more neutral terminology here is an important consideration. Also, some guidance is still provided in that this category is for harm which is below that in category two. The JCS also suggest making the same change within the PTCJ guideline.

3.7 However, it is quite difficult to get the wording of category three right, to ensure that the appropriate level of harm is captured, and the wording does not have the opposite effect and instead push cases into categories one and two. On balance, it is suggested that the original wording of 'limited effects of the offence is kept', so that sentencers can see it as a meaningful option below 'some' harm in category three.

Question four: Does the Council agree not to reword the category three factor, but

leave as consulted on?

3.8 West London Magistrates bench commented that one of the most harmful things that can happen as a result of this offence is victims having to significantly change their lifestyle, either their home or work situation for fear of the consequences to them or their families of further contact. They stated that they did not feel the category one harm factors adequately reflect this. They propose an additional category one factor: 'victim caused to change lifestyle to avoid contact, e.g victim forced to move home or change employment'. Again, the risk with adding this factor is making category one harm top heavy, so it is suggested that if the Council wish to include reference to this impact, it is done as a step two factor.

Question five: Does the Council agree that if reference to a victim having to change their lifestyle to avoid contact is to be added, this should be as an aggravating factor?

3.9 The JCS suggest that there should be a category one factor relating to offences which occur in a custodial establishment. They argue that those in custody may be witnesses in other cases and may have significant grounds to fear violence as unlike other witnesses they are unlikely to be able to move location to avoid the intimidation. There could be a category one factor of 'offence occurred within a custodial establishment.' Perhaps there is a stronger argument for including this factor than the others discussed above, as it is akin to contact in a person's home which is in category one-except here the victim cannot move location.

Question six: Does the Council wish to add an additional category one harm factor of 'offence occurred within a custodial establishment'?

3.10 Now turning to the PTCJ guideline attached at **Annex A**. A small number of respondents questioned the use of terms used such as 'serious' 'substantial 'some' etc, one magistrate saying they were 'woolly' and another saying they were too open to debate and needed better definition. In particular, the Sentencing Academy and Andrew Ashworth and The JC raised a concern with the harm factors relating to the impact on the administration of justice. They state that by virtue of the offence, almost all cases will result in some impact on the administration of justice. So as currently drafted, they argue almost all cases will be swept into category two harm, it being difficult to see which cases would fall into category three. They also suggest that courts may struggle to see the difference between 'some impact' and 'limited impact', although the difference in sentence severity between the two is significant.

3.11 They suggest rewording the harm factors to ‘very significant impact on the administration of justice’ in category one, ‘significant impact on the administration of justice’ in category two and ‘low impact on the administration of justice’ in category three. The Council will be aware that there have been previous discussions on the gradations of factors between the categories within many guidelines, whether to say ‘serious’ ‘significant’ etc. However, for this particular harm factor within this offence, these suggestions seem sensible, and should assist to make sure the appropriate category is selected. The risk otherwise as the respondents suggest is that cases would fall into category two rather than three. As there are the same factors within witness intimidation they also suggest this change is made on both guidelines.

3.12 One Judge within the road testing of the guideline commented that they did not like the phrase ‘limited effects of the offence’ page five of **Annex D**. As discussed earlier, the JCS proposed that category three within both guidelines is amended to ‘harm which falls below categories one and two’, but it is recommended that ‘limited effects of the offence’ is retained. To incorporate the ‘low impact on the administration of justice’ factor category three could be:

- Limited effects of the offence including, but not limited to, low impact on the administration of justice

Question seven: Does the Council agree to the rewording of the impact on administration of justice factors within both guidelines? And to retaining ‘limited effects of the offence’ within category three?

3.13 In the road testing of this guideline some comments were made by Judges that when words like ‘some’ rather than serious or significant were used in category two harm this leads to arguments by Counsel whether a case falls into category one or two. They asked whether there could be some guidance as to what is some or serious distress, like in the manslaughter or death by dangerous guidelines. As noted in paragraphs 3.10 and 3.11 these terms are very carefully considered by the Council. However, people sometimes still take issue with the terms, some like ‘serious’, some prefer ‘significant, others dislike the word ‘some’ and so on. As they are very different offences and the guidelines are constructed differently It is not thought that anything could be usefully taken from the manslaughter or death by dangerous guidelines, and that additional guidance shouldn’t really be needed to decide what constitutes serious harm.

3.14 However one Judge suggested the addition of the word ‘some’ in front of the first factor in category two harm so that it reads: ‘some suspicion cast upon an innocent party as

a result of the offence' and another suggested that the fourth bullet point in category one is amended to: 'serious or substantial delay caused to the course of justice'. The addition of these words may be helpful to address concerns raised about these factors. One Judge noted that there was no explicit reference to the cost/impact on police in investigating false narratives, for example. The Council did consider doing so during guideline development but decided that this type of impact could be captured within the impact on administration of justice factors.

Question eight: Does the Council agree just to add the words 'some' to the category two harm factor and 'serious' to the category one factor but no other changes to the harm factors?
Question nine: Does the Council wish to include an explicit reference to the impact on police time/costs?

3.15 The London Criminal Courts Solicitors' Association (LCCSA) and the Suffolk Magistrates Bench both asked if it was necessary to have a separate harm factor for delay caused to the course of justice, as well as impact on the course of justice, arguing that delay would be captured within the impact on the course of justice. In developing the draft guidelines the Council felt it was right to have two separate factors on these points, but it is arguable that delay would be captured within the impact on the course of justice factor.

Question ten: Does the Council still wish to have two separate harm factors? Or just impact on the course of justice?

3.16 The JC, the Criminal Solicitors' Law Association (CLSA) and a magistrate raised a concern about the category one harm factor of 'serious consequences for an innocent party(ies) as a result of the offence' and the category two factor of 'suspicion cast upon an innocent party as a result of the offence (for example time spent in custody/arrest)'. They state that the casting of 'suspicion' could itself be considered to have serious consequences for an innocent party, including serious distress and loss of reputation, a false accusation made against a teacher for example. The magistrate felt that suspicion should also be a category three harm factor. Although there could be real consequences for innocent person of having suspicion cast upon them as suggested- it would not be the same level of harm caused as if they had been arrested or falsely convicted and sent to prison for a time.

Question eleven: Does the Council agree that the harm factor relating to suspicion stays within category two?

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:	**27 January 2023**
Paper number:	**SC(23)JAN08 – Motoring offences paper 1**
Lead Council member:	**Rebecca Crane**
Lead official:	**Ollie Simpson** **ollie.simpson@sentencingcouncil.gov.uk**

1 ISSUE

1.1 Considering consultation responses on guidelines relating to:

- causing death by driving whilst disqualified;
- causing serious injury by driving whilst disqualified;
- causing death by driving whilst unlicensed/uninsured;
- driving/attempting to drive with a specified drug above the specified limit;
- being in charge of a motor vehicle with a specified drug above the specified limit.

1.2 There is a point raised in relation to the drug driving guidelines which has readacross to the draft guideline for causing death by careless driving whilst under the influence.

2 RECOMMENDATIONS

2.1 That Council makes amendments to the proposed guidelines, as set out below.

2.2 That where amendments to the drug driving guidelines would read across to the existing guidelines for excess alcohol and unfit through drink or drugs, these are flagged in a future consultation, either on motoring or miscellaneous amendments.

