Sentencing Council

OFFICIAL - SENSITIVE

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18 January 2024

Dear Members

Meeting of the Sentencing Council – 26 January 2024

The next Council meeting will be held in the **Queens Building, Judges Conference Room, 1st Floor Mezzanine at the Royal Courts of Justice.** This will be a hybrid meeting, so a Microsoft Teams invite is also included below. **The meeting is Friday 26 January 2024 and will be from 9:45 to 15:15**.

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

The agenda items for the Council meeting are:

▪ Agenda	SC(24)JAN00
▪ Minutes of meeting held on 15 December	SC(23)DEC01
▪ Immigration	SC(24)JAN02
▪ Protest offences	SC(24)JAN03
▪ Miscellaneous amendments	SC(24)JAN04
▪ Housing offences	SC(24)JAN05
▪ Assault harm	SC(24)JAN06

The external communication evaluation for November is included with the papers.

You will notice that we have a short agenda item on meeting dates. Because of the flow of work we are likely to be running short on material to justify four full meetings in the latter half of the year and are considering removing one of the meetings. I will briefly talk through the options and ask for your views.

We have arranged for a photographer from the MoJ design team to take portrait photographs of some of the members attending the January meeting. Phil may be asking you to spare 10 minutes during the lunch break to have your picture taken. The photographs will be used on the website, in the annual report and, potentially, elsewhere. If you would prefer not to be photographed, please let her know.

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.

Please note that these papers are shared strictly for the purposes of guideline development and evaluation only. If you wish to discuss the content with colleagues for any other purposes, please speak to the author of the paper or another member of the Office staff.

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

Best wishes

Steve Wade

Head of the Office of the Sentencing Council

Sentencing Council

COUNCIL MEETING AGENDA

26 January 2024
Royal Courts of Justice
Queen's Building

09:45 – 10:00	Minutes of the last meeting and matters arising (paper 1)
10:00 – 10:15	Autumn meeting dates – presented by Steve Wade
10:15 – 11:00	Immigration – presented by Vicky Hunt (paper 2)
11:00 – 11:15	Break
11:15 - 11:45	Protest offences – presented by Lisa Frost (paper 3)
11:45 – 12:45	Miscellaneous amendments part 1 – presented by Ruth Pope (paper 4)
12:45 – 13:45	Lunch (and photography)
13:45 – 14:15	Miscellaneous amendments part 2 – presented by Ruth Pope (paper 4)
14;15 – 14:45	Housing offences – presented by Jessie Stanbrook (paper 5)
14:45 - 15:15	Assault harm – presented by Lisa Frost (paper 6)
15:15 – 15:30	Break
15:30 - 16:45	Governance sub group meeting

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COUNCIL MEETING AGENDA

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MEETING OF THE SENTENCING COUNCIL

15 DECEMBER 2023

MINUTES

Members present:	Bill Davis (Chairman) Simon Drew Elaine Freer Tim Holroyde Jo King Stephen Leake Juliet May Rob Nixon Stephen Parkinson Johanna Robinson Beverley Thompson Mark Wall Richard Wright
Apologies:	Rosa Dean
Representatives:	Claire Fielder for the Lord Chancellor (Director, Youth Justice and Offender Policy)
Members of Office in attendance:	Steve Wade Lisa Frost Ruth Pope Ollie Simpson Jessie Stanbrook

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 17 November 2023 were agreed subject to a minor correction.

2. MATTERS ARISING

2.1 The Chairman noted that Rob Nixon had recently been appointed formally as the police representative on the Council.

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

3.1 The Council considered responses to the consultation which had closed on 30 November. In the light of the generally positive responses to the proposals the Council agreed to adopt the changes consulted on to the Allocation and Children and young people guidelines, the Supplying or offering to supply a controlled drug guideline, the Individuals: Unauthorised or harmful deposit, treatment or disposal etc of waste/ Illegal discharges to air, land and water guideline and the loss of control, diminished responsibility, unlawful act and gross negligence manslaughter guidelines.

3.2 Taking account of the responses received, the Council agreed to make some amendments to the proposals consulted on for the Fraud guideline and the Breach of a protective order guideline.

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

4.1 The Council signed off a package of draft motoring guidelines for consultation. These include guidelines on aggravated vehicle taking offences, vehicle registration fraud, driver disqualification, and various other miscellaneous matters related to motoring.

5. DISCUSSION ON SC RESPONSE TO JSC RECOMMENDATIONS – PRESENTED BY LISA FROST, OFFICE OF THE SENTENCING COUNCIL

5.1 The Council considered the recommendations for the Council in the recently published report of the Justice Committee inquiry into public opinion and understanding of sentencing. The Council agreed its response, subject to changes which would be included in a final version. It was noted that some of the recommendations were outside of the remit of the Council, and a number of others were already in place or underway as part of the delivery of the Council's five year strategy and other work.

5.2 The Council agreed to consider how the other, more complex recommendations could be taken forward.

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

6.1 The Council considered issues relating to licence conditions that had come to its attention. This included the impact that limitations stemming from licence conditions can have on the rehabilitation of offenders.

6.2 The Council considered that the majority of the issues raised were outside the Council's remit, and passed those issues relevant to sentencer training to the Judicial College for consideration.

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Sentencing Council

Sentencing Council meeting:	**26 January 2024**
Paper number:	**SC(24)JAN02 – Immigration**
Lead Council member:	**Stephen Leake**
Lead official:	**Vicky Hunt** **vicky.hunt@sentencingcouncil.gov.uk**

1 ISSUE

1.1 The Council is asked to consider some minor changes to the guidelines and sign off the package of guidelines ready for consultation in March.

2 RECOMMENDATION

2.1 That the Council discuss and agree the minor changes and sign off the guidelines.

3 CONSIDERATION

3.1 Now that the Council has considered all of the guidelines in this project a few minor amendments are proposed to ensure consistent language is used throughout. The office has also recently tested some of the guidelines in a transcript exercise to inform the resource assessment. In carrying out this exercise it became clear that some factors may not be clear enough.

3.2 In addition, the Court of Appeal has recently set guidance for courts sentencing Facilitation cases in the absence of sentencing guidelines. Considering this guidance, the Council may wish to include of a couple of additional factors.

<u>Facilitation Guideline (s25 and 25A Immigration Act 1971)</u>

3.3 The facilitation guideline was the first guideline that the Council considered in this project. The agreed version is attached at **Annex A** pages 6-10.

3.4 The first factor in high culpability is ‘leading role in a commercial activity’. It may be that the Council intended that this factor relates to group activity where the offender plays a leading role but that is not clear from the wording of the factor. In the recent transcript exercise the following case was discussed:

R v Kuznecovs

"Mr Kuznecovs, you had been stopped by Border Force officers driving your Latvian cab and trailer, in which you had two Albanians secreted in the cab, one man and one 17 year old woman. These were illegal immigrants. This was a one-off incident in which you stood to gain 400 euro."

3.5 In the exercise the offender was categorised as B as the offender's culpability falls between the factors described in A and C. However, there was discussion amongst those testing the guidelines that the top Culpability A factor might apply with the wording as it currently is. The offender was a leading role and the activity was for commercial purposes.

3.6 If the Council considers that this factor is aimed at group activity, thus eliminating the possibility that cases such as Mr Kuznecovs would be included, then the factor could be amended to 'leading role in a group activity carried out for commercial purposes'.

Question 1: Does the Council want to amend the culpability A factor to 'Leading role in a group activity carried out for commercial purposes'?

3.7 The second factor in category A is 'Sophisticated nature of offence/ significant planning'. Since developing this guideline the Council has discussed and agreed a guideline for the offences of knowingly entering/ arriving in the UK without leave/ valid entry clearance (ss 24(B1) and 24(D1) Immigration Act 1971). In that guideline a similar factor appears but is worded 'Sophisticated planning by the offender beyond that which is inherent in the offence'. Would the Council like to adopt that wording in the Facilitation guideline?

Question 2: Would the Council like to amend the second factor in the Facilitation guideline to 'Sophisticated planning by the offender beyond that which is inherent in the offence'.

3.8 A recent Court of Appeal case, R v Ahmed [2023] EWCA Crim 1521 set out general guidance to assist courts in sentencing Facilitation cases in the absence of a definitive Sentencing Council guideline. The majority of that guidance is reflected in the factors currently within the draft Facilitation guideline however there are a couple of areas which are not covered by the guideline.

3.9 The first is a consideration of whether the offender's primary motivation was to obtain asylum. The Court commented that:

"…in an appropriate case it may be relevant to take into account the circumstances which might be relied on as arguable grounds for claiming asylum, i.e. where the offender's

principal concern was to gain entry to the UK as an individual with the assistance given to others being a collateral purpose."

3.10 Indeed, when the Council recently discussed the content of the guideline for the offences under ss 24(B1) and 24(D1) Immigration Act 1971 it was agreed that a factor relating to asylum should be included in these terms; 'Offender fled persecution or serious danger'.

3.11 Does the Council want to include a similarly worded factor in the Facilitation guideline?

Question 3: Does the Council want to include a factor reflecting the offenders possible asylum grounds within the guideline, and if so at Step 1 or 2?

3.12 The guidance in R v Ahmed also refers to a number of aggravating factors that may be considered in a relevant case, including previous attempts to enter the UK. In the ss 24(B1) and 24(D1) Immigration Act 1971 guideline, the Council included the following aggravating factors:

- Previously deported, removed or extradited from the UK or deprived of UK citizenship
- Previous history of failed applications for leave to enter/ remain in the UK or for asylum (if not already taken into account at step 1)

3.13 The Council might want to include the same factors in the Facilitation guideline?

3.14 Another possible aggravating factor referred to in the Court of Appeal case was 'the involvement of others (particularly children)'. The Council might, therefore want to add this to the aggravating factors in the Facilitation guidelines, and possibly into the ss 24(B1) and 24(D1) Immigration Act 1971 guideline.

Question 4: Does the Council want to add the two aggravating factors relating to previous removals and failed entry applications to the Facilitation guideline?

Question 5: Does the Council want to add an aggravating factor relating to the involvement of others to the Facilitation and/ or ss 24(B1) and 24(D1) Immigration Act 1971 guideline?

<u>Sign Off</u>

3.15 All of the guidelines are attached at **Annex A** as follows:

Knowingly Enters the UK Without Leave/ Knowingly Arrives in the UK Without Valid Entry Clearance	S24(B1) and s24(D1) Immigration Act 1971	Page 1-5
Facilitation Assisting Unlawful Immigration to the UK Helping Asylum Seekers to Enter the UK	S25 and s25A Immigration Act 1971	Page 6-10
Breach of Deportation Order	S24(A1) Immigration Act 1971	Page 11-15
Deception	S24A Immigration Act 1971	Page 16-20
Possession of False Identity Documents etc with Improper Intention	S4 Identity Documents Act 2010	Page 21-25
Possession of False Identity Documents etc Without Reasonable Excuse	S6 Identity Documents Act	Page 26-29

Question 6: Is the Council content to sign these guidelines off ready for public consultation in March?

4 EQUALITIES

4.1 The Council has not yet considered the equalities data for the offences created by the Nationality and Borders Act 2022. Data on the demographics for the following offences are presented below:

- Breaching a deportation order – 24(A1) Immigration Act 1971
- Knowingly entering the UK without leave – 24(B1) Immigration Act 1971
- Knowingly arriving in the UK without valid entry clearance – 24(D1) Immigration Act 1971

Breaching a Deportation Order

4.2 Only around 20 offenders were sentenced for this offence between June to December 2022. The majority of these offenders were male (90 per cent representing 18 offenders). Almost all male and female offenders were sentenced to immediate custody (1 male offender received a suspended sentence).

4.3 Due to the majority of offenders' ethnicities not being recorded or known, volumes for each ethnicity group are too low to draw any useful comparisons.

Knowingly entering the UK without leave

4.4 Fewer than 5 offenders were sentenced for this offence between June and December 2022, all of whom were male, however their ethnicities were not recorded or not known.

Knowingly arriving in the UK without valid entry clearance

4.5 From June to December 2022, around 120 offenders were sentenced for this offence. Almost all offenders (97 per cent) were male. For both males and females, the majority of offenders received an immediate custodial sentence and a small proportion received a suspended sentence (however females accounted for fewer than 5 offenders).

4.6 Ethnicity is not known for around 39 per cent of offenders. Immediate custody was the most common outcome across all known ethnicity groups. Although there were small differences in ACSL between the ethnicity groups, each of these groups include fewer than 30 offenders. This means that the ACSLs are more sensitive to small changes in volume.

Overall

4.7 With the information available, there does not appear to be any substantial differences in sentencing between groups for these offences that would require the Council to take action at this stage. The Council can ask questions at consultation to seek views on this area from consultees.

5 IMPACT AND RISKS

5.1 We will publish a resource assessment alongside the consultation. This will be circulated to Council members alongside the consultation document. The resource impacts for each offence are summarised below.

5.2 For assisting unlawful immigration to the UK (s25), a sample of 18 transcripts of Crown Court judges' sentencing remarks from 2022 were analysed to understand the possible effects of the combined s25 and s25A guideline on sentencing practice. Based on the transcript analysis, the (mean) average custodial sentence length (ACSL) is estimated to increase by around 1 year 4 months under the draft guideline (the ACSL of the transcript sample after any reduction for guilty plea was 3 years 8 months and this increased to 5 years when cases were sentenced using the draft guideline). This is anticipated to lead to a potential requirement of around 50 additional prison places. The transcript analysis indicated that the largest impacts would arise from the most serious cases i.e. cases falling into the highest categories of the sentence table, as intended. Notably, for cases that fell within A1, the sentences imposed under the draft guideline were up to 6 years higher than the original sentences imposed.

5.3 The estimate of 50 additional prison places is based on the volume of offenders sentenced in 2022, which is notably lower than the volumes in previous years (around 90 offenders were sentenced in 2022, compared to 140 in 2021). It is difficult to predict future trends in volumes. However, if volumes were to increase, the impact on prison resources would also increase.

5.4 For the offence of helping asylum-seekers to enter the UK (s25A), although transcript analysis has not been conducted, it is anticipated that there will be a limited impact on prison and probation resources due to the very low volumes (fewer than 5 offenders were sentenced in 2022).