3 CONSIDERATION

Death and serious injury whilst disqualified

3.1 Given the nature of the offence, and assuming the question of quality of driving is dealt with via other offences or not at all, there are a limited number of factors which can come into play to make one offence more serious than another for this and the other “whilst disqualified/unlicensed/uninsured” offences. Many of the points raised in relation to these guidelines would also apply to causing death by driving whilst unlicensed or uninsured.

3.2 Various respondents suggested a high culpability factor relating to repeated breaches of the disqualification:

> "It might be added that where there is evidence that D frequently drove in contravention of the disqualification, this should fall within A High Culpability. This would be different to the aggravating factor of previous convictions, as it would not require the offender to have been convicted of driving whilst disqualified, but there would need to be evidence presented to the court that disqualified driving was habitual." – *Professor Sally Kyd*

> "We agree with the culpability factors. However we suggest adding a further 'high culpability' factor for cases where the driver is known to have driven on more than one occasion while disqualified." – *Cycling UK*

> "Agree but would believe high culpability should include cases of a recidivist nature." – *Transport for London*

3.3 We have proposed an aggravating factor of "history of disobedience to disqualification orders (where not already taken into account as a previous conviction)". The main argument against adding anything about disobedience to the current order is what the evidence would be to determine this, unless it came from the offender themselves. I therefore do not propose making this change.

3.4 Another theme of some responses was whether "driving shortly after disqualification imposed", and whether the time elapsed since imposition of a ban was relevant:

> "Driving whilst disqualified whether 1 day after disqualification or 6 months should increase culpability equally" – *Member of the public*

> "With driving shortly after being disqualified cited as a high culpability reason, there is a danger that someone who is close to the end of their driving ban will be regarded more leniently." – *Member of the public*

> "We consider that driving shortly after disqualification has been imposed will not always be a higher culpability factor. There will be situations as envisaged in the lower culpability factors proposed where driving takes place that could be immediately after disqualification is imposed but that nevertheless ought not to be aggravated by the driving taking place soon

after disqualification. We consider there is a tension between the two, for example between the second lower culpability factor (Decision to drive was brought about by a genuine and proven emergency) and driving again shortly after a disqualification is imposed. It may be useful for there to be some clarification on what "shortly after" would mean in this context." – *Kennedy's law firm*

3.5 We had discussed this question ahead of consultation, and concluded there was a difference in culpability at least between someone reaching the end of their (say, lengthy) disqualification and someone flouting a ban freshly imposed by the court – the latter showing a clearer snub to the court's authority. But as these responses show the point is debateable.

3.6 A key question is to what extent quality of driving is reflected at either step one or step two. We deliberately did not include any reference to this in these offences, as it should be the subject of separate charges, and therefore taken into account as part of totality, or otherwise irrelevant to the offence in question. Some challenged this approach:

"The question here is really whether the culpability and/or aggravating and mitigating factors should take account of the standard of driving. The statutory provision does not require that D's driving fell below the standard of the competent and careful driver but, following the Supreme Court's decision in *Hughes* [2013] UKSC 56, it is required that there is something to be criticised about D's driving. This offence is likely to be charged alongside other causing death by driving offences. The extent to which D's driving departed from the required standard should be reflected in sentence (that might include listing as a mitigating factor that there was little to criticise in relation to D's standard of driving at the time of the offence)" – *Professor Sally Kyd*

"Although the quality of driving does not affect culpability for the offence, I believe that some characteristics of dangerous or careless driving should be included as an aggravating factor." – *Member of the public*

3.7 I remain of the view that the factors in this guideline should relate closely to the offence itself and where the offender has also been convicted of careless or dangerous driving, those guidelines will apply. It is worth noting that this offence carries double the maximum penalty of causing death by careless driving, so may well be the lead offence of the two.

3.8 There is an elegance to Professor Kyd's suggestion of reflecting the standard of driving as a mitigating factor in that it does not "intrude" too much into what should be the real substance of the guideline, but allows for the situation where the driver's actions have

not been a significant contributory factor to the death (alongside "actions of the victim or third party contributed significantly to collision or death").

3.9 I therefore propose "no evidence of careless or dangerous driving which contributed to the collision or death" as an additional mitigating factor across all the guidelines in this group (suitably amended for causing serious injury whilst disqualified).

Question 1: does the Council wish to add the mitigating factor "no evidence of careless or dangerous driving which contributed to the collision or death"?

3.10 On step two factors, several respondents raised the same sorts of general issues we considered in relation to standard of driving offences (for example, whether the victim being a close friend or relative was relevant, or whether "sole or primary carer" should mitigate).

3.11 HM Council of District Judges picked up on our note (copied from the existing driving whilst disqualified guideline) relating to the statutory aggravating factor of previous convictions:

> *"An offender convicted of this offence will always have at least one relevant previous conviction for the offence that resulted in disqualification. The starting points and ranges take this into account; any other previous convictions should be considered in the usual way."*

3.12 They point out that a disqualification may have been imposed for an offence using the general disqualification power in section 163 of the Sentencing Code (the common example they suggest is taxi touting, but it could be any offence). They also point out that a disqualification may be imposed for not paying child maintenance, though this is rare. Given the rarity, and the argument that if a disqualification has been imposed and still in force it is by definition recent and relevant, I do not propose amending the note.

3.13 On the other hand, several respondents, including the CPS, pointed out that the mitigating factor "No previous convictions or no relevant convictions" could not apply to this offence. This is almost correct, subject to the points made by HM Council of District Judges above.

3.14 Our breach guidelines do not contain this as a mitigating factor, although the magistrates' courts guideline for driving whilst disqualified does. One could argue that offenders who breach a disqualification, particularly where it results in death or serious injury, should not be afforded the mitigation of another offender who has not committed *any* previous offences. However, the strictly logical and just corollary of the note on the aggravating factor (see above) is that the previous conviction has been taken into account in setting the starting point, and the offender then has a right to the mitigation that any another

offender would have at step 2. We could therefore alter the factor to refer to any previous convictions *other* than that which gave rise to the disqualification.

3.15 If we did change this there would be a strong case to amend the mitigating factor as it appears in the driving whilst disqualified guideline. I suggest this can be done without consultation, although (as per below with the drink and drug driving guidelines) Council may wish to mention or consult on the change, either as part of the next motoring consultation (covering aggravated vehicle taking and other things) or as part of the next round of miscellaneous amendments.

Question 2: do you agree to amend the mitigating factor "No previous convictions or no relevant convictions" to "No previous convictions or no relevant convictions, other than that for which the current order for disqualification was imposed"?

Death whilst unlicensed/uninsured

3.16 There were further points made in relation to culpability and step two factors which specifically related to causing death whilst unlicensed or uninsured.

3.17 The West London Bench and an individual magistrate thought that never having passed a test should be a high culpability factor. I am not immediately clear why this should be the case. In any case the blame which could be attached to not ever having been qualified to drive would be matched by the culpability of having been at one stage but now knowingly driving (and killing someone) without a licence.

3.18 The West London Bench also proposed additional step two factors:

> "We propose an additional aggravating factor where the driver has been uninsured for a long period of time and is purposely avoiding paying for insurance. We therefore propose the addition of the following aggravating factor:
>
> - Evidence that the driver has been uninsured for a long period of time.
>
> On the flip side… we propose an additional mitigating factor where the driver has previously held insurance but has recently failed to renew that insurance. We therefore propose the following additional mitigating factor:
>
> - Recent failure to renew insurance where insurance was previously held."

3.19 There may be a case for these factors, particularly as the equivalents of the previously-mentioned culpability factor relating to a recently imposed disqualification. However, the aggravating factor would need the qualification that the offender was *driving* whilst uninsured and that creates the same evidential problems as for someone who has been previously driving whilst disqualified (see para 3.3 above).