5.5 The Council will be aware that the s25 and s25A offences were amended by the Nationality and Borders Act 2022 (NABA), to increase the statutory maximum sentence from 14 years to life. It was therefore anticipated that sentences would go up. The Council agreed that it was clearly parliament's intention that offenders receive higher penalties for these offences, however the Council considered that the main increases should be for the most serious offences (A1 and B1). This appears to have been achieved by the draft guideline.

5.6 Analysis of a sample of 16 transcripts of sentencing remarks for possessing false identity documents etc with improper intention (s4) from 2022 indicated that there would be a limited impact overall on prison and probation resources under the guideline. The transcript analysis suggested a small increase in ACSL of around 1 month (from 11 months to 12

months under the draft guideline), potentially requiring fewer than 5 additional prison places overall. The majority of cases included in the sample fell into culpability C (12 out of 16) and none fell into culpability A. However, this is in line with current sentencing practice as most offenders receive custodial sentences much lower than the statutory maximum of 10 years (84 per cent of immediate custodial sentences in 2022 were 12 months or less, after any reduction for guilty plea).

5.7 For the offence of deception (s24A), it is anticipated that any impact on prison and probation resources will be limited due to low volumes of offenders sentenced (around 10 in 2022). For possessing false identity documents etc without reasonable excuse (s6) and the offences created under NABA, it is difficult to estimate the impact of the guidelines due to a lack of data available on how current cases would be categorised. The majority of offenders are sentenced at the magistrates' courts, which means any evidence from transcripts is unlikely to be representative of the different types of offending and limits its usefulness in understanding the resource impacts of the guidelines. Additionally, as the offences created under NABA came into force in June 2022, less than a year of data is currently available.

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Sentencing Council

Sentencing Council meeting:	**26 January 2023**
Paper number:	**SC(24)JAN03 – Protest offences**
Lead Council member:	**TBC**
Lead official:	**Lisa Frost**
	Lisa.frost@sentencingcouncil.gov.uk

1 ISSUE

1.1 This meeting is to agree the offences which should be included in the Protests guideline.

2 RECOMMENDATION

2.1 That the Council

- Considers the offences within scope and agrees which offences should be included.

3 CONSIDERATION

3.1 Public protests have been a high-profile issue recently, and the government has introduced a number of new offences to address trends in protest activity. In explaining the rationale for these new offences the Government stated: 'These new measures are needed to bolster the police's powers to respond more effectively to disruptive and dangerous protests. Over recent years, guerrilla tactics used by a small minority of protesters have caused a disproportionate impact on the hardworking majority seeking to go about their everyday lives, cost millions in taxpayers' money and put lives at risk. This has included halting public transport networks, disrupting fuel supplies and preventing hundreds of hard-working people from getting to their jobs.'

3.2 New offences to address disruptive activity by protestors causing public nuisance were introduced in 2022, and additional offences were created in 2023 to address very specific activity being adopted by protestors such as tunnelling and locking on.

3.3 Guidelines already exist for some offences commonly charged during the course of protests, including criminal damage, assault and public order. Other offences are also commonly charged for activity in the course of protests, including aggravated trespass and offences under the Public Order Act 1986 for which guidelines do not currently exist.

Data

3.4 Usually, in considering which offences should be within scope of a guideline, volumes of offences are provided to enable assessment of whether offences are high volume, indicating the guideline will aid consistency of approach and sentence, or low volume, meaning guidance is likely to be useful to sentencers given the relative rarity of the offence.

3.5 Currently, no data is available for volumes of newer offences and is not anticipated to be available until Spring 2024. This is due to delays with MOJ statistics publications. It is anticipated that data for some offences will be obtained by the March meeting, although this will still be limited to offences sentenced up to June 2023. Further statistics will be available in the Summer.

3.6 In the absence of data this paper is limited to providing a list of all offences known to be commonly charged for which guidelines would be useful for sentencers. These are included by the CPS as potential offences which can be charged during protests, demonstrations or campaigns. The Council is asked to consider if all of these offences should be considered for inclusion in a Protests guideline.

Offence	**Statutory Maximum**	**In force date**
Intentionally or recklessly causing public nuisance (Section 78 PCSCA 2022)	10 years imprisonment (either way)	Section 78 Police, Crime, Sentencing and Courts Act 2022 (PCSCA) abolished the common law offence of public nuisance and created this statutory offence, in force from 28 June 2022
Interference with use or operation of key national infrastructure (Section 7 POA 2023)	12 months imprisonment (either way)	3/05/2023
Aggravated trespass (Section 68 CJPOA 1994)	3 months imprisonment (summary only)	1994
Wilful obstruction of the highway (Section 137 Highways Act 1980)	From 12 May 2022: 6 months' imprisonment, an unlimited fine, or both.	New sentence in force from May 2022

	Prior to 12 May 2022: Level 3 fine (summary only)	
Locking-on (Section 1 POA 2023)	6 months imprisonment (summary only)	03/05/2023
Being equipped to lock-on (Section 2 POA 2023)	Unlimited fine (summary only)	03/05/2023
Obstruction of major transport works (Section 6 POA 2023)	6 months imprisonment (summary only)	02/07/2023
Causing serious disruption by tunnelling (Section 3 POA 2023)	3 years imprisonment (either way)	02/07/2023
Causing serious disruption by being present in a tunnel (Section 4 POA 2023)	3 years imprisonment (either way)	02/07/2023
Being equipped for tunnelling (Section 5 POA 2023)	6 months imprisonment (summary only)	02/07/2023
Breach of a condition on one-person protest (Section 14ZA POA 1986)	Level 4 fine (summary only)	28/06/2022
Failure to comply with a condition imposed on a public procession (Sub-section 12(4)&(5) POA 1986)	Organiser – 6 months' imprisonment, a level 4 fine, or both Participant – Level 4 fine (summary only)	28/06/2022
Failure to comply with a condition imposed on a public assembly (Sub-section 14(4)&(5) POA 1986)	Organiser – 6 months' imprisonment, a level 4 fine, or both Participant – Level 4 fine	28/06/2022

	(summary only)	
Offences relating to trespassory assembly (Sub-section 14B(1)&(2) POA 1986)	Organiser – 3 months' imprisonment, a level 4 fine, or both. Participant – Level 3 fine (summary only)	28/06/2022

3.7 While there are more offences than are usually included in guidelines it is likely that a number of these will have overlapping features and it may be possible for multiple offences to be covered under one guideline in some cases, such as where offences share similar features or statutory maximum sentences. This will be considered during development and groupings proposed if appropriate. Similar issues were present during the development of the Public Order guidelines, particularly with s4, s4A and s5 offences.

3.8 It is also important to note that as many offences are summary only there will be limited evidence available to inform guideline development, as transcripts will not be available for cases dealt with in the magistrate's courts. Work will be undertaken to identify appropriate evidence sources to inform recommendations.

Question 1: Does the Council agree that all offences listed should be included in the Protests guideline? Are there any offences the Council considers should be removed from scope?

Question 2: Does the Council have any further views on the proposed guideline and its scope?

4 EQUALITIES

4.1 There are no equalities issues to consider at this point.

5 IMPACT AND RISKS

5.1 The right to protest is protected by law. However, Parliament has sought to address activity causing disruption and inconvenience to the public and deter offending. This guideline is likely to raise concerns regarding erosion of individual rights and freedoms, similar to issues which arose in the development of the Public Order guidelines. The Council effectively addressed potential criticism during that project and officials will ensure robust rationales underpin proposals and decisions.

Sentencing Council

Sentencing Council meeting:	**26 January 2024**
Paper number:	**SC(24)JAN04 – Miscellaneous amendments**
Lead Council member:	**Jo King**
Lead official:	**Ruth Pope** **ruth.pope@sentencingcouncil.gov.uk**

1 ISSUE

1.1 This is the second of two meetings to consider the responses to this year's consultation on miscellaneous amendments to sentencing guidelines before publication of the changes in March which will come into effect on 1 April 2024. The consultation closed on 30 November and we received over 80 responses.

1.2 At this meeting the Council will be asked to consider the responses relating to new mitigating factors and changes to expanded explanations.

2 RECOMMENDATION

2.1 That the Council agrees any changes relating to the mitigating factors (and associated explanatory materials) for the existing factors of:

- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Agee and/or lack of maturity

2.2 That the Council agrees to adopt the proposed new factors, and agrees any changes to the associated explanatory materials, for:

- Difficult and/or deprived background or personal circumstances
- Prospects of or in work, training or education
- Pregnancy and maternity

3 CONSIDERATION

Background

3.1 In 2021, the Council commissioned the University of Hertfordshire to conduct research into and report on Equality and diversity in the work of the Sentencing Council. The research aimed to identify and analyse any potential for the Council's work to cause disparity in sentencing outcomes across demographic groups, and to make recommendations for how

to mitigate these disparities, if possible. In light of the findings and the recommendations in the research report (the 'UH report'), the Council published a response in January 2023 setting out the steps being taken which include reviewing the use and application of aggravating and mitigating factors and expanded explanations in sentencing guidelines. In the response the Council undertook to consult on some changes and additions and to conduct research into how these changes might work in practice.

Remorse

3.2 The UH report recommended that the Council should "Extend the expanded explanation for 'remorse', and include 'learning disability, communication difficulties and cultural differences' as influential factors in the evaluation of remorse". The Council consulted on a revised expanded explanation for the mitigating factor as follows:

> **Remorse**
> The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction).
>
> Lack of remorse should never be treated as an aggravating factor.
>
> Remorse can present itself in many ways. A simple assertion of the fact may be insufficient, and the offender's demeanour in court could be misleading, due to for example:
>
> - nervousness
> - a lack of understanding of the system
> - learning disabilities
> - communication difficulties
> - cultural differences
> - a belief that they have been or will be discriminated against
> - peer pressure to behave in a certain way because of others present
> - a lack of maturity etc.
>
> If a PSR has been prepared it will provide valuable assistance in this regard.

3.3 The explanation differs from that currently in use, in that the examples of what may affect an offender's demeanour (which are currently in a paragraph) were put into a bulleted list and the items in red were added. Additionally (and possibly inadvertently) in the final sentence the current wording 'it may provide' was changed to 'it will provide'.

3.4 Around 33 respondents commented on this proposal. Over half were generally in favour of the proposal and some of those suggested areas for improvement. Around 10 respondents were firmly opposed to the proposals. The main area of disagreement (including among some who were broadly supportive) was in relation to 'cultural differences'.

> The proposed expanded definition includes "cultural differences" as a factor which allegedly might mean the offender's demeanour in court could be misleading.

I do not know what “cultural differences” actually mean in this context and why they are relevant. I note that sentencers who were asked their opinion raised the exact same points and the Council should reflect on these concerns and remove this.

Philip Davies MP

The issue of remorse is subjective, and often open to misinterpretation by the author of a pre sentence report, Currently, remorse is dealt with by way of guilty pleas, co-operation with the probation services during the preparation of the report, and the actions of the defendant. Speculation as regards cultural and other factors makes a proper analysis impossible.

Criminal Law Solicitors Association

We agree with the additional factors listed and welcome the research that underpins these changes. However, given the question that has been raised in the research regarding the term ‘cultural differences’ we hope that there will be follow up research that may address how this term is used in practice.

Sentencing Academy

The Drive Partnership agrees strongly with the addition of learning disabilities and communication difficulties to the expanded explanation for the mitigating factor of remorse. It is important that these factors are considered in the process of sentencing and an inability to articulate and/or present in a certain way does not disproportionately affect sentencing. Many perpetrators of domestic abuse are highly deceitful and able to manipulate professionals, including within the criminal justice system. We would like to see language barriers included under the point of “communication difficulties” to ensure that individuals for whom English is not their first language are not considered to be less remorseful.

The Drive Partnership would urge caution with the inclusion of “cultural differences” within the expanded explanation. Whilst we strongly appreciate the intention behind this change, we would encourage further thinking about the phrasing to ensure that the emphasis rests on those responsible for sentencing being aware of their potential unconscious bias towards those from different cultures, rather than cultural differences being a reason and/or justification for not expressing remorse. Cultural differences are often cited to minimise and justify abusive behaviour by both perpetrators and professionals who work with them, and we are cautious of this being applied in sentencing.

The Drive Partnership

We agree with the inclusion of learning disabilities and communication barriers but are concerned by the lack of detail and consideration regarding the inclusion of cultural differences. This requires more clarity in order to be useful and understood.

End Violence Against Women

Restore Justice questions the point of cultural differences in the same way as in the consultation and quoted above. The relevance of cultural differences in remorse presents too much ambiguity. The Council admits the limitations of the research, and difficulties to define this further, which we consider as significant factors in not adding this particular factor to the expanded explanation list for remorse.

We strongly disagree with adding ‘cultural differences’ to the expanded explanation for the mitigating factor of remorse, or making it a ‘relevant’ factor at all. The alternative suggestion is that ‘cultural differences’ are not to be considered as relevant.

Restore Justice

3.5 Others raised fundamental issues relating to the consideration of remorse

This is the only mitigating factor which has no evidential basis at all, both in its current form and with the expanded explanation. It remains vague and open to interpretation. …

The expanded explanation now adds a whole new breadth of interpretation that allows a court to speculate that the defendant might have said sorry, were it not for a comprehensive list of factors which bring the potential to encompass the vast majority of defendants. It becomes difficult to envisage a finding other than that any defendant is potentially incapable rather than unwilling to express any form of remorse. Members of the bench may disagree in the speculation about each individual - would they if they could, or not?

This mitigating factor is vastly over-used on absolutely no real evidence at all. Sentence is already reduced for those who admit their offence to the police, and with credit for guilty plea in court. This is factual and evidenced. Very occasionally there is something extra - making the call to the police, giving first aid, writing a letter of apology, fixing the fence - something!

A suggestion to either remove 'remorse' as it stands altogether, or leave it there but add 'EVIDENCE of' to exercise the minds of the judiciary. The need to ask 'Why are we reducing the sentence even further for this defendant? What did they actually DO?.

Legal Adviser

The reduction for remorse must be earned and it must be demonstrated. The sentence could topple from custody to community on this factor. It has to be substantiated. …

What did this offender do to demonstrate remorse to the victim, whether an individual or the general public? How can the sentencer be convinced that there is true remorse? What is the evidence of action after the offence took place? For example, they are offering to pay compensation and they have saved it up in the meantime to pay some or all of it immediately, or they present a letter to the court to pass to the victim (monitoring as to whether that actually happens or not!).

Faster Fairer Justice

Remorse is impossible to assess and is almost irrelevant. I have seen and heard offenders congratulating their solicitors for their apology statements that have got them off with suspended sentences laughing at the judiciary. Real remorse should be demonstrated by making amends.

Individual

> Offenders can express remorse in a variety of different ways, including verbally via partial or full apologies and non-verbally through, for example, tears, downward eye gaze, or hanging their head low. Implementing remorse as a mitigating factor already involves asking sentencers to do something that psychological research suggests is very difficult, i.e., evaluating the veracity of a stranger's statement in the absence of an opportunity to carry out detailed questioning. In addition, the proposed amendment would require sentencers to bear in mind that they may be misreading the offender's signals, which may be purposively deceptive. Research suggests that people find it difficult to accurately judge non-verbal cues to deception, and particularly so when these are expressed by someone from a different culture. Consequently, the Council is proposing to make the sentencer's task even more difficult than it is at present. …
>
> Recent research on Crown Court sentencing suggests that written apologies are common practice in the courts and that sentencers may have diverse attitudes regarding their value for assessing remorse. Therefore, it might be helpful to include specific wording somewhere giving the example of a written apology to the victim and stating the Council's position on the value of such evidence.
>
> **Dr Ian K. Belton and Professor Mandeep Dhami**

3.6 Concerns about how remorse is demonstrated and taken into account were also expressed by those with lived experience of the criminal justice system:

> Members outlined concern over mis-intended consequences coming from the way some individuals might express remorse and felt that this was potentially problematic if used in sentencing which has been echoed in our neurodiversity forum which is a factor that is prevalent in the revolving door group Members worried that defendants with learning difficulties would be disadvantaged.
>
> Another explained that she had been assumed to be unremorseful in Court but that this was because of the emotional state she was in at the time. "When I was sentenced, they accused me of not showing remorse, but I was in a state of shock. I didn't really feel anything. It didn't mean I wasn't remorseful because I was just in this state. But that's because I was also suffering with really bad mental health because of the crime as well. But they don't ever take that into consideration, it was just, 'oh she's not showing any remorse at all.'"
>
> Members discussed to what level remorse should be considered in sentencing. There were mixed feelings about this. Some identified that remorse is not indicative of whether a person is ready to start rehabilitation and that it is difficult to assess the validity of displayed remorse. One offered this analysis:
>
> "It is important to note that remorse is not always a reliable indicator of rehabilitation potential. Some persons may express remorse simply because they believe it will help them get a lighter sentence. Others may be genuinely remorseful but may still reoffend due to factors such as addiction or mental health problems."

> Others continued this theme, pointing out what looks like contrition can be more about self-pity. “You can't simply walk into court and say that you're sorry, or, you know, because a certain amount of that will be feeling sorry for oneself as opposed to genuinely remorseful for the crime that's been committed.”
>
> **Revolving Doors**

> We consistently heard people describe remorse as an outdated, archaic concept, and that too much weight was placed on it in sentencing decisions. Remorse can be an inappropriate expectation for people in crisis situations. We frequently heard that, due to issues relating to the crisis that led to the crime, people are unable to show remorse in court, but will feel remorse at a later stage. This means using remorse as a factor in a sentencing decision is ill advised. Whilst remorse might not be recognised, or might not be possible, it can also be easier to appear remorseful if you come from certain backgrounds, as many cultures and backgrounds are taught not to show emotion or display it in ways that may not be recognisable to those making the sentencing decision.
>
> **National Experts Citizen’s Group**

3.7 Dr Laura Janes made suggestions for additions to the expanded explanation. She states “The proposed changes are an improvement but risk an overly restricted view of the circumstances in which genuine remorse may not be apparent”. She proposes:

> Remorse can present itself in many ways. A simple assertion of the fact may be insufficient. However, the offender’s demeanour in court or the way they articulate their feelings of remorse may not accurately reflect the full extent of their remorse, due to for example:
>
> - nervousness
> - a lack of understanding of the system
> - mental disorder
> - learning disabilities
> - communication difficulties
> - cultural differences
> - a belief that they have been or will be discriminated against
> - peer pressure to behave in a certain way because of others present
> - age and/or a lack of maturity etc.
>
> If a PSR has been prepared it may provide valuable assistance in this regard.

3.8 In previous discussions members have noted the inherent difficulties with the application of remorse as a mitigating factor. It is perhaps worth noting that the expanded explanation starts with:

> **Remorse**
>
> The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction).
>
> Lack of remorse should never be treated as an aggravating factor.

3.9 In practice, it is likely that the weight attached to the mitigating factor of remorse will be most significant where there is some evidence of the extent of the remorse – in the ways suggested by respondents, some of which may engage other mitigating factors. However, there may be situations where it is appropriate for a court to take remorse into account where an offender has not provided evidence.

3.10 It is noteworthy that for some offenders the mitigating factor of remorse is not viewed positively.

3.11 Removing remorse as a factor is not an option at this stage because that was not what was consulted on. In any event, the Council may feel that remorse does and will continue to play a part in sentencing, not least because a genuine expression of remorse may provide some solace to victims in certain circumstances.

3.12 The point about being clearer about what is meant by 'cultural differences' and how that relates to remorse is a valid one, but not easy to resolve. If the Council accepts the view of the Drive Partnership, that it is the cultural differences between the sentencer and the offender that are relevant, then it may be preferable to remove it from the list and add a reminder to consider the issues covered by the Equal Treatment Bench Book.

3.13 Taking all of the responses into account, suggested wording is:

> **Remorse**
>
> The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction).
>
> **Lack of remorse should never be treated as an aggravating factor.**
>
> Remorse can present itself in many ways. A simple assertion of the fact may be insufficient.
>
> The court should be aware that the offender's demeanour in court or the way they articulate their feelings of remorse may be affected by, for example:
>
> - nervousness
> - a lack of understanding of the system
> - mental disorder
> - learning disabilities
> - communication difficulties (including where English is not their first language)
> - a belief that they have been or will be discriminated against
> - peer pressure to behave in a certain way because of others present
> - age and/or a lack of maturity etc.
>
> If a PSR has been prepared it may provide valuable assistance in this regard.

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

Question 1: Does the Council wish to adopt any of the suggested changes to the expanded explanation for the mitigating factor of remorse?

Good character and/or exemplary conduct

3.14 The UH report recommended that the Council should *"*Consider providing more inclusive examples of 'good character and/or exemplary conduct', alongside existing examples". In response, the Council said that it would remove the example currently given (of charitable work) and include the factor in the review of the expanded explanations in order to ascertain how sentencers are applying and interpreting it.

3.15 In research interviews with sentencers a version of the factor where the current example of charitable works was removed was received favourably though some suggested a list of examples would be an aid to sentencing. However, none of those that were asked were able to suggest what those examples should be.

3.16 Another finding from the research was that in some cases 'good character' was equated with having no previous convictions, although these are separate factors in guidelines. If a sentencer reads the expanded explanation they will see that the "factor may apply whether or not the offender has previous convictions", but if they think it does not apply, they are unlikely to click on the explanation. The Council therefore consulted on changing the wording of the mitigating factor itself and the accompanying explanation to:

Positive character and/or exemplary conduct (regardless of previous convictions)

- This factor may apply whether or not the offender has previous convictions.
- Evidence that an offender has demonstrated positive good character may reduce the sentence.
- **However**, this factor is less likely to be relevant where the offending is very serious. Where an offender has used their positive character or status to facilitate or conceal the offending it could be treated as an aggravating factor.

3.17 Around 22 respondents commented on this proposal. Most were supportive of the change, a few felt the change was unnecessary and some raised concerns.

It is hard to separate character from previous convictions. We find it difficult to see how a person who has previous criminal convictions (unless of the lowest type of motoring offences, such as parking or speeding, etc.) could be said to be of good character or exemplary conduct almost by definition.

The change suggested is better than the current text but does not for us solve this dilemma. For the author, “Positive character and/or exemplary conduct (regardless of previous convictions)” creates a significant difficulty and is highly self-contradictory. Exactly what positive character traits or exemplary conduct demonstrated should be taken into account as a mitigating factor, if the defendant is known to have a criminal record? We agree with some of the research views that here more guidance on what is being referred to would be very helpful for sentencers. Such character traits or exemplary conduct would need to be compelling and not self-serving.

West London Magistrates Bench

We agree with the recommendation to include examples of what constitutes good character. The need for examples is supported by the apparent lack of consensus amongst sentencers concerning what this mitigating factor means in practice. As the consultation document notes: “Although there was a suggestion that more examples of conduct that may demonstrate good character would be useful, sentencers that were asked about this found it difficult to suggest what these might be.” If the Council were to decide to explore including examples, it would make sense to look at the kind of evidence of good character that is typically presented in court, namely, in the testimonials provided by friends, family, and community members. These testimonials deal with a broad range of character-related issues including public service but also matters such as trustworthiness and reliability as a worker or partner, caring responsibilities, and status within the community – what otherwise could be described as ‘everyday good character’. The challenge here is that there may be substantial difference of opinion amongst sentencers regarding the weight that should be given to such testimonials, as suggested by the findings from Belton’s (2018) interviews with Crown Court sentencers.

Dr Ian K. Belton and Professor Mandeep Dhami

NECG members questioned what criteria decides if someone has ‘good character’ and found the concept to be unclear, subjective, and possibly informed by stigma, labelling and prejudice.

There was consensus that, as with remorse, issues such as learning disabilities, neurodiversity, acquired brain injury, trauma, addiction, mental health crisis, domestic violence, or any combination of these can make it impossible to communicate or show good character. Furthermore, the NECG emphasised that judging ’good character’ was especially problematic in terms of race.

Whilst attempts to address addiction and self-improvement can be viewed positively the inability to achieve this should not be viewed negatively (‘bad character’). There are many factors within the system preventing people from accessing support – often linked to income and circumstances. It is also apparent that different processes can make it harder to evidence remorse or good character, such as an adjourned case allowing more time. It can also be more difficult for people on remand.

The NECG believe that instead of an assessment of ‘character’ the focus should be on understanding the circumstances, context and mitigating factors behind the crime.

National Experts Citizen’s Group

3.18 There was also one response which disagreed with the proposal stating “This is a great opportunity to keep previous convictions or lack of, completely separate to 'demonstration of exemplary conduct' e.g. war veteran record, life-saving activities.” The Council will note that the revised factor no longer includes the term ‘good character’, though it is still used in the expanded explanation.

3.19 The Council may wish to consider revising the bullet point ‘Evidence that an offender has demonstrated positive good character may reduce the sentence.’ Perhaps to: ‘Evidence that an offender has demonstrated a positive side to their character may reduce the sentence.’

3.20 Despite those thoughtful responses that urge the Council to provide examples, the difficulty still arises of how to provide a succinct list of suitable inclusive examples. The suggestions such as testimonials are likely to favour a middle class offender.

Question 2: Does the Council wish to make any changes to the proposed ‘Positive character and/or exemplary conduct (regardless of previous convictions)’ and accompanying expanded explanation?

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

3.21 The UH report noted concerns raised by civil society organisations that sentencers may not always take into account offenders’ efforts to access help, especially when it has been delayed for reasons outside of their control. The Council therefore agreed to consult on amending the expanded explanation that accompanies the mitigating factor of ‘Determination and/or demonstration of steps taken to address addiction or offending behaviour’ to make it clearer that the factor should be applied where support has been sought but not received – by adding the words in brackets:

> Where offending is driven by or closely associated with drug or alcohol abuse (for example stealing to feed a habit, or committing acts of disorder or violence whilst drunk) a commitment to address the underlying issue (including where support has been sought but not yet received) may justify a reduction in sentence. This will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation.
>
> Similarly, a commitment to address other underlying issues that may influence the offender’s behaviour (including where support has been sought but not yet received) may justify the imposition of a sentence that focusses on rehabilitation.
>
> The court will be assisted by a PSR in making this assessment.

3.22 We received around 28 responses to this question. Most were supportive of the proposed addition. Three disagreed on the basis that it would encourage unsubstantiated and/or insincere claims of having sought help and one disagreed with the concept of mitigation on this ground entirely. Of those that were broadly in support, some suggested making it clear that the factor applies only when the reasons for the support not having been received are outside the offender's control and others stressed the need for evidence of support having been sought.

3.23 From the perspective of those with lived experience of the criminal justice system, the National Expert Citizen's Group expressed a counterview:

> The group felt that it was difficult for those in addiction to show their potential or demonstrate commitment to change, due to the nature of addiction.
>
> 'What I have experienced from addiction I don't think you can judge people character while during addiction but if they are putting effort into reforming themselves but maybe fall off the wagon then the character reference should be done by those people who have worked with them. But if they have proved they have changed over a period this should be considered. And I think that all the above should be taken into account and should add to the good character. People in addiction can have up and downs and slips but this doesn't mean they are a bad person.'
>
> At the Women's Forum, there was consensus that often, women in the criminal justice system have experience of trauma, which, makes it difficult for them to take any steps to alter their behaviour. This is particularly acute as there is a lack of trauma informed support available:
>
> 'Most women have had years of trauma; the courts are seeing the same women over and over again. They need more safe, rehabilitative spaces to deal with the trauma, otherwise it will not reduce the crime.'
>
> There was also concern about women being afraid to share their problems because of fear of consequences in relation to their children.
>
> 'There is a lot of fear around having your children taken away and presenting as if you don't need help in case they decide you can't cope and remove your children'.

3.24 There were suggestions for explicitly referring to gambling addiction as part of the explanation. The Howard League for Prison Reform suggested:

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

3.25 The Prison Reform Trust suggested:

> Where offending is driven by or closely associated with drug or alcohol abuse (for example stealing to feed a habit or committing acts of disorder or violence whilst drunk), or problem gambling (for example stealing to fund their problem gambling) a commitment to address the underlying issue (including where support has been sought but not yet received) may justify a reduction in sentence.

3.26 The Drive Partnership ('who have extensive frontline experience and knowledge working with a range of domestic abuse perpetrators across different risk and harm levels and from a range of different communities') responded from the 'point of view of behaviour change interventions for domestic abuse perpetrators' and expressed concerns about the 'the potential for highly manipulative and articulate domestic abuse perpetrators being able to use [the mitigating factor] to their advantage'.