3.20 The suggested mitigating factor does seem more convincing, and could capture that offender who didn't have a genuine belief they were insured, but who has a history of being insured and may credibly have been planning to again. We may, though, want to add a warning against double mitigation for the person who had a genuine belief they were insured to drive (being categorised as low culpability).

Question 3: do you agree to add the mitigating factor "recent failure to renew insurance where insurance was previously held (where not taken into account at step one)".

3.21 The Motor Insurers Bureau, which has a particular interest in deaths caused by uninsured drivers, wanted to see two additional aggravating factors:

> "We agree with the proposed guidelines and suggest adding the following:
>
> - Vehicle itself uninsured as opposed to an insured vehicle being driven by an uninsured person. This can indicate a conscious choice to break the law over a prolonged period.
>
> - Evidence of previous knowledge that vehicle was uninsured – e.g. a Continuous Insurance Enforcement (CIE) or police warning letter sent to the registered keeper if they are the offender being sentenced."

3.22 On the former, I am not sure about creating a hierarchy between those who are personally uninsured set against those whose vehicles are. The issue of long term offenders is caught more broadly (and more directly) by the proposal above from the West London Bench.

3.23 For the latter we already include "disregarding warnings of others about driving whilst unlicensed or uninsured", although we could add "for example, a Continuous Insurance Enforcement (CIE) or police warning letter" to provide some help.

Question 4: do you want to add to the current aggravating factor so it reads: "disregarding warnings of others about driving whilst unlicensed or uninsured (for example, a Continuous Insurance Enforcement (CIE) or police warning letter)?

Drug driving guidelines

3.24 Our proposed drug driving (drive/attempt to drive and in charge) were based on the existing equivalents for unfit through drink or drugs, and we should bear in mind that any changes we make in response to this consultation may well have readacross to these guidelines and those for drive/attempt to drive and in charge over the alcohol limit.

3.25 Most respondents were content with our approach to culpability, working within the current limitations of understanding of how different amounts of different drugs affect driving. However, despite our explanation, two magistrates did want to see different amounts of drug reflected in the culpability table (as with alcohol) and felt our proposed guidance was too vague.

3.26 An issue arose in road testing related to the high culpability factor "evidence of another specified drug or of alcohol in the body". In a drop down explanation we say (among other things), "This factor may apply whether or not the 'other' specified drug or alcohol is present at a level that could give rise to separate charges." However, magistrates were unclear on whether a small level of drink not proven to be above the legal limit (taken alongside cocaine) met this factor.

3.27 Taking the wording at face value, with the explanation, this does capture another drug or alcohol present even if not above the legal limit. But should it? I put the question to Professor Kym Wolff from the Department for Transport's Advisory Panel on Alcohol, Drugs & Substance Misuse & Driving. She said

> *"The interpretation of the magistrates is probably correct [i.e. only to apply the factor where each drug/alcohol is over the limit] – certainly for the highest tariff offences. Whilst it is also true that a combination of drugs and alcohol when not every substance is above the legal limit should also be recognised as very unsafe for drivers.*
>
> *Generally, it would be better to use the legal cut-off for drugs and alcohol and consider that the higher the concentration of alcohol or drug detected above the limit the greater, the degree of impairment and risk of a RTC.*
>
> *So, alcohol and drugs used alone have a certain risk associated with their use when driving. When drugs are combined with other drugs or with alcohol that risk is multiplicative."*

3.28 This question has a readacross to the guideline for causing death by careless driving whilst under the influence, where we propose "mixing" as a high culpability factor. For this guideline, Professor Wolff recommends that the top level include mixing above the legal limits, and medium include mixing drugs and alcohol *below* the legal limits.

3.29 There may be a case for constructive ambiguity here: by leaving the explanation as "This factor may apply…" we are letting magistrates consider whether the mixing merits higher culpability on the facts of the case (or whether (eg) a can of lager drunk the night before can be ignored for these purposes). But given the confusion in road testing and the

significant consequences attaching to categorisation in the causing death by careless under the influence guideline, we should probably provide a clear steer.

3.30 For the drug driving guidelines I propose that the culpability factor be amended to "evidence of another specified drug or of alcohol in the body above the legal limit", amending the relevant line in the explanatory dropdown to "this factor applies even where the presence of the 'other' specified drug or alcohol is the subject of separate charges".

3.31 For the causing death by careless under the influence guideline, I have slightly adapted Professor Wolff's proposal where it contained some internal inconsistencies. Also adding in the blood and urine measurements as discussed ahead of consultation, I propose (with additions/amendments to the version consulted on in red bold):

The legal limit of alcohol is 35µg breath (80mg in blood and 107mg in urine)	High culpability	Medium culpability	Lesser culpability
71µg**/163mg/216mg** or above of alcohol OR Deliberate refusal to provide specimen for analysis OR Evidence of substantial impairment and/or multiple drugs **above legal limit** or combination of drugs and alcohol **above the legal limit**	Starting point: 12 years Sentencing range: 8 – 18 years	Starting point: 9 years Sentencing range: 6 – 12 years	Starting point: 6 years Sentencing range: 5 – 10 years
51- 70µg**/117-162mg/156-215mg** of alcohol OR A single drug detected **above the legal limit** **OR both alcohol and drugs detected together, one or both being below the legal limit**	Starting point: 9 years Sentencing range: 6 – 12 years	Starting point: 6 years Sentencing range: 4 – 9 years	Starting point: 4 years Sentencing range: 3 – 7 years
36-50µg**/81-116mg/108-155mg** of alcohol	Starting point: 6 years	Starting point: 3 years	Starting point: 1 year 6 months

OR **A single drug detected below the legal limit**	Sentencing range: 4 – 9 years	Sentencing range: 2 – 5 years	Sentencing range: 26 weeks - 4 years

3.32 On the other hand, as Professor Wolff herself points out, there is an inherent danger and unpredictability in any level of mixing, so Council may want to consider taking a more "zero-tolerance" approach whereby any level of alcohol and/or drug mixing is considered at the highest level.

Question 5: do you agree that the high culpability factor in the drug driving guidelines related to "mixing" be engaged when both substances are above the legal limit?

Question 6: on the same principle, do you agree with the revised table for causing death by careless driving whilst under the influence?

3.33 Various discrete points were made about culpability. Benjamin Damazer, a magistrate with experience in pharmaceuticals questioned our proposed note on not "double counting" certain drugs which may be present as the result of taking one drug. Our explanatory note reads:

"For these purposes where the following pairs of drugs appear together they shall be treated as one drug as they may appear in the body as a result of a single drug use: Cocaine and benzoylecgonine (BZE); 6-Monoacteyl-morphine and morphine; or Diazepam and Temazepam."

Mr Damazer said:

> "Diazepam and Temazepam (and Lorazepam) are three different chemical compounds in the same family. To allow them to be linked as proposed is akin to saying whisky and beer don't both count towards a total alcohol consumption or that skunk and leaf cannabis should not both be considered.
>
> The indications are erroneous. All part of benzodiazepine group but different. Temazepam (Normison, normies) is a short acting drug properly prescribed for very short medical procedures (eg tooth extraction) or to assist inability to get to sleep. Diazepam (Valium) is a longer acting drug. Lorazepam (Ativan) is used for longer surgical procedures to assist memory loss (eg colonoscopy). None of these products is the derivative of any other (unlike the cocaine and heroin examples)."