3.27 The Domestic Abuse guideline contains a mitigating factor of 'Evidence of genuine recognition of the need for change, and evidence of obtaining help or treatment to effect that change'. The Council may feel that the concerns expressed by the Drive Partnership could be explored as part of the ongoing evaluation of the Domestic Abuse guideline.

Question 3: Does the Council wish to make any changes to the proposal consulted on for the expanded explanation for 'Determination and/or demonstration of steps having been taken to address addiction or offending behaviour'?

Age and/or lack of maturity

3.28 In response to the recommendation in the UH report: "Consider ways in which more guidance can be issued for sentencing young adults to improve consistency and precision in sentence reduction for young adults", the Council agreed to consider the need for this as part of the expanded explanations research. In some of the scenarios we tested with judges and magistrates in research interviews, the offender was a young adult. The mitigating factor was frequently applied where the offender was 19 years old. However, in scenario versions where the offender was 22 years old, there was more variation in whether or not it was applied as a mitigating factor.

3.29 The content of the expanded explanation raised no issues in research but the Council considered that recognition of this factor by sentencers might be improved if a reference to the age range to which it typically applies were included in the factor itself. The proposal is therefore to change the factor to:

- **Age and/or lack of maturity (typically applicable to offenders aged 18-25)**

3.30 There were around 30 responses to this proposal. Two-thirds of respondents supported the proposal with many of them making additional suggestions. Those that opposed the change did so either because they felt it was unnecessary or because they were opposed to the concept of young adults being treated more leniently.

> Whilst lack of maturity may be relevant in very young offenders, it is hard to see how highlighting this for every offence for those up to the age of 25 can be justified in this way.
>
> I am not sure there is anything you cannot do legally at the age of 25 so it is hard to reconcile this with being given special dispensation in court and making magistrates and judges consider the age of up to 25 as being relevant.
>
> A serving police officer aged 25 claiming a lack of maturity if convicted of an offence would clearly be a nonsense. It would be equally ridiculous for a magistrate to do the same if they were convicted of an offence.
>
> Seeing as this will apply to so many offenders, serious offenders may benefit – including sexual and violent offenders. This will naturally be a concern to the public and I do not support this either.
>
> **Philip Davies MP**

> We think that the proposed change to include 'age and/or lack of maturity' factor into the sentencing guidelines for 18- to 25-year-olds is discriminatory, biased, and unfair.
>
> People become adults from 18 years of age and as adults assume responsibilities and privileges that come with reaching such a milestone. They can vote, they can already drive, work and pay taxes, they can have sexual relationships, marry, and have children. Immaturity and 18-25 age bracket cannot be separate, distinctive and significant mitigating factors in the criminal justice system and in the sentencing rule book to pursue leniency and sentence reduction.
>
> Most of those who commit crimes know perfectly well what they are doing. If someone has particular learning, psychological or psychiatric issues, these are assessed within the criminal justice process and acknowledged by sentencers. **Purely considering any 18 to 25-year-old offender as neurologically under-developed, less able to evaluate their actions or limit their impulsivity and risk taking is absolutely laughable.**
>
> **We strongly disagree with this proposed change to the age and/or lack of maturity factor to serve as a mitigating factor in sentencing and be applied by the sentencers. There is no alternative suggestion other than omitting this as a factor.**
>
> **Restore Justice**

3.31 Among those who supported the proposal, some made specific suggestions for changes to the text of the factor:

> We welcome the inclusion of the age range in the amended factor. However, we would suggest adding "inclusive" to the age range, so it is absolutely clear that it includes those aged 25. So, it would read as follows (additions in red):

"age and/or lack of maturity (typically applicable to offenders aged 18-25 inclusive)"

It will be important for the Council to continue to monitor the impact of this change. We also recommend that this section of the guidance cross-refers to the equal treatment bench

The Prison Reform Trust

We agree that age and/or lack of maturity is an important factor for sentencers to consider. Given that there is a wide range of defendants for whom age and maturity are not in correlation, we wonder whether it is preferable to say something like:

- Age and/or lack of maturity (typically but not exclusively applicable to offenders aged 18-25); or
- Age and/or lack of maturity (often most prevalent in, but not limited to, offenders aged 18-25).

Crown Prosecution Service

3.32 Others made specific suggestions for changes to the expanded explanation:

It may be that given the errors apparent in the sentencing of children in R v ZA, it would be useful if this expanded explanation could flag the need for sentencers to refer first and foremost to the children's guideline when sentencing any person who has committed an offence when under the age of 18. In addition, this guidance should also point to the fact that the children's guidance will not necessarily cease to be relevant where a young adult offends (see Balogun [2018] EWCA Crim 2933).

Further, many young adults are care experienced but have been passed over or not provided with appropriate support that they are entitled to as a matter of law. If they have been in care at any point, they are more likely to have experienced trauma, rejection and criminalisation that would not have occurred to a child in the family home. …

These are all relevant matters that should be taken into consideration when sentencing young adults.

I would therefore suggest the following changes (shown in red):

Age and/or lack of maturity (typically applicable to offenders aged 18-25)

Where a person has committed the offence under the age of 18, regard should be had to the overarching guideline for children and young people. That guideline may also be relevant to offending by young adults.

Age and/or lack of maturity can affect:

- the offender's responsibility for the offence and
- the effect of the sentence on the offender

Either or both of these considerations may justify a reduction in the sentence.

The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).

In particular young adults (typically aged 18-25) are still developing neurologically and consequently may be less able to:

- evaluate the consequences of their actions
- limit impulsivity
- limit risk taking

Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.

Immaturity can also result from atypical brain development. Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse may affect development.

An immature offender may find it particularly difficult to cope with custody and therefore may be more susceptible to self-harm in custody.

An immature offender may find it particularly difficult to cope with the requirements of a community order without appropriate support.

There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct.

Many young people who offend either stop committing crime, or begin a process of stopping, in their late teens and early twenties. Therefore a young adult's previous convictions may not be indicative of a tendency for further offending.

Where the offender is care experienced or a care leaver the court should enquire as to both the impact of their experience in care and the any effect a sentence may have on the offender's ability to make use of support from the local authority. (Young adult care leavers are entitled to time limited support. Leaving care services may change at the age of 21 and cease at the age of 25, unless the young adult is in education at that point). See also the Sentencing Children and Young People Guideline (paragraphs 1.16 and 1.17).

Where an offender has turned 18 between the commission of the offence and conviction the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed, but applying the purposes of sentencing adult offenders. See also the Sentencing Children and Young People Guideline (paragraphs 6.1 to 6.3).

When considering a custodial or community sentence for a young adult the Probation Service should address these issues in a PSR.

It is also the case that young adults from minoritised backgrounds often experience accumulated disadvantage that needs to be factored into sentencing and the guideline does not presently reflect this. It may be that cross referencing to the guidance on difficult or deprived backgrounds may be appropriate here, both in respect of care experienced young people and those from minoritised backgrounds.

Dr Laura Janes

We also welcome the proposal to specify the age range within the mitigating factor which provides helpful clarity about its intended application. We propose that this is strengthened by adding 'inclusive' after the 25 to ensure that it extends up to the age of 26 in practice. We hope that this will be sufficient to improve the extent to which this factor is used in sentencing young adults and note that we have previously proposed that young adults would otherwise benefit from a separate guideline. It is important that the Council continues to monitor the impact of guidelines on young adults to ensure that as much weight is given in sentencing to the protected characteristic of age, as it is for race and gender. Finally, we note that our previous proposal to clarify factors related to atypical brain development was only partially adopted and we suggest that an additional amendment is made to the extended explanation in the paragraph "Immaturity can also result from atypical brain development. Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse may affect development" so that it reads as follows:

> Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse, may affect development. It can also be affected by neuro-developmental disorders and acquired brain injury.

We would like to see a note be added to cross-refer to the relevant guideline i.e.

> The 'Sentencing offenders with mental disorders, developmental disorders, or neurological impairments guideline' may also be of relevance.

Transition to Adulthood (T2A)

3.33 Others who supported the proposal made more general or wide-ranging suggestions:

We believe that more work needs to be done in this area, although this is outside the scope of this consultation and may also be outside of the scope of the Council's remit. The precipitous transition from being sentenced in the Youth Court and the Adult court, we believe, can result in some young adults being sentenced in an inappropriate way. We recognise, however, to resolve this may require legislation.

Legal Committee of HM Council of District Judges (Magistrates' Courts)

We support this proposed change but it does highlight the potential complexity when dealing with the sentencing of young adults that may be better dealt with through a specific guideline for offenders of this age rather than an expanded explanation.

Sentencing Academy

Yes, we support this change. We do however encourage the Council and sentencers to also consider intersectional gender dynamics which should be read alongside any guidance relating to age and/or maturity.

We know that young women and girls have specific needs relating to adverse childhood experiences, particularly in relation to domestic abuse. The London Blueprint recognises that young girls are more likely to have had experienced sexual

violence and intimate partner violence and to have mental health concerns, which are all risk factors in increasing the likelihood of contact with the criminal justice system.

Advance research indicated that 48% of survey participants agreed that previous relationships were a factor in their offending; the same research found that 73% of respondents began their first committed relationship before the age of 16. For young women in contact with the criminal justice system, their age and experiences of abuse are highly likely to intersect and have an impact on their behaviour. It is therefore essential that sentencers are informed and regularly trained on gender dynamics and the impacts of trauma.

Advance

It is important to ensure sentencers use an intersectional approach when considering age and maturity, giving proper consideration to gender and race and the different factors that can be relevant for young women and girls and for Black, minoritised and migrant young people, including Black, minoritised and migrant young women and girls. This must include consideration of the impact of care experience and how this intersects with gender, race and migrant status.

63% of girls and young women (16–24) serving sentences in the community have experienced rape or domestic abuse in an intimate partner relationship. …

Recent research confirmed that care-experienced children are disproportionately likely to have youth justice involvement compared to those without care experience, with some groups of 'ethnic minority' children being even more likely to have youth justice involvement. A significantly higher proportion of care-experienced children in this study received a custodial sentence compared to non-care-experienced children. Custodial sentences were twice as common among Black and 'mixed ethnicity' care-experienced children compared to white care-experienced children.

The over-representation of care-experienced children in the criminal justice system particularly affects girls: care-experienced girls are more likely to receive both non-custodial and custodial sentences than girls without care experience, with the rates of immediate custodial sentences being 25 times higher for girls who have spent time in care.

Centre for Women's Justice

3.34 These wider points could be discussed by the Equality and Diversity Working Group with a view to bringing any proposals to a Council meeting in the summer (possibly as part of the next miscellaneous amendments consultation).

Question 4: Does the Council wish to adopt any of the suggestions to amend the text of the factor (see 3.31)?

Question 5: Does the Council wish to adopt any of the suggestions to amend the text of the expanded explanation (see 3.32)?

Question 6: Does the Council agree that the wider issues raised should be considered by the E&D working Group?

New factors: Difficult and/or deprived background or personal circumstances and Prospects of or in work, training or education

3.35 In response to the recommendation in the UH report: "Consider including 'difficult/deprived backgrounds', 'in work or training' and 'loss of job or reputation' in the mitigation lists of theft and robbery guidelines" the Council undertook to test potential new mitigating factors and associated expanded explanations across all offence specific guidelines.

3.36 Two proposed new factors and expanded explanations: 'Difficult and/or deprived background or personal circumstances' and 'Prospects of or in work, training or education' were discussed with groups of judges and magistrates.

3.37 The views on introducing these factors were predominantly negative or neutral from judges and magistrates, though there were also some positive comments for both factors. A frequent comment was that the factors were not necessary as sentencers would take them into account anyway.

3.38 The Council considered that these two factors should be considered as a pair to address concerns that some offenders would be discriminated against by one or other of them. The Council felt that the assertion that sentencers are taking them into account anyway is not necessarily an argument for not including them. Firstly, because if most sentencers are already considering these matters, the presence of the factors and the expanded explanations will help to ensure that the factors are applied in a consistent and appropriate way. Secondly, in the interests of transparency and fairness (particularly for unrepresented offenders), it is important that guidelines include factors that are routinely taken into account.

3.39 The Council therefore consulted on adding the following:

> **Difficult and/or deprived background or personal circumstances**
>
> The court will be assisted by a pre-sentence report in assessing whether there are factors in the offender's background or current personal circumstances which may be relevant to sentencing. Such factors **may** be relevant to:
>
> - the offender's responsibility for the offence and/or
> - the effect of the sentence on the offender.
>
> Courts should consider that different groups within the criminal justice system have faced multiple disadvantages which may have a bearing on their offending. Such disadvantages include but are not limited to:
>
> - experience of discrimination
> - negative experiences of authority

- early experience of loss, neglect or abuse
- early experience of offending by family members
- experience of having been a looked after child (in care)
- negative influences from peers
- difficulties relating to the misuse of drugs and/or alcohol (but note: being voluntarily intoxicated at the time of the offence is an aggravating factor)
- low educational attainment
- insecure housing
- mental health difficulties
- poverty
- direct or indirect victim of domestic abuse

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

Prospects of or in work, training or education

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

Where an offender is in, or has a realistic prospect of starting, work, education or training this may indicate a willingness to rehabilitate and desist from future offending.

Similarly, the loss of employment, education or training opportunities may have a negative impact on the likelihood of an offender being rehabilitated or desisting from future offending.

The court may be assisted by a pre-sentence report in assessing the relevance of this factor to the individual offender.

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

The court may ask for evidence of employment, training etc or the prospects of such, but should bear in mind any reasonable practical difficulties an offender may have in providing this.

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

3.40 There were round 34 responses relating to the proposed ‘Difficult and/or deprived background or personal circumstances’ factor and 27 relating to the ‘Prospects of or in work, training or education’ factor. Around two-thirds of respondents broadly agreed with the proposals though several of those had suggestions for changes. Of those who disagreed,

several had strong objections particularly to the ‘Difficult and/or deprived background or personal circumstances’ factor.

3.41 Some objected on the grounds that many people come from a poor or deprived background and do not offend. Others noted that these matters are already taken into account and the court is best placed to assess mitigation without the guidelines being over-prescriptive:

> This is an incomplete and potentially misleading attempt to identify the 'nth' degree of mitigation known as 'any other mitigation'. The court is capable of identifying endless additional factors in relation to the particular individual and the particular offence - let the court do that. This list cannot possibly be digested for reference on every sentence and much of it is totally irrelevant to some offences but could be wrongly brought into play. The other danger is that defendants who exhibit the flip sides could be unfairly disadvantaged - those who are not poor, those who live in secure housing, those who have the security of family life. These matters should all be left for the application of judicial discretion within the excellent training of the Equal Treatment Bench Book - the book is much bigger than this list and PSRs may address as necessary with evidence.
>
> **Legal Adviser**

> Sentencing decisions must be based on all of the personal factors of the individual offender. This expansion carries the danger of limiting the personal factors towards a limited set of unfortunate circumstances which may or may not have any effect at all on the offence. Additionally, it has the danger of presenting as a full list of personal factors. The exact opposites of the factors can equally be causes of offending behavior e.g. the educated, rich, intelligent, middle class offender may be far more naive and vulnerable in relation to some offending behavior.
>
> Let the bench determine the relevance of personal factors for each offender and their offence. We're in the realms of psychology to assess this simply as a listed prompt.
>
> **Faster, Fairer Justice**

> Many people have gone through any or all of the above and/or many other adverse circumstances and disadvantages, however those perceived disadvantages should never be considered either as a reason for offending or as a predisposition to offending, nor should they be considered [by the Council and sentencers] as mitigating factors. This would be biased and prejudiced in itself. There are many people who haven’t gone down the criminal route but have experienced difficult circumstances or faced multiple disadvantages at some point in their lives or throughout their lives and have overcome those difficulties and disadvantages whilst being law-abiding good citizens. So why should any such disadvantages define an offender?
>
> We strongly disagree that the proposed changes related to difficult and/or deprived background or personal circumstances should form new mitigating factors. We do not propose an alternative.

Restore Justice

We believe this is generally extremely patronising – not least to law-abiding working-class communities. Often it is actually those who come from the poorest communities who will be the victims of the crimes in these cases.

Low educational attainment and poverty are not excuses to commit crimes. Other examples are very subjective – for example, citing experience of discrimination could, on the one hand, apply to everyone in some way or another. If it is not supposed to apply to everyone, how would a sentencer truly know if someone had experienced discrimination and why and to what extent this should have a bearing on their sentence?

We object very strongly to this new mitigating factor being included and note that we are not alone as it seems that, according to your consultation document, only a minority of judges and magistrates shared positive views when asked to comment on the proposed change in focus group discussions.

Blue Collar Conservatives

I do not agree that having a difficult or deprived background makes you less culpable for committing an offence – such as robbery with all the violence that entails and the fear caused to the victim. However, I am at even more of a loss to understand why this mitigation is being suggested for all offences.

I also do not think that "experience of discrimination" or "negative experiences of authority" (if they can even be verified or quantified) should have any bearing whatsoever on sentencing. Neither should having been in care/having low educational attainment etc.

I object very strongly to this whole section as a mitigating factor for any offence never mind all offences.

Philip Davies MP

3.42 These last two responses were echoed in the response from the Lord Chancellor who states:

As regards the ‘difficult and/or deprived’ factor, the Government is clear that many of the examples of difficulty or deprivation that have been set out in the consultation, such as low educational attainment and poverty, ought not to be relied upon as excuses to commit crimes. Presupposing that relatively low income for example (or indeed other deprivation) indicates a propensity to commit crime risks appearing patronising at best, or inaccurate at worst. Moreover, many in society, including no doubt judges and MPs, will have encountered young people from modest educational or financial backgrounds who have shown scrupulous integrity and a commitment to leading a law-abiding life.

It is also important to note that victims of many types of crime, including violent crime, are often themselves from most deprived communities. The factor is highly subjective and many of the examples, including ‘negative experiences of authority’ and

‘deprived background’ could potentially have a very broad application. It is unclear from the factor how evidence of a deprived background could be established and what the bearing should be on the sentence. I note that similar concerns were raised by the judicial focus group, including that the factor could potentially cover the majority of those sentenced and that the link to mitigation is unclear.

3.43 The Lord Chancellor went on to say:

That said, I want to emphasise my support for ensuring that custody is used as a last resort. I consider that there may be scope for further exploration by the Council as to whether mitigating factors, which are more narrowly focussed, may be appropriate. As currently presented in the consultation, these factors are too broad in terms of the circumstances they include and the type of offending they could apply to.

3.44 The Sentencing Academy made a slightly different point:

Given the lukewarm reception that this amendment received in the focus groups we would suggest caution before proceeding with its introduction – particularly, as noted, that it will cover a large number of offenders who fall to be sentenced. Whilst these factors may be of greater relevance the first time an offender appears before the court, most of these factors are static and it is questionable as to whether they should provide mitigation every time that an offender is sentenced.

3.45 Those who supported the proposal for the ‘Difficult and/or deprived background or personal circumstances’ put counter arguments:

It has to be right that all circumstances relevant to the offender should be taken into account. Whilst poverty and social deprivation do not of their own accord increase criminal behaviour, the impact upon a defendant should not be overlooked.

Criminal Law Solicitors Association

Whilst it is true that this factor may apply to very many defendants, this does not in the author’s view, make it any less worthy of consideration as mitigation. As with all mitigating factors, it is up to the sentencers to assess how this may be considered mitigation for the particular offence/offender and what weight should be placed on it when considering sentence. This new factor should be included.

The bullet list of disadvantages to look out for is very helpful.

The counter-argument can be made that these circumstances apply to very many people who do not commit crimes, so why should they be considered to potentially reduce any sentence? The facts of the individual offence and offender will always be the deciding factors here as to what weight (if any) is given to this factor.

West London Magistrates Bench

I strongly support the change proposed for the following reasons.

Sentencers are, with few exceptions, drawn from those who have been able to make a success of life and who have been born into an environment with many

opportunities. Those who are sentenced usually do not fall into either of those categories.

… The fact that some sentencers might give weight to such things anyway is fallacious, as the Sentencing Council points out.

The need to address this issue is now acute.

Social mobility (as opposed to inclusivity) has been in retreat in recent decades. … A pronounced people like us culture has developed in the full time judiciary and the number and geographical distribution of magistrates' courts has been greatly reduced. Both of these phenomena have, despite efforts to increase inclusivity, lowered the level of exposure to and familiarity with the factors listed in the bullet points in the Sentencing Council's identification of the issue on the part of sentencers.

… I accept the point that the factors identified in the bullet points are common features of those sentenced. The truth of that observation is consistent with the existence of a sentencing system which disproportionately punishes and fails to deflect from crime or rehabilitate those who factors beyond their control have predisposed to criminality.

Although I am a supporter of guidelines for sentencing, one of their unintended consequences has been that there is a de-humanising of, and a lack of subjectivity in the sentencing process. This effect is reflected in the objection recorded from some sentencers in the research groups referred to "….that these issues were not mitigation in the sense that they make the offence less serious". Objectively that is true, but sentencing, if it is to be effective in reducing offending and maintaining confidence, especially in the communities most affected by crime and from which most of those sentenced come, needs to be focussed on offenders. Guidelines need to emphasise this more. A failure in that respect leads to an increased prison population, damage to social cohesion (and essential co-operation with the police) an adverse effect on families and the next generation and no worthwhile benefit in crime reduction.

… The chances of ending up in prison if you have been in care are so high as to constitute a scandal, and a scandal that the sentencing system has failed to address.

Retired Circuit Judge

It is understandable that some sentencers in the reference group felt that these factors could apply to virtually every offender they sentence and were therefore not very helpful.

However, they are matters that are routinely and legitimately raised in mitigation and ought to be considered. It is therefore right that they are included in the guidelines.

The Law Society

We welcome the inclusion of the proposed new mitigating factor and associated expanded explanation "difficult and/or deprived background or personal circumstances". Many people involved in the criminal justice system will have

experienced multiple disadvantage, which relates to their offending behaviour. People from lower socio-economic groups are often over-represented in the criminal justice system , and individuals released from prison are often released with debts which have built up during their sentence, adding to the problems they face on release.

The Prison Reform Trust

We support the intent of the proposed new mitigating factor of difficult and/or deprived background or personal circumstances, and its associated expanded explanation. For the reasons set out in the Consultation Paper, we consider that setting out a non-exhaustive list of factors to consider helps to ensure consistency, transparency and fairness. As is to be expected, our clients all have experience of at least one, and usually many, of the listed factors. The factors usually have direct relevance to their offending behaviour.

APPEAL's Women's Justice Initiative

Some members felt that the circumstances of the individual and the state they were living in was often due to systemic issues and that this needed consideration within sentencing, particularly within the context of those impacted by multiple disadvantages.

Members were also clear that offending does not happen in a vacuum and so personal circumstances at the time an offence occurred needed consideration.

There was also consensus that age, previous experience of the care system and experience of abuse and neurodiversity needed to be considered.

Members were also eager that sentencers were able to have understanding of causal factors of offending – and could find sentences most likely to help the person sentenced to address the causes of their offending.

Members particularly felt experiences of trauma needed to be considered in sentencing.

Revolving Doors

The Committee recognises that, in practice, these factors are already taken into account by the courts. We support the inclusion of the new mitigating factors and recognise that they will promote consistency of sentencing and support making sentencing more transparent to the public.

Justice Committee

3.46 Suggestions for changes to the proposals include:

- Adding a references to relevant sections of the ETBB
- Changing 'the court will be assisted by a pre-sentence report in assessing whether there are factors in the offender's background etc…'. to say 'the court may be assisted…', instead of 'will' – as there are occasions where the information regarding difficult and/or deprived background or personal

circumstances could be obtained from other sources, without the need for a pre-sentence report

- In relation to 'negative influences from peers' expanding it to say '(may be particularly relevant to offenders aged 18-25 or where there is a lack of maturity or particular vulnerability)'
- Adding 'and family members' to 'negative influences from peers'
- Changing the wording relating to having been in care ('experience of having been a looked after child (in care)' to cover those who are care experienced more widely, so that it reads 'experience of having been in care or in contact with social services as a child'
- Alternatively, 'experience of being a child in care (looked after child)'
- Adding a reference to coercive or controlling behaviour to 'direct or indirect victim of domestic abuse'
- Adding 'experience of trauma (including a history of sexual exploitation)'

3.47 Several respondents commented on:

- difficulties relating to the misuse of drugs and/or alcohol (but note: being voluntarily intoxicated at the time of the offence is an aggravating factor)

3.48 The Legal Committee of HM Council of District Judges (Magistrates' Courts) put forward two views from its members:

> One view expressed was to agree with this factor being included. However, those in favour of that view suggest the actual wording of the aggravating feature that is in the existing guidelines be used, namely 'but note commission of an offence whilst under the influence of alcohol or drugs is an aggravating feature' rather than 'being voluntarily intoxicated at the time of the offence is an aggravating feature'.
>
> Another view expressed was that the inclusion of this factor leaves the Guidelines open to an appearance of internal inconsistency and may be confusing to sentencers and others. Moreover, that view continues, whilst early exposure to misuse of drugs and alcohol may be regarded as a mitigating factor, the words chosen namely "difficulties relating to the misuse of drugs and/or alcohol" are too vague and broad. They do not reflect sufficiently either the element of choice that may be involved in such difficulties arising & continuing, nor the fact that such drug misuse likely involved engagement in criminal behaviour. There will be multiple circumstances where it would be inappropriate to treat such 'difficulties' as matters of mitigation.

3.49 The Prison Reform Trust challenged the reference to "being voluntarily intoxicated" stating that it suggests that people have agency over their addiction.

> We would urge the Council to reconsider the wording of this point, to avoid contradiction and to give more weight to taking into account difficulties relating to the misuse of drugs and/or alcohol

3.50 The Criminal Sub-Committee of HM Council of Circuit Judges noted:

> We continue to have concerns as to the confusion that arises by the inclusion of "difficulties relating to the misuse of drugs and/or alcohol (but note: being voluntarily intoxicated at the time of the offence is an aggravating factor)". This has the potential for unnecessary confusion.

> We question the extent to which the misuse of alcohol and/or drugs should be regarded as a matter of general mitigation. Many offences of violence are committed by those who have developed problematic use/abuse of alcohol and/or drugs. How should the sentencing exercise operate when saying "your offence is aggravated by the fact that you were drunk at the time but mitigated by the fact that you have been drinking to excess for so long that you now have a problem".?

3.51 The aggravating factor of 'Commission of offence whilst under the influence of alcohol or drugs' (which appears in almost all guidelines) has the following expanded explanation:

> The fact that an offender is **voluntarily** intoxicated at the time of the offence will tend to increase the seriousness of the offence provided that the intoxication has **contributed to the offending**.
>
> This applies regardless of whether the offender is under the influence of legal or illegal substance(s).
>
> In the case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary, but the court should have regard to the extent to which the offender has sought help or engaged with any assistance which has been offered or made available in dealing with the addiction.
>
> An offender who has voluntarily consumed drugs and/or alcohol must accept the consequences of the behaviour that results, even if it is out of character.

3.52 It is concerning that responses on behalf of judges have raised issues with the bullet relating to the misuse of drugs or alcohol. The point is a slightly complex one: as the Council of Circuit Judges say, the court may be balancing the aggravating factor of having committed the offence under the influence with the mitigating factor of having a problem with substance abuse. In practice, as always, the court will have to consider what weight, if any, to attribute to each of these. Suggestions for how to word this point in the expanded explanation more helpfully are welcome!

3.53 Some of the objections raised may overlook the fact that the explanation talks in terms of: 'such factors **may** be relevant'; 'multiple disadvantages which may have a bearing on their offending' and 'Such disadvantages include but are not limited to'. The Council has tried to strike a balance between drawing sentencers' attention to the potentially relevant considerations without being over prescriptive. Other objections may overlook the fact that the two new proposed factors should be considered as a pair.

3.54 In relation to the proposed factor of 'Prospects of or in work, training or education', those that objected to the factor or had reservations suggested that it is unnecessary (as courts take it into account anyway), is difficult to evidence or is discriminatory.

The prospects of work, training or education may be an important factor which sentencers consider during the sentencing exercise. We are concerned that there is a possible lack of clarity about how this could amount to mitigation/reduction in seriousness merely by the fact that an offender is in work, training or education.

Similarly, it may tend to discriminate against those who are not, or cannot be, in work, training or education.

CPS

Whilst we generally agree with the suggested amendment, we consider that it should be tempered with a warning to the effect that the court should have in mind that there are many people who appear before them who are unable to work for various reasons and the court must ensure that this group is not in any way discriminated against when considering this additional mitigating feature.