3.34 Although the comparison with whisky and beer isn't quite right (both contribute to a higher alcohol reading but we would not treat them as different drugs for these purposes), I have checked with Professor Wolff on the point. She agrees that Diazepam and Temazepam can be prescribed in their own right, have different effects and it would be best to remove the reference to them from the note.

Question 7: are you content to remove the reference to Diazepam and Temazepam in the note on mixing drugs?

3.35 The West London Bench wondered whether "passengers in vehicle" should place an offender in high culpability (where we have proposed it as an aggravating factor). There may be some force in this, but I suspect it is such a common occurrence that it would place too many cases in high culpability, and we need to reflect the particular culpability of driving larger vehicles for commercial purposes.

3.36 On that point, two members of the public queried our wording of "driving for hire or reward", taken from the existing drink/drug guidelines but different to "driving for commercial purposes" standard across the other motoring guidelines on which we consulted. I agree that "commercial purposes" is clearer, potentially broader and in any case consistent with the other guidelines. If we were to change it here we will want to consider amending it for the existing drink/drug driving magistrates' guidelines.

Question 8: do you agree to change the culpability factor from "driving for hire or reward" to "driving for commercial purposes"?

3.37 HM Council of District Judges (Magistrates' Courts) thought it would be helpful to "make clear whether the higher culpability factors apply to driving or attempting to drive." I do not think we should legislate by the back door for a different penalty between the two, but for absolute certainty we could amend the factors as follows (additions in bold):

- Driving **(or attempting to drive)** an LGV, HGV or PSV etc
- Driving **(or attempting to drive)** for hire or reward

Again, if you were minded to make this change we would want to make the change for the guideline for driving/attempting to drive while unfit.

Question 9: do you want to add "or attempting to drive" to the relevant culpability factors?

3.38 Under harm, the West London Bench proposed assistance to magistrates in what counts as "obvious signs of impairment". They suggested a list of descriptors, potentially as a drop down with what these signs may be, including,

- Signs of poor driving / road use, such as deviating from lanes, late braking, not using headlights, inability to notice hazards, inability to maintain a constant speed, aggressive or erratic driving, excessive risk taking.
- Pupil dilation / reddening of eyes.
- Slurred speech.
- Slow physical reaction times.
- Unsteady on feet / unable to walk in a straight line.
- Poor physical co-ordination skills.
- Mental confusion – such as strange / inappropriate answers to simple questions.
- Lack of concentration.
- Dizziness.
- Appearance of drowsiness / sleepiness / fatigue.
- Nausea / vomiting / cramps.
- Aggression, panic attacks or paranoia.

This may go some way to providing the extra guidance which magistrates sought in road testing about what "obvious signs of impairment" means (and to whom the impairment should be obvious).

3.39 However, as ever with particularisation this runs the risk of opening up a checklist exercise, and omitting other signs that could result from drug use. On balance, I recommend leaving the harm factor "obvious signs of impairment" open to interpretation.

3.40 A more general issue with harm raised by a few respondents is that in these guidelines (as in simple dangerous driving) it arguably bleeds across from culpability – where any harm which has been caused is not an element of the offence. Unlike other guidelines, in other words, the focus remains on what the offender has done and not the impact on victims (if any). Further, for the offence(s) of being over the specified limit, the only thing that needs to be evidenced is the specimen reading and the fact someone was driving, attempting to drive, or in charge of the vehicle.

3.41 However, that does not mean we are precluded from saying more on harm caused or risked, as we do in the dangerous driving guideline. We have an aggravating factor "*involved in accident (where not taken into account at step 1)"* and this could be brought forward to be

a harm factor (proposed by the West London Bench and Professor Sally Kyd). Or indeed we could go further and reflect some of the harm factors in dangerous driving: “offence results in injury to others”, “circumstances of offence created a [high] risk of serious harm to others” and “damage caused to vehicles or property”.

3.42 Against this, one could argue that if injury caused to others, damage caused to property, and/or the quality of the driving were not such as to attract separate charges or convictions, then they do not merit being counted at step one. There also may be problems of evidence presented to the court if the Police have simply relied on the levels of drug present.

3.43 Additionally, bearing in mind this is a high volume offence, there is a risk that a large number of cases involving minor prangs and collisions would be pushed up into higher harm with the risk of a significant number of short custodial sentences. On balance I would <u>not</u> recommend moving this factor forward.

3.44 In any case, whether we retain “involved in accident” at step two or move it to step one, we were rightly pulled up for our use of the word “accident” by Prof Kyd, Action Vision Zero, Transport for London and Cycling UK:

> “This should refer to crash or collision as accident implies unfortunate if not inevitable. Given the guidelines are for cases where criminal culpability has been proven, this language should be updated. It has been over 15 years since the CPS adopted the policy of referring to crash or collision, not accident. The DfT has recently announced it too will refer to collision and not accident.” – *Action Vision Zero*

Question 10: do you want to move “involved in accident” forward to become a harm element (<u>not</u> recommended)?

Question 11: wherever it is placed, are you content to change the word “accident” to the word “collision”?

3.45 Some respondents questioned the mitigating factor “very short distance driven”. As well as the question of subjectivity raised in road testing, several respondents said it was irrelevant whether the journey was a short or a long one given the potential for harm. Another person suggested that it was the *intention* to drive a long journey that was the critical aggravation.

3.46 A member of the public made the following suggestion:

I recommend splitting the "High level of traffic or pedestrians in the vicinity" factor into two parts: "High level of traffic," and "Vulnerable road users in the vicinity, including pedestrians, cyclists and horse riders".

I agree that there are two distinct elements here and we should be promoting the idea of the broader class of vulnerable road users (including motorcyclists).

Question 12: do you agree to create two separate aggravating factors:

- **High level of traffic**
- **Vulnerable road users in the vicinity, including pedestrians, cyclists, horse riders, motorcyclists etc?**

3.47 The West London Bench proposed a mitigating factor to match “spiked drinks” which appears in the guidelines for excess alcohol:

“We believe there should be an equivalent for drugs of the mitigating factor “Spiked drinks” for alcohol. It is possible that certain illegal drugs may be placed in drinks or food for criminal purposes – for example GHB (gamma hydroxybutyric acid – also known as liquid ecstasy). Since many of these types of drugs lead to symptoms such as mental confusion and loss of inhibitions, it is quite possible that an otherwise innocent person might try and drive after consuming such substances unknowingly. We suggest an additional mitigating factor here:

- Illegal drugs consumed unknowingly”

3.48 This seems an unobjectionable proposal, especially as it reflects what is in the equivalent alcohol guidelines. I cannot improve on the wording the West London Bench suggest, given that there is no generic equivalent of “spiked drinks” for drugs.

Question 13: do you agree to add the mitigating factor “illegal drugs consumed unknowingly”?

3.49 As mentioned above, many of these changes could and arguably should be made to the existing equivalent guidelines for excess alcohol and unfit through drink or drugs, although some will be relevant only to guidelines for driving/attempting to drive rather than in charge, and some may be relevant only to unfit or excess.

3.50 We could make those changes without further consultation, if we believe they are appropriate, and assuming that those interested parties who have responded to this consultation value consistency across guidelines. However, some of the changes proposed are more than wording tweaks and do make substantive changes. This would argue in favour of them being either consulted on (or at least mentioned) either in the next motoring consultation or in this year’s round of miscellaneous amendments, so that they can be well

publicised in advance of being made and coming into force. Alternatively, Council may want to look at the changes on a case by case basis. I recommend (if Council agree the consequential changes are appropriate) that we do not make the changes now, but that they be mentioned, not consulted on, in a future consultation.