Legal Committee of HM Council of District Judges (Magistrates' Courts)

[I]t is well known that employment is closely interwoven with desistance. We encourage the Council to consider that when a custodial sentence is imposed, sizeable barriers to finding work upon release are created, and so a cycle of unemployment, poverty, and criminalisation either begins or is perpetuated. Where work is then secured, it would be preferable to impose a suspended or community sentence, to avoid sending someone back to square one in their job search upon release.

As with the majority of cases of women's offending, their rehabilitation needs are much better met in the community anyway, with a prison sentence creating a gap in someone's CV, and separation from family and community networks.

We suggest the Council considers voluntary work, apprenticeships and education/training with the same weight as paid work, as all are purposeful activities associated with desistance. We do identify with the concern stated about those groups who are unable to work, as this might well discriminate, so urge an intersectional and pragmatic approach.

It is also worth considering the longer-term impacts of a criminal conviction on someone's employability prospects, and so convictions which become spent sooner (eg. non-custodial sentences) are beneficial in terms of someone's chances of finding meaningful employment later in life. Our own research shows a great deal of employer prejudice towards people with convictions, so the weight of a criminal record to disclose hampers someone's chances of finding employment later in life (which disproportionately impacts women, as they are more likely to build careers in sectors which require Enhanced DBS checks). When sentencing takes place, it is worth considering the impact this has on subsequent years of someone's life and career, and the barriers to employment and desistance that is created.

These barriers to employment are even more significant for women and people of marginalised genders, Black and racially minoritised communities. This should be considered in sentencing, as a criminal record is often one of many factors which prevent people from finding work, holding down a job, and progressing in a career.

Working Chance

> We support this proposed change in principle, but suggest one amendment to the expanded explanation, to add "The absence of work, training or education should never be treated as an aggravating factor, especially where childcare responsibilities, disability, or other matters make participation in work, training or education more challenging."
>
> Being a sole or primary caregiver for dependents is already a standalone mitigating factor, but we consider this addition would clarify the position. Practical ability to work or be in education or training varies between people and their situations, and a commitment to rehabilitation can be demonstrated in different ways.

APPEAL's Women's Justice Initiative

3.55 The wording of the expanded explanation does cover most of the points raised by respondents even if not in as much detail as they suggest. In practice, the factor will be considered alongside other relevant factors and it may be unhelpful to make the explanation much longer by adding further details or cross referencing to other factors.

3.56 Again, it is worth remembering that evidence suggests that courts often do take both of these two proposed factors into account and that the two factors should be considered as a pair.

Question 7: Does the Council wish to make any changes to the proposed 'Difficult and/or deprived background or personal circumstances' factor? (see paragraphs 3.46 and 3.52)

Question 8: Does the Council wish to make any changes to the proposed 'Prospects of or in work, training or education' factor?

Pregnancy and maternity

3.57 The UH report recommended that the Council should: "Specify pregnancy and maternity as a discrete phase where medical conditions are referred to in the guidelines". In response, the Council proposed to remove the reference to pregnancy from the factor of 'Sole or primary carer for dependant relative(s)' and to create a new mitigating factor and consult on that new factor and the associated expanded explanation.

3.58 The current reference to sentencing pregnant offenders in the expanded explanation for the mitigating factor 'Sole or primary carer for dependent relative(s)' states:

In addition when sentencing an offender who is pregnant relevant considerations may include:

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

3.59 The Council consulted on adding the following factor and expanded explanation:

> **Pregnancy, childbirth and post-natal care**
>
> When considering a custodial or community sentence for a pregnant offender the Probation Service should be asked to address the issues below in a pre-sentence report.
>
> When sentencing an offender who is pregnant relevant considerations may include:
>
> - any effect of the sentence on the physical and mental health of the offender and
> - any effect of the sentence on the child
>
> The impact of custody on an offender who is pregnant can be harmful for both the offender and the child.
>
> Women in custody are likely to have complex health needs which may increase the risks associated with pregnancy for both the offender and the child.
>
> There may be difficulties accessing medical assistance or specialist maternity services in custody.
>
> This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. See also the Imposition of community and custodial sentences guideline.
>
> For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.

3.60 There were around 64 responses to this proposal. The vast majority were supportive, though many made suggestions for changes or additions to the text consulted on. There were just six responses that opposed adding this as a discrete factor. Most did so on the grounds that it would be abused by women who would use pregnancy as an excuse to avoid prison. One also claimed that the factor was discriminatory as it only applies to women and was counter to equality. One respondent made an interesting point from a health perspective:

> No. Do the statistics consider alternative reasons for those poorer outcomes (eg preterm birth) e.g. isn't it likely that those women may have comorbidities such as drug and alcohol misuse for example and these directly impact stillbirth rates, prematurity, birth defects etc. Therefore, not all being directly contributed to being held on remand or in prison.

> Increasing mitigation, has the potential to create a precedent that women keep an otherwise unwanted baby to have a more favourable sentence. Furthermore, may be the reason not to have an abortion creating a perpetuating cycle of ACEs with a baby born into poor condition.
>
> I feel it would be more beneficial to put in place better health measures for women held on remand and for women in prison including regular access to onsite maternity care, appropriate access to supplementation, mental health support and rehabilitation against whatever offenders are in for.
>
> Those held on remand are usually for serious crimes for which it is appropriate that they are held, pregnant or otherwise.
>
> **Dr Daisy Wiggins, Senior midwifery lecturer**

3.61 This point is relevant in the context of the consensus view among most respondents who cited evidence of poor outcomes for pregnant women in prison compared to the general population, such as:

> A study published in 2020 found that 22% of pregnant prisoners missed midwife appointments, compared with 14% in the general population, and that 30% missed obstetric appointments, compared with 17% in the general population.
> Pregnant women in prison are almost twice as likely to give birth prematurely as women in the general population, which puts both the mothers and their babies at risk
> Women in prison are seven times more likely to suffer a stillbirth than those in the general population, according to figures obtained through freedom of information requests sent to 11 NHS trusts serving women's prisons in England.
>
> **Leigh Day**

3.62 The Council may feel that, though health outcomes for the cohort of pregnant women who appear before the courts for sentence could be lower than the general population even without custody, there is still a compelling case for courts to consider the needs of both offender and child at the point of sentence.

3.63 There were several suggestions that were common to many of the responses:

- It should be made clear what is meant by 'post-natal' the consensus being that this is period of 12 months from birth
- There should be a strengthening of the importance of a PSR for pregnant or post-natal offenders
- The text should contain more information on the health risks to mothers and babies in prison
- The text should contain more information about the wider consequences of imprisonment on both mother and child including the impact of separation
- The text should refer to suspended sentences
- It should state that pregnancy and the post-natal period should be considered an 'exceptional circumstance' not to impose a mandatory minimum sentence
- Where an immediate custodial sentence is imposed, the reasons for sentence should be required to address:

- that increased pregnancy risks are an intrinsic consequence of the imposition of a custodial sentence on a pregnant woman
- that custody poses inherent barriers to accessing medical assistance and specialist maternity care, causes trauma to pregnant and postnatal women in particular and has an adverse impact on a child's development
- the medical needs of a pregnant or postnatal woman and her child, including her mental health needs
- the best interests of the child (including the fact that it is universally recognised that separation in the first two years can cause significant harm to both mother and child);
- the effect of the sentence on the physical and mental health of the woman
- the effect of the sentence on the child once born
- the fact that prisons are overcrowded
- why a community or suspended sentence is not appropriate

3.64 These issues are argued in the response from Level Up ('a coalition of lawyers, academics, psychiatrists and organisations with significant interest in, and long experience working with, perinatal women in the criminal justice system') which is reproduced in full at **Annex A**, and by Birth Companions ('a women's charity dedicated to tackling inequalities and disadvantage during pregnancy, birth and early motherhood') reproduced at **Annex B** and which contains responses from women with lived experience of imprisonment while pregnant or post-natal. One or both of these responses were endorsed by several other respondents (including Working Chance, the Prison Reform Trust, No Births Behind Bars, Deborah Hunt Clinical Nurse Specialist, Laura Janes, the Howard League, Maternity Action, Centre for Women's Justice, Support Not Separation, Radical Therapist Network, End Violence Against Women Coalition).

3.65 Some respondents made wider points relating to the use of remand for pregnant offenders or other maters outside the Council's remit.

3.66 The revised text proposed by Level up is:

Pregnancy, childbirth and post-natal care

When considering a custodial, community or suspended sentence for a pregnant or postnatal offender (someone who has given birth in the previous 12 months) the Probation Service should be asked to address the issues below in a pre-sentence report.

If a comprehensive pre-sentence report addressing the below issues is not available, sentencing should be adjourned until one is available.

When sentencing an offender who is pregnant relevant considerations must include:

- the established high-risk nature of pregnancy and childbirth in custody and the harm custody causes to pregnant and postnatal women and their dependants, including by separation;
- the medical needs of the pregnant woman and her unborn child, including her mental health needs;

- that access to a place in a prison Mother & Baby Unit is not automatic, and the upper age limit is two years;
- the best interests of the child (including the fact that it is universally recognised that separation in the first two years can cause significant, irreversible harm to both mother and child);
- the effect of the sentence on the physical and mental health of the woman and;
- the effect of the sentence on the child once born.

The impact of custody on a woman who is pregnant is very likely to cause significant harm to the physical and mental health of both the mother and the child. Prison is a high-risk environment for pregnant women. It poses inherent barriers to accessing medical assistance and specialist maternity care and causes harm to dependent children.

Women in custody are likely to have complex health needs, including a need for specialist trauma services, which will increase the risks associated with pregnancy for both her and the child.

Imprisonment should not be imposed where there would be an impact on dependants, which would make a custodial sentence disproportionate to achieving the aims of sentencing.

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. It is also relevant where a suspended sentence is being considered, as custody will result in significant harmful impact to the pregnant woman and child, either due to separation or because of the custodial environment. See also the Imposition of community and custodial sentences guideline.

For offences that carry a mandatory minimum custodial sentence, pregnancy and the postnatal period should be considered as an 'exceptional circumstance' strongly gravitating against imprisonment or lengthy imprisonment. That is so because the imposition of a mandatory minimum term on a woman who is pregnant or postnatal results in a disproportionately severe sentence when compared with the imposition of such a sentence upon a person who is not affected by such considerations.

3.67 Birth Companions propose:

Pregnancy, childbirth and postnatal care

When considering a custodial or community sentence for a pregnant or postnatal woman (a woman who has given birth in the last two years) the Probation Service should be asked to address the issues below in a pre-sentence report. If a comprehensive pre-sentence report addressing these issues is not available, sentencing should be adjourned until that is available.

Pregnancy and maternity are recognised as protected characteristics under the Equality Act 2010.

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

- the fact that the NHS classifies all pregnancies in prison as high risk;
- any effect of the sentence on the physical and mental health of the offender;
- any effect of the sentence on the unborn/ newborn baby/ infant

- that access to a place in a prison Mother and Baby Unit is not automatic, and the upper age limit is 18 months, with potential to extend to a maximum of 24 months in certain circumstances.

The impact of custody on an offender who is pregnant or postnatal can be harmful for the physical and mental health of both the offender and the unborn/ newborn baby/ infant.

Women in custody are likely to have complex health needs which may increase the risks associated with pregnancy and the period following birth for both the offender and the baby/ infant. Pregnancy and the postnatal period are a high-risk time in terms of severe mental ill-health in women. There is significant risk of suicide or death as a result of substance use, as evidenced by the annual reports on maternal mortality. The mental health risks are exacerbated by the uncertainty faced by those entering prison as to whether they will be able to access a place within a Mother and Baby Unit or have to deal with the trauma of separation. There are also major risks to the physical health of mother and baby, including premature and unassisted labour, pre-eclampsia, haemorrhage, and sepsis.

NHS England states that "it is because of the complexities for women in detained settings that all pregnancies must be classed as high risk." The Royal College of Midwives and the Royal College of Obstetricians and Gynaecologists both emphasise the need for alternatives to prison to be used in sentencing pregnant women wherever possible. Research shows there can be significant difficulties accessing equivalent and appropriate healthcare, including urgent medical assistance or specialist maternity services in custody and appropriate mental health provision.

Many women who give birth during their time in prison, or who enter prison during the postnatal period, will be separated temporarily or permanently from their baby, interrupting breastfeeding and risking significant trauma in a time at which the mother-baby attachment is shown to be crucial in supporting long-term development.

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. It is also relevant where a suspended sentence is being considered, as custody presents significant risk of harm to the pregnant woman, mother and child, either due to separation or because of the risks inherent in the custodial environment. See also the Imposition of community and custodial sentences guideline.

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

For offences that carry a mandatory minimum custodial sentence, pregnancy and the postnatal period should be considered as an 'exceptional circumstance' significantly mitigating against imprisonment or custodial sentence length. This reflects the fact that the imposition of a mandatory minimum term on a woman who is pregnant or postnatal results in a disproportionately severe sentence when compared with the imposition of such a sentence upon a person who is not affected by these protected characteristics.

3.68 Other respondents proposed similar changes but with some differences. For example from Birthrights:

Pregnancy, childbirth and post-natal care

When considering a custodial, community or suspended sentence for a pregnant or postnatal offender (someone who has given birth in the previous 12 months) the Probation Service should be asked to address the issues below in a pre-sentence report.

If a comprehensive pre-sentence report addressing the below issues is not available, sentencing should be adjourned until one is available.

When sentencing a pregnant or postnatal woman, relevant considerations must include:

- the established high-risk nature of pregnancy and childbirth in custody and the harm custody causes to pregnant and postnatal women
- the medical needs of the pregnant woman, including her mental health needs;
- that access to a place in a prison Mother & Baby Unit is not automatic, and the upper age limit is two years;
- the effect of the sentence on the physical and mental health of the pregnant or postnatal woman;
- Pregnancy and maternity are recognised as protected characteristics under the Equality Act 2010.

The impact of custody on a woman who is pregnant or postnatal is very likely to cause significant harm to her physical and mental health. Prison is a high-risk environment for pregnant women. It poses inherent barriers to accessing medical assistance and specialist maternity care.

Pregnant and postnatal women in custody are likely to have complex health needs, including a need for specialist trauma services, which will increase the risks associated with pregnancy.