Question 14: do you agree to make these amendments, as appropriate, to the current drink/drug drive magistrates' guidelines, but only after being included in either the next motoring consultation or in this year's round of miscellaneous amendments?

4 IMPACT AND RISKS

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

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

4.3 The decisions that the Council makes post-consultation may affect the final resource assessment. Depending on how consideration of consultation responses proceeds, we aim to present Council with a revised version of the resource assessment at the 31 March meeting.

Sentencing Council

Sentencing Council meeting:	**27 January 2023**
Paper number:	**SC(23)JAN08 – Motoring offences paper 2**
Lead Council member:	**Rebecca Crane**
Lead official:	**Ollie Simpson** **ollie.simpson@sentencingcouncil.gov.uk**

1 ISSUE

1.1 Considering consultation responses on sentence levels across motoring offences.

2 RECOMMENDATIONS

2.1 That Council keep most of the sentence levels the same as those on which we consulted, but adjust downwards those for causing serious injury by careless driving and causing injury by wanton or furious driving.

3 CONSIDERATION

Standard of driving offences

3.1 The sentence tables we proposed for consultation are set out at **Annex A**.

3.2 In terms of pure volumes of response across most offences there were calls for sentence levels to be higher than our proposals. That said, as discussed in November, there were calls for careless and lower culpability driving to be dealt with not by short custodial sentences but by means of more use of lengthy disqualifications. We will return to disqualification as part of a separate project.

3.3 For causing death by dangerous driving, some respondents, such as the charity Brake, wanted to see exact parity with unlawful act manslaughter (i.e. a very high culpability level with a starting point of 18 years and a range of 11 -24 years' custody). The National Police Chiefs' Council also thought our levels were too low. Others picked up on their desire to see several of our medium culpability factors put into high (thinking, for example, of the person who drives dangerously while over the limit being placed in medium culpability).

3.4 Even amongst those who wanted to see less use of custody generally there was not much complaint that these levels were too high. However, I believe what we have proposed remains justified. The worst cases of dangerous driving will still rarely (if ever) involve any intent to cause harm. Moreover, given the maximums of other offences (such as 5 years for causing serious injury by dangerous) we risk creating a disproportionate gap by inflating these sentences even more. If there is any case for change it may be to raise the middle

category levels marginally (noting that we are keeping deliberate decisions to (eg) drive over the limit or in a defective vehicle or drink over the limit in that category), but I do not recommend this.

3.5 Given they share the same maximum penalties, we based our levels for causing death by careless driving under the influence on these levels. These received more support, and attracted many of the same criticisms. I therefore do not propose making any amendments to those sentence levels either.

Question 1: are you content to leave the sentence levels for death by dangerous and death by careless under the influence unamended?

3.6 For causing serious injury by dangerous driving, again many respondents wanted higher sentences, some not appreciating the limits imposed by the statutory maximum.

3.7 There, were however, several voices – including road safety campaigners such as RoadPeace and Action Vision Zero – who wanted more community orders in the offence range, particularly in the lowest (2C) box (remembering that they would expect more and longer disqualifications as a counterbalance).

3.8 There may be a case for adjusting the lowest box slightly and allowing the range to reach down for a high level community order where (for example) there was significant mitigation and the injury was just over the threshold for serious. I am mindful, however, that our proposed category 2A of causing serious injury by careless driving is already illogically identical to category 2C of causing serious injury by dangerous driving, and think a more pressing question is the levels for careless driving offences (see below).

3.9 Few people took specific issue with our proposals on simple dangerous driving. Many respondents wanted higher sentences but appeared not to recognise the statutory maximum. The Magistrates Association took issue with us describing the levels as a “modest uplift” on those in the current guidelines, but did not indicate they were opposed.

3.10 Building on the point made about causing serious injury by dangerous, several respondents wanted to see less use of custodial sentences alongside greater use of disqualification for careless driving offences. Nicole and Chris Taylor, parents of a road traffic collision victim, said that they wanted to see careless driving mainly punished by non-custodial sentences. Action Vision Zero said of the proposed causing death by careless driving levels:

> “We do not agree. We believe [the sentence levels] are too high. The proposed levels all have custody as a starting point with a community order only included in the range proposed for the least culpability level. As shown above, custodial sentences are rarely used with

causing death by careless driving convictions. Only one in four drivers convicted of this offence went to prison in 2021.

We have argued that careless driving includes human errors and lapses. The Safer System approach, adopted by the DfT and transport authorities across the country, acknowledges people make mistakes and aims to design a transport system so that these mistakes do not prove fatal or serious. We do not think it fair to send drivers to prison because transport operators, politicians and policy makers have allowed excess risk in our system."

(Note that the "one in four drivers"/rarely used statistic does not take into account how many offenders may have had a suspended sentence in the ranges we are proposing – likely a highly pertinent consideration with this sort of offending.)

3.11 Professor Sally Kyd backed this up:

I think [the sentence levels] are too high. The proposed levels all have custody as a starting point with a community order only included in the range proposed for the least culpability level. Whilst there was a need to close the gap between CDDD with a higher maximum penalty, and the sentencing for this offence, I think this goes too far. Whilst a prison sentence is appropriate for level A High Culpability, it is not necessarily appropriate for level B medium culpability. Greater reliance on disqualification (with retest) as a punishment to satisfy utilitarian and retributive aims of sentencing is appropriate here and, again, i would press the Sentencing Council to attempt to provide periods of disqualification in its guidelines, especially for this offence (reducing the reliance on imprisonment).

3.12 By contrast, other voices thought that the levels were too low to reflect the taking of a life. The West London Bench thought that there needed to be more distinction between this and causing serious injury by careless driving, suggesting a fully custodial range for culpability C offences. Nicholas Atkinson KC believed Parliament's will was being ignored by the offence range not reaching the full 5 year maximum.

3.13 Again, both the Magistrates Association and HM Council of District Judges (Magistrates' Courts) queried our description of these levels as "modest" uplifts on those currently in force, but neither body said they wanted to see them decreased.

3.14 Bearing in mind the balance of views, and remembering that it is open to the court to suspend most of the sentences we propose where there is a realistic prospect of rehabilitation, I do not recommend making any amendments to the table for causing death by careless driving.

3.15 Although many agreed with our proposals, many of the points already considered about greater use of community orders were made, by the same people but with at least as

much force for causing serious injury by careless driving. Dr Adam Snow believed that the lowest (2C) box should be fully non-custodial, whilst Action Vision Zero and others thought that non-custodial sentences should make up the majority of this table. Professor Kyd made this point:

> "The proposed sentence levels are the same as for dangerous driving. If a driver falls far below the standard of a competent and careful driver, they will always display a higher level of culpability than someone who just drives below the standard of a competent and careful driver, no matter the outcome of the driving. Whether a driver causes a RTC is beyond their control (it is reliant on the reactions of other road users in many cases), as is the severity of any injuries that result, as well as whether anyone luckily escapes without injury. The worse the standard of driving, the more likely a collision will ensue, with the risks involved. I would therefore wish to see the sentencing for this offence being below that of dangerous driving, even though the maximum penalty is the same. Although I appreciate the Sentencing Council needs to be mindful of what Parliament has set as the maximum penalty, I would suggest that all but the most serious examples of this offence (where the higher level of harm is caused) would not warrant a prison sentence."

3.16 I am more persuaded of the case for non-custodial sentences, particularly where harm and culpability are lower. It is the case that Parliament has set a maximum of 2 years, but equally Parliament has set a maximum of a fine for the summary offence of simple careless driving. Our guideline for that offence goes up to a Band C fine.

3.17 A table adjusted downwards to reflect the points made about the lower culpability of careless driving could look as follows (amendments in red):

	Culpability		
	A	B	C
Harm 1	**Starting Point:** 1 year ~~6 months~~ **Category range:** ~~1~~ 26 weeks - 2 years	**Starting Point:** ~~1 year~~ 26 weeks **Category range:** ~~26 weeks~~ High level community order – 1 year ~~6 months~~	**Starting Point:** ~~26 weeks~~ High level community order **Category range:** ~~High~~ Low level community order – ~~1 year~~ 26 weeks
Harm 2	**Starting Point:** ~~1 year~~ 26 weeks **Category range:** ~~26 weeks~~ High level community order – 1 year ~~6 months~~	**Starting Point:** ~~26 weeks~~ High level community order **Category range:** ~~High~~ Low level community order – ~~1 year~~ 26 weeks	**Starting Point:** ~~High~~ Medium level community order **Category range:** ~~Low level community order~~ Band C Fine – ~~26 weeks~~ High level community order

3.18 Note that this follows diagonally when read alongside the table for causing serious injury by dangerous driving. The Band C fine overlap in box 2C with the simple careless driving guideline can be justified as in that guideline Band C fines are reserved for the worst cases of careless driving where there may have been some injury or property damage, where here these are for borderline cases of careless driving.

3.19 Against this, one might be uneasy about the prospect of someone inflicting lifelong infirmity on someone, even if by the most momentary of mistakes, receiving a community order.

Question 2: do you want to make the changes to the sentencing table for causing serious injury by careless driving as above?

3.20 The levels for causing injury by wanton or furious driving were set in proportion to the other guidelines (culpability A aligning with dangerous driving, B with careless driving and C being all other cases; Harm 1 being death and the equivalent of higher harm in the serious injury guidelines; 2 being other cases of serious harm to the GBH standard; and 3 being all other cases). Similar points were therefore made on our proposals.

3.21 Many responses expressed disbelief about the levels (particularly where a death may have been caused), whilst acknowledging that the statute severely limits what the Council can do. Others suggested there may be a case for distinguishing between the inherent risk of harm caused by bicycle riders compared to motorised vehicles.

3.22 If you agree to make the changes suggested above for causing serious injury by careless driving I would recommend the following changes for wanton or furious:

	Culpability		
	A	B	C
Harm 1	**Starting Point:** 1 year 6 months **Category range:** 1 - 2 years	**Starting Point:** ~~1 year~~ 26 weeks **Category range:** ~~26 weeks~~ High level community order – 1 year ~~6 months~~	**Starting Point:** ~~26 weeks~~ High level community order **Category range:** ~~High~~ Low level community order – ~~1 year~~ 26 weeks
Harm 2	**Starting Point:** 1 year **Category range:** 26 weeks – 1 year 6 months	**Starting Point:** ~~26 weeks~~ High level community order **Category range:** ~~High~~ Low level community order – ~~1 year~~ 26 weeks	**Starting Point:** ~~High~~ Medium level community order **Category range:** ~~Low level community order~~ Band C Fine – ~~26 weeks~~ High level community order

Harm 3	**Starting Point:** 26 weeks **Category range:** High level community order – 1 year	**Starting Point:** **Starting Point:** ~~High~~ Medium level community order **Category range:** ~~Low level community order~~ Band C Fine – ~~26 weeks~~ High level community order	**Starting Point:** Low level community order **Category range:** Band ~~B~~ A fine – ~~High~~ Medium level community order

Question 3: do you agree to make those changes (subject to your response on question 2)?

Whilst disqualified, unlicensed or uninsured offences

3.23 Again, the weight of opinion wanted to see sentence levels increased for these offences. In particular, several respondents (including Roadpeace) questioned why we had not used the full 10 year space provided by Parliament for causing death by driving whilst disqualified. Dr Adam Snow was one respondent who made a suggestion for reworking the levels:

> "I would propose the high culpability starting point of 7 years, with a category range of 5 – 9 years"… Accordingly I would reassess the medium culpability as follows: Starting Point – 4 years, Category Range – 2-5 years custody and lesser: Starting Point 2 years, Category Range High Level Community Order – 3 years custody."

Heather Rothwell JP thought the range should be only custodial. Cycling UK, whilst generally pushing for lower sentences in their response, thought high culpability cases should have a starting point of 8 years, and medium cases five years. Only Professor Kyd argued for lower sentences.

3.24 In practice, it is quite likely that such a charge/conviction will be brought alongside one for causing death by dangerous or careless driving; in the latter case it will be the more serious charge, but even in the former it is quite possible that the sentence for the "whilst disqualified" offence will be more severe than for the standard of driving. In any case one will aggravate the other.

3.25 Beyond being responsive to consultation replies and Parliament's will, I am unpersuaded that these levels should be raised. The nexus between the offending and the harm is weak, and where there is not enough evidence of bad driving (though enough of a link between the driver's actions and the death for a charge to be brought) the levels we propose could already be seen as being on the severe side. We also need to keep

proportion between this and the causing death by careless and dangerous levels, hindered in this as we are by the respective maximum penalties.

Question 4: are you content to leave the levels for causing death whilst disqualified unamended as consulted on?

3.26 For the other offences in this group, various respondents wanted to see higher sentences, but often without any recognition of the maximum penalty (particularly in the case of the 2 year limit for causing death whilst unlicensed or uninsured). The Motor Insurers Bureau, for example, wanted an increase up to three years of the statutory maximum. There were calls for causing serious injury whilst disqualified to be treated as on a par with causing serious injury whilst driving dangerously.

3.27 In terms of specific suggestions for amendments, the West London Bench thought the lowest level for causing death whilst unlicensed/uninsured should be raised from a medium community order to 13 weeks' custody (with a range of a medium community order up to 26 weeks).

3.28 The Magistrates Association thought the lowest culpability levels for causing serious injury whilst disqualified "*should have the same sentence as just driving while disqualified. This is especially as the standard of driving is not relevant."*. Assuming they mean the highest level of that offence, this would mean decreasing what we have proposed to a starting point of 12 weeks' custody (where life threatening injuries may have resulted) and a range of a high level community order to 26 weeks. This would place this category out of proportion to the other levels.

3.29 Given the weight of responses wanting increased levels for these offences, I certainly do not recommend any downwards changes to the levels we have proposed. For the same reasons as set out for death whilst disqualified I do not believe we should increase levels either, but if we do want to be responsive to people's views there may be a case for adjusting the levels for death whilst unlicensed/uninsured upwards (perhaps to the levels that we *had* proposed for the top harm levels of causing serious injury by careless driving, or at least raising the lowest range to include a custodial sentence).

Question 5: are you content to leave the levels for causing death whilst unlicensed/uninsured and causing serious injury whilst disqualified unamended as consulted on?

Drug driving

3.30 Generally, respondents were content with our proposals for drug driving levels. They were identical to those which exist for the equivalent offences of driving/attempting to drive

and in charge whilst unfit through drink or drugs (the best comparator given the unknown link between quantities of drug and impairment).

3.31 In terms of specific suggestions, Lilian Hobbs JP proposed increases for drive/attempting to drive. She thought category 2 should include custody and a minimum 3 year ban and that category 1 should have a minimum 5 year ban. Heather Rothwell JP thought there should be a starting point of Band D fine (presumably for category C, where we had proposed a Band C starting point).