Imprisonment should not be imposed where there would be an impact on dependants, which would make a custodial sentence disproportionate to achieving the aims of sentencing.

This factor is particularly relevant where a pregnant or postnatal woman is on the cusp of custody or where the suitability of a community order is being considered. It is also relevant where a suspended sentence is being considered, as custody will result in significant harmful impact to the pregnant woman and child, either due to separation or because of the custodial environment. See also the Imposition of community and custodial sentences guideline.

For offences that carry a mandatory minimum custodial sentence, pregnancy and the postnatal period should be considered as an ‘exceptional circumstance’ strongly gravitating against imprisonment or lengthy imprisonment. That is so because the imposition of a mandatory minimum term on a woman who is pregnant or postnatal results in a disproportionately severe sentence when compared with the imposition of such a sentence upon a person who is not affected by such considerations

3.69 The Lullaby Trust, Bliss, End Violence Against Women Coalition and the Centre for Women's Justice suggested changing the word 'child' to 'baby/infant' throughout, to "reflect the specific vulnerabilities associated with this period".

3.70 Birth Companions and Dr Laura Janes make the point that there is an overlap with the 'Age and/or lack of maturity' factor and a danger that young pregnant women may be perceived as more mature than they are.

3.71 The Council may feel that some strengthening of the expanded explanation and some additional information would be appropriate. Suggested items for inclusion are:

> When considering a custodial or community sentence for a pregnant or postnatal offender (someone who has given birth in the previous 12 months) the Probation Service should be asked to address the issues below in a pre-sentence report. If a suitable pre-sentence report is not available, sentencing should normally be adjourned until one is available.
>
> When sentencing a pregnant or postnatal woman, relevant considerations may include:
>
> - the medical needs of the offender including her mental health needs
> - any effect of the sentence on the physical and mental health of the offender
> - any effect of the sentence on the child
>
> The impact of custody on an offender who is pregnant or postnatal can be harmful for both the offender and the child including by separation, especially in the first two years of life.
>
> Access to a place in a prison Mother & Baby Unit is not automatic, and the upper age limit is two years.
>
> Women in custody are likely to have complex health needs which may increase the risks associated with pregnancy for both the offender and the child. The NHS classifies all pregnancies in prison as high risk.
>
> There may be difficulties accessing medical assistance or specialist maternity services in custody.
>
> This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. See also the Imposition of community and custodial sentences guideline.
>
> For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.
>
> Where immediate custody is imposed, the court should address the issues above when giving reasons for the sentence.

3.72 The Council may also wish to consider whether to address the issue of whether pregnancy or the post-natal period can constitute an 'exceptional circumstance not to impose a mandatory minimum term.

Question 9: Does the Council wish to make any of the suggested changes to the expanded explanation for the 'Pregnancy, childbirth and post-natal care' factor?

4 EQUALITIES

4.1 As noted throughout this paper some responses make points relating to equalities. The impetus behind most of these changes was to address any disparity in sentencing outcomes across demographic groups.

5 IMPACT AND RISKS

5.1 It is difficult to quantify any impact that the proposed changes may have. With regard to the proposed new factors, the evidence we have is that sentencers do often take these matters into account already. Any impact would be to reduce the sentence imposed

5.2 Several respondents noted the lack of published data on sentencing of pregnant or postnatal women:

> We note with concern that the Sentencing Council, at the time of opening this consultation, did not have access to data on the number of pregnant or postnatal women sentenced each year. Since this consultation has been opened, some of this data has been made available.
>
> A freedom of information request, the results of which were published in The Observer on 29 October 2023 found that between April 2022 and March 2023, in the 80% of cases where data was available for pregnant women in prisons, 34% were on remand, 49% had been sentenced and 17% had been recalled. We urge the Sentencing Council to require the Ministry of Justice to collect and publish data on the pregnant and postnatal prison population.
>
> Since this consultation was launched, the government has announced plans to introduce a presumption against all sentences of 12 months and under. If this legislation is passed, it may impact a significant cohort of female offenders, including pregnant and postnatal ones, and adds strength to the proposition that sentencing guidelines must ensure sentencers fully understand the threat to life and wellbeing posed by imprisoning a pregnant or postnatal woman, even for a short period of time.
>
> **Level Up**

Sentencing Council

Sentencing Council meeting:	**26 January 2024**
Paper number:	**SC(24)JAN05 – Housing offences**
Lead Council member:	**N/A**
Lead official:	**Jessie Stanbrook** **Jessie.stanbrook@sentencingcouncil.gov.uk**

1 ISSUE

1.1 Scoping the project on guidelines for housing related offences.

2 RECOMMENDATIONS

2.1 That Council agrees to continue to scope housing related offences for potential sentencing guidelines, including discussions with external stakeholders, to determine the correct scope for a potential project.

3 CONSIDERATION

3.1 Several stakeholders have written to the Council since 2015 requesting consideration of sentencing guidelines for a number of different housing related offences or groups of offences. These stakeholders include individual prosecutors, barristers or solicitors, individuals working in enforcement teams in local councils and colleagues in the (then) Ministry of Housing, Communities and Local Government (MHCLG), now the Department for Levelling Up, Housing and Communities (DLUHC.)

3.2 The main offences that stakeholders cite in their communications pertain to the private rented sector and "rogue landlords", such as offences related to letting out houses in multiple occupation (HMOs), unlawful eviction, failing to comply with various orders e.g. prohibition orders, improvement notices, or not obtaining a licence for properties subject to licensing and related offences.

3.3 From these initial communications and some initial research and discussions, the two key concerns for the lack of guidelines for these types of offences are:

1. Low level, inconsistent and diverging penalties imposed both at magistrates' and Crown Courts:
    - "Because the magistrates' court has no guidelines the fines meted out (the sentences are usually fines) are incredibly inconsistent and it is impossible to know whether a lay client is going to receive a fine of around £2,000 or £10,000…. There is a lot of

guesswork going on regarding what consists of aggravating and mitigating features…" (Barrister)

- "The factors that may influence the type and severity of a penalty on the facts of a case does not seem to correlate with sentences imposed by the different Courts…" (Research Officer, The Association of Tenancy Relations Officers (ATRO))

2. Significant gravity of offences and harm to victims (without any guidance on how to support decision making) – and victims seem to generally be vulnerable, "stuck" in the low-income private rental sector:

    - "One recent penalty imposed by the Oxford Magistrates was of a fine of £180 for the illegal eviction of a tenant that included an assault. It has resulted in continuing anxiety experienced by the tenant…" (Research Officer, The Association of Tenancy Relations Officers (ATRO))

    - "Loss of home in any circumstances constitutes a substantial injury to emotional and psychological wellbeing. A very sudden loss of home or a forced move following a prolonged campaign of intimidation visits unmeasurable harm on the victim's mental health…" (Cambridge House (registered charity) report on Safer Renting)

3.4 In 2019, an article published by a solicitor on LocalGovernmentLawyer.com, set out the following:

- "It has long been a problem that housing offences have no sentencing guidance. Although fines have now been increased such that they have no limit, Magistrates have little idea where to start and the fines can vary wildly between different courts. In some cases very high fines are given for relatively minor offences and in other cases breaches that put lives at risk are given token fines."

3.5 Overall, research and the discussions I have had paint a picture of the housing related cases reaching court causing high harm to mostly vulnerable victims, but in part due to the lack of sentencing guidelines for these offences that have mostly unlimited fines, sentences of low and diverging penalties.

Scope

3.6 The landscape of housing offences is complex and the variety of offences sit across different primary and secondary legislation. The National Residential Landlords Association refer to 168 pieces of legislation that cover the private rented sector which give local authorities powers to enforce landlords to meet their statutory obligations. The main legislation that creates criminal offences includes:

- Housing Act 2004
- Protection from Eviction Act 1977

- The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018
- Housing and Planning Act 2016
- Regulatory Reform (Fire Safety) Order 2005
- Health and Safety at Work Act 1974
- Immigration Act 2014
- Prevention of Social Housing Fraud Act 2013
- The Homes (Fitness for Human Habitation) Act 2018
- Environmental Protection Act 1990

3.7 The main legislation in Wales is the Renting Homes (Wales) Act 2016 (that came into force in December 2022)

Enforcement

3.8 The Housing and Planning Act 2016 amended the Housing Act 2004 to allow financial penalties, up to a maximum of £30,000, to be imposed as an alternative to prosecution for certain relevant housing offences.

3.9 DLUHC have advised that since then, the general focus for policy have been pushing for civil penalty notices in the first instance or unless the offending is particularly serious. This continues to be the case; civil penalty notices are easier to obtain than a prosecution and the revenue of civil penalty notices are obtained by the local authority.

3.10 The National Residential Landlords Association (NRLA) identified in a report published in 2021 that 67% of local authorities in England had not successfully prosecuted a landlord in the last three years (for the five offences requested through an FOI) but in contrast, 130 local authorities (47%) had issued a civil penalty in the same time frame. They also found that just three local authorities are responsible for 38% of all the reported criminal prosecutions, that 61 (22%) of local authorities have successfully prosecuted at least one private landlord for a breach of the HMO management regulations in the last three years and that 19% of councils in total have prosecuted a private landlord for operating without an HMO licence, with 242 offences successfully prosecuted over the last three years.

3.11 The NRLA sets out in this paper that one of the key reasons for the lack of prosecutions by local authorities is the lack of sufficient resources and funding for training and staffing. As they state, “the introduction of civil penalties was intended to at least partially address this.” Through civil penalties, local authorities are able to raise funds to use for future enforcement which allows them in turn to increase their staff and broaden their

enforcement strategy. However, it was reported in 2022 that nearly half of London councils either do not employ or will not say whether they employ anyone to deal with illegal eviction, and stakeholders have suggested the picture is the same across the country.

3.12 A Justice Select Committee report on the Private Rented Sector published in 2018 set out:

> "We have received evidence that civil penalties are not strong enough to deter landlords who are prepared to commit the most serious offences, and fines issued through the courts are often insufficient to make prosecutions worthwhile."

3.13 In response, the government said:

> "We introduced a range of additional powers for local authorities through the Housing and Planning Act 2016 to help local authorities take robust action against rogue landlords; for example, banning orders and a database of rogue landlords and agents which were introduced in April 2018. Since April 2017, local authorities have been able to impose civil penalties of up to £30,000, with the level of penalty set locally to take account of the circumstances of the case… Local authorities' use of civil penalties will depend on their local circumstances and time is needed to enable implementation to become embedded around the country…. However, we recognise that fines being imposed in the criminal courts currently may not be enough to deter the most serious offenders. We will work with the Ministry of Justice and the independent Sentencing Council to consider how we can ensure appropriate penalties are imposed for these offences."

3.14 It was around this time that the (then) MHLCG got in touch to ask about sentencing guidelines for these offences and asked for input into this response.

3.15 The database of rogue landlords referred to exists as closed list of landlords and agents who have either received a banning order, been convicted of a banning order offence or received two or more civil penalties for a banning order offence within a 12-month period. A banning order offence does not necessarily lead to a banning order, and the local housing authority will need to subsequently seek a separate banning order conviction against a landlord once that landlord has been convicted of a banning order offence. Those landlords placed under a banning order are prohibited from letting a property for the duration of that ban. A local housing authority may use previous offence and penalty information when considering further action against a landlord failing to meet regulations.The general view of the database is that it has not been a great success and it seems there is a plan to replace it with a portal for landlords, though I have not yet received confirmation of this.

Legislative change

3.16 There are currently three housing related bills going through Parliament. Most relevant is the **Renters (Reform) Bill**, at report stage in the Commons, which makes various provisions related to rented homes, such as abolishes fixed term assured tenancies and assured shorthold tenancies. Most key for potential sentencing guidelines, as currently drafted, the Renters (Reform) Bill will make enforcement of the Protection from Eviction Act a statutory duty for local authorities. This is likely to increase enforcement activity, but it is not clear how much of this increase will be on the criminal side, rather than the civil side. The Local Government Association has concerns about local authority resourcing, as set out in a brief below, which may impact the level of the increase in enforcement activity:

> "The Bill places significant new regulatory and enforcement responsibilities on councils. We welcome the provisions in the Bill that enable local authorities to keep the proceeds of financial penalties to reinvest in enforcement activity. However, this funding is unlikely to be sufficient to cover the costs of the new duties in the Bill or the scale of the proactive work that is needed to improve standards for tenants. Councils are facing severe budgetary constraints. Multiple inquiries and reviews, including the Department of Levelling Up Housing and Communities (DLUHC) own research, identified that many local enforcement teams do not currently have the resources and capacity to proactively tackle poor standards in the PRS."

3.17 The Renters Reform Bill is also introducing a civil penalty for harassment and illegal eviction for the first time (alongside the current ability for a criminal prosecution). The Local Government Association has called for this to be much higher, up to £30,000, in line with other financial penalties that can be issued by enforcement authorities against landlords who breach legislation, for example the Leasehold Reform (Ground Rent) Act 2022. Of the Bill,

3.18 There are two other housing related bills going through the Commons at the moment which are the **Housing Act 1988 (Amendment) Bill** and **Leasehold and Freehold Reform Bill**. It is not yet clear whether these Bills fall into the same scope which I am looking at for sentencing guidelines but I have made enquiries with DLUHC.