3.32 Of the few specific comments made about being in charge of a vehicle, some thought that "consider disqualification" in the top and middle boxes was too weak and we should mandate disqualification. The Magistrates Association suggested a mandatory disqualification of 6 -12 months.

3.33 The West London Bench made a more general point:

> "[T]he sentence starting point and range are more severe for this offence of being in charge of a vehicle under the influence of illegal drugs rather than excess alcohol (which has a starting point of Medium community order and a range of Low Level community order to 6 weeks custody) [unless we have used an incorrect guideline]. This was not the case for the drive/attempt to drive offence...
>
> We don't fundamentally disagree with this, because there is an argument to be made that driving or being in charge of a vehicle with an illegal drugs impairment is more serious than driving or being in charge of a vehicle with excess alcohol, as the act of taking those drugs is itself illegal and can have serious and complex effects on an individual and their sensory and decision-making processes. It does however mean that the SC is not treating the offences of "Driving or attempting to drive with a specified drug above the specified limit" and "Being in charge of a motor vehicle with a specified drug above the specified limit" as regards sentence alignment with their excess alcohol equivalents.
>
> The sentences (for driving and for in charge) should either both be the same as those for excess alcohol or both should be higher for illegal drugs impairment than for excess alcohol (as taking specified illegal drugs is per se illegal). We request that the SC looks at this again."

3.34 As mentioned above, the levels for in charge with drugs over the limit are the same as for unfit through drink or drugs. So this anomaly (if we accept the characterisation) already exists. The main justification may be something similar to that proposed by the West London Bench: that being over the limit or unfit through drugs is inherently more unsafe, with the effect if an offender is called on to drive more unknowable.

3.35 This feels a little weak, and I believe there is a case for consistency between the two guidelines. We could change the top level of in charge whilst over the drug limit to that for the excess alcohol equivalent, and change the lowest level to consolidate the two lower levels. This would mean adjusting that level downwards as follows:

Level of seriousness	**Starting point**	**Range**	**Disqualification/ points**
Category 1	~~High~~ Medium level community order	~~Medium~~ Low level community order – ~~12~~ 6 weeks' custody	Consider disqualification (extend if imposing immediate custody) **OR** 10 points
Category 2	Band C fine	Band B fine – Medium level community order	Consider disqualification **OR** 10 points
Category 3	Band B fine	Band ~~B~~ A fine - Band C fine	10 points

3.36 However, there may be a stronger case, given the overall tenor of responses on drug driving, to increase the levels for the existing excess alcohol guideline to the levels we proposed for drugs. We could do this either as part of the next round of miscellaneous amendments, or as part of the next set of motoring offences. On balance I recommend this approach. We may be accused of encouraging sentence inflation (the vast majority of offenders for in charge with excess alcohol receive a fine), but that point can be put to the test in consultation.

Question 6: are you content to leave the levels for in charge as they are, but consult in future on adjusting the levels for in charge with excess alcohol?

4 IMPACT AND RISKS

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

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

4.3 The decisions that the Council makes post-consultation may affect the final resource assessment. Depending on how consideration of consultation responses proceeds, we aim to present Council with a revised version of the resource assessment at the 31 March meeting.

Sentencing Council

Sentencing Council meeting:	**27 January 2023**
Paper number:	**SC(23)JAN09 – Reduction in sentence for a guilty plea**
Lead Council member:	
Lead official:	**Ruth Pope** **ruth.pope@sentencingcouncil.gov.uk**

1 ISSUE

1.1 There is a concern that the Reduction in sentence for a guilty plea guideline fails to incentivise some offenders to plead before the PTPH in indictable only cases.

2 RECOMMENDATION

2.1 That the Council agrees whether changes are required to the guilty plea guideline and if so what action should be taken.

3 CONSIDERATION

3.1 The Senior Presiding Judge (SPJ) has issued the Better Case Management Revival Handbook with the aim of increasing efficiency in the Crown Court. His concern is to tackle the very substantial backlog of cases in the Crown Court. One cause of the continuing backlog identified by the SPJ is the need to have more than one hearing in the Crown Court when the defendant pleads guilty at the PTPH in indictable only cases. Sentence often has to be adjourned for a report. While each individual extra hearing is relatively insignificant in terms of court time taken, collectively they result in a considerable amount of court and judge time being taken away from other work.

3.2 The guilty plea guideline requires a defendant to indicate a guilty plea at the first hearing (i.e. the magistrates' court) to be entitled to a one-third reduction. If not and a guilty plea is entered at the first hearing at the Crown Court (the PTPH) the defendant will be entitled to a one-quarter reduction. This is subject to the exceptions set out in the guideline, the first of which reads:

> ### F1. Further information, assistance or advice necessary before indicating plea
>
> Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done, a reduction of one-third should still be made.

In considering whether this exception applies, sentencers should distinguish between cases in which it is necessary to receive advice and/or have sight of evidence in order to understand whether the defendant is in fact and law guilty of the offence(s) charged, and cases in which a defendant merely delays guilty plea(s) in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal.

3.3 The scenario which is causing concern is one where a defendant is either unrepresented at the magistrates' court or the representative has insufficient time to advise them properly before sending. The suggestion is that having lost the certainty of a one-third reduction there is then little incentive to indicate a plea before the PTPH.

3.4 It is acknowledged by the SPJ that the court has the discretion to take an indication ahead of the PTPH into account as mitigation or the court could use the exception at F1 to allow a one-third reduction where the plea is indicated as soon as the necessary advice or information is received, but it is argued that these are open to interpretation and therefore lack certainty.

3.5 There appear to be several possible ways in which this issue could be addressed, including:

- Amend the guideline so that for indictable only cases the one-third reduction is available for an indication prior to the first hearing in the Crown Court. This is not recommended as it would disadvantage those who do indicate at the magistrates' court and would undermine the certainty provided by the guideline
- Allow a sliding scale between the one third at the first hearing and the one quarter at the second hearing. This again is not recommended as it would undermine certainty and therefore would not provide the clear incentive sought.
- Make no change to the guideline and leave it to the Court of Appeal to clarify that where a defendant does not receive the information and advice necessary at the first hearing but indicates a plea (though his representative) as soon as possible thereafter, the one-third reduction should be applied. This relies on a suitable case coming before the CACD and the judgment being understood and applied consistently.
- Make an amendment to the F1 exception in the guideline to clarify that an indication of a guilty plea should be made as soon as the defendant has received the necessary advice and information without waiting for the next hearing and that in those circumstances the one-third reduction is preserved.

3.6 The final option appears to be the best solution, subject to finding the right formulation of words. It would have the advantage of applying to all types of cases; a similar

issue could apply to either way offences in the Crown Court and to cases tried in magistrates' courts which are far more numerous (around 15% of cases sentenced in the Crown Court are indictable only).

3.7 If the Council is minded to consider making a change to the guilty plea guideline, the next issue is how and when to go about it. The next two Council meetings are very busy so if the Council wished to respond fairly quickly, we could form a small working group to draft the changes and bring them to the May meeting. Any substantive changes to the guideline would need to be consulted on – this could be done as part of the 2023/24 miscellaneous amendments or, if it was felt that the change should be made more quickly, run as a separate targeted consultation perhaps over a shorter period than usual.

Question 1: Does the Council wish to take any action to address the issue raised by the SPJ?

Question 2: If so, should a working group be set up to discuss potential changes?

Question 3: If changes are agreed by the Council how should these be consulted on?

4 EQUALITIES

4.1 The equalities implications of any proposed changes would need to be considered carefully and raised in consultation.

4.2 There are wider equalities issues relating to guilty plea rates among different demographic groups. The Council was aware of these when the guideline was drafted and while the level of certainty that the guideline provided militates against bias, it does not allow for discretion to take account of the issues of mistrust of the system that are known to exist.

4.3 If the Council wanted to open the project up to an exploration of these issues, the project would become larger and require more time.

5 IMPACT AND RISKS

5.1 The Council has a very full work plan and so any additional projects that we take on may cause delays to others.

5.2 The resource impacts of any changes to the guilty plea guideline are potentially significant (given that it applies to all cases), though on the face of it the proposed changes should not lead to a requirement for more prison places. Nevertheless work would need to be done to assess the impact of any changes.

5.3 If any changes were subject to a targeted consultation over a reduced period there is a risk that the Council would be seen as failing to consult widely and fully. However, if it were

included as part of the miscellaneous amendments it might not receive as much attention as if consulted on separately.

Question 4: Are there particular issues relating to equalities or impact that should be explored further?

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External communication evaluation

December 2022

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Users*	405,934	244,628
Sessions per user	1.29	1.89
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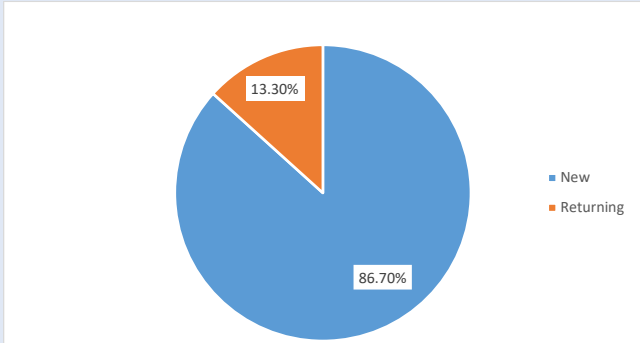
Ave time on site	02:06	04:22
Bounce rate**	57.33%	55.10%

Visitors: new and returning



Announcements

12th	Public confidence in the criminal justice system: 2022 - report
16th	Official statistics pre-announcement: exploring equality and diversity in the work of the Sentencing Council
16th	Sentencing seminar: current issues in sentencing policy and research – seminar promotion

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cps.gov.uk
judiciary.sharepoint.com (Judicial Intranet)
Uk.search.yahoo
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*Users: Number of people who have visited the website at least once within the date range
**Bounce rate: Percentage of people who land on a page on the website, then leave

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Magistrates' court guidelines search page	233,552	95,588
Crown Court guidelines homepage	51,753	28,071
Website homepage	42,777	26,130
Magistrates' court homepage	36,577	19,244
/fine-calculator/	33,556	16,282
/offences/magistrates-court/item/common-assault-racially-or-religiously-aggravated-common-assault-common-assault-on-emergency-worker/	28,417	17,017
/offences/magistrates-court/item/excess-alcohol-driveattempt-to-drive-revised-2017/	22,396	12,933
Common offence illustrations*	19,364	9,357
Common offence illustrations /assault/	18,117	11,136
/offences/magistrates-court/item/supplying-or-offering-to-supply-a-controlled-drug-possession-of-a-controlled-drug-with-intent-to-supply-it-to-another/	17,234	10,788

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Crown Court	Causing grievous bodily harm with intent to do grievous bodily harm / Wounding with intent to do GBH
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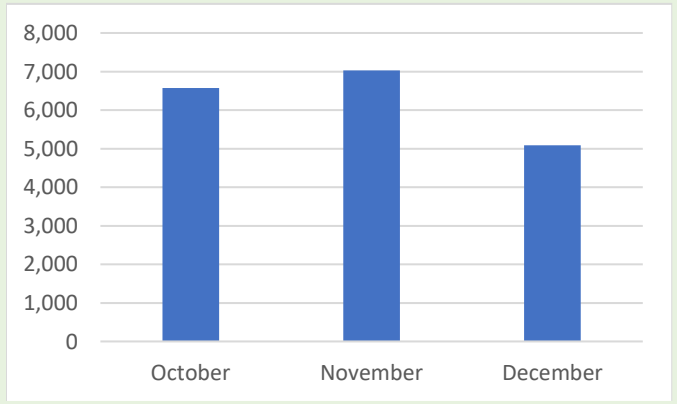

Most watched video

How offenders are sentenced in England and Wales

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02:10

Impressions*

19,045

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

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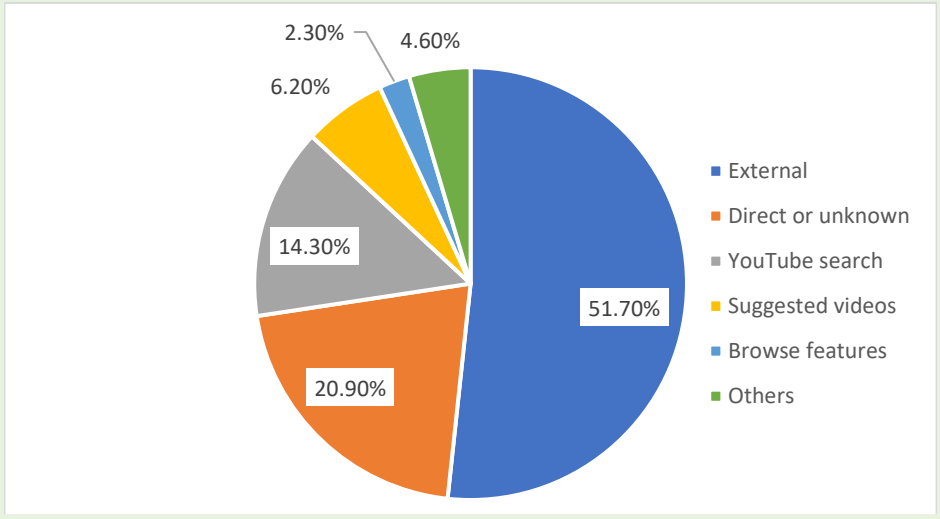
YouTube

How viewers find our videos



YouTube search: terms used

1	Crown Court
2	Crown court sentencing UK
3	UK court sentencing
4	How to become a magistrate
5	Magistrate

- External: Traffic from websites and apps embedding or linking to our videos on YouTube (60% www.sentencingcouncil.org.uk)
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Official statistics pre-announcement: exploring equality and diversity in the work of the Sentencing Council

Public confidence in sentencing and the criminal justice system: 2022 - news item

Minutes of Council meeting November 2022

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Public confidence in sentencing and the criminal justice system: 2022

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Highlights

	Tweets	Impressions	Mentions	Profile visits
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Last month	4	8,235	52	741

Top tweet

What drives the public's attitudes to and understanding of the criminal justice system? New report published today explores what people know and feel about the CJS and what sort of factors influence their attitudes:

Impressions: 984	Total engagements: 54

Top mention

#PetTheft victims are being let down by authorities. Traumatic for people & pets, its not taken seriously by police @AssocPCCs or courts @SentencingCCL. #PetAbduction is not an offence @DefraGovUK. Scammers are getting away with targeting victims 💔 #PetTheftReform needed in 2023

Dr Daniel Allen @Dr_Dan_1

Animal geographer @KeeleUniversity Interested in Perceptions, Policy and Practice. #PettheftReform founder with @SAMPAuk

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