Offence Data

3.19 Offences considered in the scoping for this project so far include the below:

Offence	Legislation	Max
Breach of HMO licence conditions	Housing Act 2004 s 72(3)	Unlimited fine
Knowingly permit overcrowding of HMO	Housing Act 2004 s 72(2)	Unlimited fine

Fail to have HMO licence	Housing Act 2004 s 72(1)	Unlimited fine
Fail to have licence for Part 3 housing	Housing Act 2004 S 95(1)	Unlimited fine
Breach of Part 3 licence conditions	Housing Act 2004 S 95(2)	Unlimited fine
Failing to comply with an Improvement Notice	Housing Act 2004 S 30(1)	Unlimited fine
Failure to comply with prohibition order	Housing Act 2004 S 32(1)	Unlimited fine plus £20 per day for every day premises used after conviction
Failure to comply with management regulations in respect of HMOs	Housing Act 2004 S 234(3)	Unlimited fine
False or misleading information "Knowingly / recklessly supply false / misleading information to a housing authority"	Housing Act 2004 S 238(1)	Unlimited fine
Contravention of an overcrowding notice	Housing Act 2004 S 139(7)	£2,500 fine
Person unlawfully deprives or attempts to deprive a residential occupier of any premises of his occupation of those premises	Protection from Eviction Act 1977 S 1(2) and (4)	Imprisonment 2 years
Use or threaten violence to secure entry to premises	Criminal Law Act 1997 (s 6(1) and (5))	Imprisonment 6 months
Tenant sublets or parts with possession of a property or ceases to occupy knowing that it is a breach of secure tenancy	Prevention of Social Housing Fraud Act 2013 sections 1(1), 1(2)	Imprisonment 2 years
Tenant sublets or parts with possession of a property or ceases to occupy knowing that it is a breach of assured tenancy	Prevention of Social Housing Fraud Act 2013 sections 2(1) and 2(2)	Imprisonment 2 years
We do not currently have data on the below but understand these may also be relevant offences		
Breach of a banning order	Housing and Planning Act 2016 s 21	Imprisonment 6 months
Fire safety offences	Regulatory Reform (Fire Safety) Order 2005 Article 32 paragraphs (1) and (2)	(1)(a) to (d) and (2) (h) Imprisonment 2 years Otherwise unlimited fine
Landlord letting to someone disqualified from renting as a result of their immigration status	Immigration Act 2014 s 33A(1) and (10)	Imprisonment 5 years

Agent letting to someone disqualified from renting as a result of their immigration status	Immigration Act 2014 s 33B(2) and (4)	Imprisonment 5 years
Gas safety offences - duties on landlords	Health and Safety at Work Act 1974 s 33(1)(c) where a person contravenes Reg 36 of the Gas Safety (Installation and Use) Regulations 1998	Imprisonment 2 years

3.20 Generally, volumes of offenders sentenced for housing offences is low. The available data on the criminal offences are categorised in the following categories:

- Failure to comply with certain orders/notices/regulation and supplying misinformation to a housing authority (summary offences under Housing Act offences)
- Offences connected with houses in multiple occupation and housing licences
- Alter/suppress/destroy a document required to produce under a section 235 notice
- Failure to comply with overcrowding order
- Sub-letting
- Dishonestly sub-letting
- Unlawful eviction of occupier
- Unlawful harassment of occupier

3.21 Figures for the main offences (so far) can be seen in Annex A. Annex A sets out the volumes for adult offenders and organisations (where applicable) sentenced for offences where the offence listed is the principal offence. Data for some offences have not been included where the offence included non-housing related offences, or where offence codes were not able to be identified.

Focuses

3.22 Given the considerable length of time since the initial communication from some of the stakeholders that were originally in contact (some from 2014-2017) it has been difficult to get in touch with many of them. However, in order to get a more up to date picture, I have spoken to the relevant team at DLUHC, to the Chair of the Association of Tenancy Relations Officers (ATRO) who is also the Principal Legal and Policy Officer in the Private Housing Standards at Sheffield City Council (a member of the ATRO had previously written to the Council on this issue) and Ms. Hatoon Zeb, Solicitor-Advocate (Higher Court; Criminal & Civil Proceedings) who is also a magistrate, each of whom reiterated their strong request for

the development of sentencing guidelines for various housing offences since their previous correspondence. Due to their individual interests, the suggestion for focus for guidelines covered two main groups of offences: unlawful eviction (Protection from Eviction Act 1977), and offences related to houses in multiple occupation (Housing Act 2004).

A. Unlawful eviction

3.23 There are at least 9 offences related to unlawful eviction under the Protection from Eviction Act 1977. As noted earlier, the current Renters Reform Bill going through Parliament, aims to make the enforcement of the Protection from Eviction Act a statutory duty (whether through civil or criminal means). The Chair of the Association of Tenancy Relations Officers (ATRO) and Principal Legal and Policy Officer in the Private Housing Standards at Sheffield City Council (one of the most active enforcement teams in a local authority) suggested that this legislative change is very likely to increase the number of prosecutions there will be; he is already receiving calls from colleagues in other local authorities asking for guidance.

3.24 Unlawful eviction is often not simply a civil matter, with significant harm caused to and impact on victims. The Guardian published a news story in December 2023 titled “Illegal evictions in England hit record high, but less than 1% landlords convicted”. As set out both by the Chair of the ATRO and also in this article, “illegal eviction, where a landlord forcefully removes a tenant from their home without a court order or even a legal reason, is often violent and routinely sees tenants having their possessions stolen by their landlord.” Cases cited include a tenant forced out of his home while awaiting surgery after weeks of harassment, before which the landlord changed the locks and took all the tenant’s possessions, including his medication, as alleged by the tenant.

3.25 Research by the charity Cambridge House through their service Safer Renting compiled statistics on illegal eviction by counting the number of cases logged by charities that support victims of the practice, as there is no existing routine form of data collection on the issue. This research found 8,748 cases in 2022, which according to their data trend, is a record high and 12% more than the year before, and is suggested to be a “substantial underestimate”. This is compared to the 46 prosecutions proceeded against and 36 convictions in 2022 from Ministry of Justice data cited in this research.

3.26 The Chair of the ATRO set out his concerns that a move away from criminal prosecutions for these types of offences would send the wrong message that these offences are not serious enough to be prosecuted, and that the way these offences are handled when dealt with through a civil penalty through the tribunals means they are ill equipped to understand the complexities of what is essentially a criminal case.

3.27 According to the General Guideline under the expanded explanation for Fines, “it should not be cheaper to offend than to comply with the law.” However, the Chair of the ATRO suggested it often costs more than £1,000 for a landlord to gain possession of their house, and cited his experience of some courts imposing as little as £250 for offences related to unlawful eviction.

B. Houses in Multiple Occupation (HMOs)

3.28 The Housing Act 2004 introduced three tiers of licensing for HMOs and a failure to obtain a licence is a summary criminal offence which is the most common type of HMO offence. Offences also cover breaches of The Management of Houses in Multiple Occupation (England) Regulations 2006, which are also summary criminal offences with unlimited fines. The offences are all strict liability subject to the defence of reasonable excuse and the parameters of 'reasonable excuse' are very narrow. There are also a number of other regulations, for example, concerning fire safety, which we do not currently have data for.

3.29 The group of offences related to houses in multiple occupation (Housing Act 2004) is another in which the harm to victims and prevalence of vulnerable victims may go some way to justifying the development of sentencing guidelines despite lower volumes of prosecutions. The barrister (who is also a magistrate) that I spoke to set out the average case for an HMO offence being a house with too many people living there in very poor conditions sharing basic facilities. Some aggravating factors she has experience of seeing is the landlord renting the space both to families with young children and also young adult males and renting to people without the correct immigration status. Her experience of more aggravating features include the landlord not returning deposits, harassment or taking advantage of or exploiting the tenants in their houses in a variety of ways.

3.30 The prosecution of these types of offences is also complex. Officers prosecuting landlords for failure to licence a HMO (for example) will also look at the standard of housing. One of the stakeholders talked to who has experience prosecuting but also presiding as a magistrate over these types of cases set out the prevalence of related offences being grouped together covering both HMO related offences but also housing safety and standards offences. This aggravates offences and should lead to much higher penalties, but the lack of guidelines mean that her experience is that penalties are low and inconsistent.

3.31 Given the issues in the housing market currently which is accentuated by the cost of living crisis, it is clear that there is a need for better regulation of multi-let properties for tenants and to ensure they are safe and habitable.

Issues

3.32 MHCLG published guidance in 2016 for local housing authorities on pursuing civil penalties sets out information on determining an appropriate sanction, including what factors a local housing authority should take into account when deciding whether to prosecute or impose a civil penalty.

> "Local housing authorities are expected to develop and document their own policy on when to prosecute and when to issue a civil penalty and should decide which option it wishes to pursue on a case-by-case basis in line with that policy. **Prosecution may be the most appropriate option where an offence is particularly serious or where the offender has committed similar offences in the past."**

3.33 This guidance also covers what factors a local housing authority should take into account when deciding on the level of civil penalty. Briefly these are below, and as members may recognise, include a number of the purposes of sentencing.

a) Severity of the offence.

b) Culpability and track record of the offender.

c) The harm caused to the tenant.

d) Punishment of the offender.

e) Deter the offender from repeating the offence.

f) Deter others from committing similar offences.

g) Remove any financial benefit the offender may have obtained as a result of committing the offence.

3.34 It is likely that this guidance will be updated following the Renters Reform Act gaining royal assent.

3.35 It is relevant to note here that if a local authority wants to ban a landlord from letting properties, that landlord must have been convicted of a banning order offence and the local housing authority must then seek a separate banning order conviction. Under Schedule 1 of the Housing and Planning Act 2016, these include offences outlined in this paper pertaining to the Protection from Eviction Act 1997, the Housing Act 2004 as well as further offences. In these cases, the local housing authority has the discretion to add the landlord to the aforementioned rogue landlord database.

Recommendation

3.36 The types of offences discussed in this paper are inherently difficult to prosecute in terms of the resource and knowledge required by local authorities and the police of these offences. The police do already have a duty to intervene, but for unlawful eviction especially, it is reported that cases are often wrongly dismissed as civil matters.

3.37 The high proportion of low level and inconsistent sentencing for prosecutions for these types of offences is widely recognised as a contributing factor to the reluctance of local authorities to prosecute these types of offences (in amongst other issues set out in this paper, such as resourcing). This reluctance, leading to low volumes of prosecution, results in sentencers who are inexperienced sentencing these types of offences and are therefore unsure how to impose sentences and fine levels (particularly for offences with unlimited fines), further adds to the inconsistency in sentencing.

3.38 Despite the low volumes, in part explained by the above, it has been suggested by stakeholders that sentencing guidelines for these offences would help local authorities differentiate when an offence should receive a civil penalty or be prosecuted, and of course provide guidance to courts on the appropriate criminal penalties for those offences and factors to take into account, resulting in more confidence in prosecuting these types of offences.

3.39 At this point, despite the low volumes, I would consider it of value to have further conversations with external stakeholders who have not written to the Council in the past on this issue but have significant experience in this area. These include Shelter, Cambridge House (Safer Renting), the National Residential Landlords Association (NRLA), Landlord Associations, individual local authorities (a group of which could be convened by DLUC, which has been offered) and/or more lawyers that prosecute and defend these types of cases in both magistrate and Crown courts.

3.40 Similarly, while we have a basic understanding of some of the data of these types of offences, there are a number of offences for which we have not yet found data through the Home Office offence codes and some offences are grouped together, so more in depth work and further analysis using Criminal Justice System codes to look at the data would be beneficial to increasing our understanding.

3.41 It is recommended the Council agrees to doing further work scoping this area despite the low volumes set out in Annex A.

Question 1: Does the Council agree to continue scoping housing offences despite the low volumes in the data?

Question 2: If the Council does wish to continue scoping housing offences, does the Council support an initial focus on offences related to Houses in Multiple Occupation (HMOs) and unlawful eviction?

Question 3: Does the Council have any views more broadly on the project as a result of the information in the paper, including any additional areas to focus on?

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Sentencing Council

Sentencing Council meeting:	**26 January 2024**
Paper number:	**SC(24)JAN06 – Assault (Harm)**
Lead Council member:	
Lead official:	**Lisa Frost** **Lisa.Frost@sentencingcouncil.gov.uk**

1 ISSUE

1.1 This meeting is to update the Council on work undertaken to identify if any issues are apparent with the approach to assessing harm in the Assault guidelines; specifically, whether a lack of provision for assessing harm risked rather than caused is leading to disproportionately low harm assessments and sentences for ABH and GBH S20 offences.

2 RECOMMENDATION

2.1 That the Council agrees to maintain the approach to assessing harm in the Assault guidelines and clarify the assessment relates to harm caused.

3 CONSIDERATION

3.1 At the July 2023 Council meeting the Council considered a paper in relation to the harm assessment in the Assault guidelines. Specifically, the question raised was whether the harm assessment should provide for foreseeable harm as provided for by section 63 of the Sentencing Act.

3.2 Section 63 of the Act provides:

> Assessing seriousness
>
> Where a court is considering the seriousness of any offence, it must consider—
>
> (a) the offender's culpability in committing the offence, and
>
> (b) any harm which the offence—
>
> (i) caused,
>
> (ii) was intended to cause, or
>
> (iii) might foreseeably have caused.

3.4 In summary it was noted that the intention in drafting the original guidelines was that the Assault guidelines should assess harm actually caused, given that the offence charged would be informed by the injury caused by the offence. In developing the revised guidelines

the Council considered that the culpability factors assess an offender's intention to cause harm and include foresight of the level of potential harm in a specific offence by factors such as the level of force, type of weapon used or duration of an attack.

3.5 The revision to the guidelines specifically sought to clarify issues identified in the evaluation of the guideline which had led to some unintended impacts, which included categorisation and sentence increases for GBH offences. The revision intended to ensure proportionate seriousness categorisations, and factors and sentences were developed to ensure these were suitably high in the most serious cases. Council members present during the development may recall that considerable work was undertaken to ensure relativity of sentences, and to ensure proportionality of sentences in comparison to similar or related offences such as Manslaughter. As an example, the starting point for a reckless culpability unlawful act manslaughter offence (which could be a GBH s20 offence if death does not occur) would be 6 years custody. The Council considered it important to ensure that sentences were properly calibrated to ensure that there is an appropriate distinction in the sentence reflecting harm caused in such offences.

3.6 It was highlighted that the potential conflation of culpability and harm was discussed recently in the case of R v Dixon, which in considering a GBH S18 sentence, interpreted the guideline correctly in its assessment of harm relating to actual harm rather than foreseeable or risked. In that case reference was made to the Seriousness guideline which stated that harm foreseen or intended may be relevant to the culpability of the offender:

> " If much more harm or much less harm has been caused by the offence than the offender intended or foresaw, the culpability of the offender, depending on the circumstances, may be regarded as carrying greater or lesser weight as appropriate " para. D 1.19 Overarching Principles: Seriousness Guideline.

3.7 While the Council agreed that the harm assessment for GBH s18 should relate to actual harm given the intention in the offence, it agreed work should be undertaken to assess if this approach was leading to unjustified seriousness assessments for assault offences which may be committed recklessly.

3.8 Transcripts are not available for common assault cases so analysis of 31 GBH s20 and 30 ABH transcripts has been undertaken. In terms of findings, there was an issue noted with the harm assessment in ABH cases involving non-fatal strangulation, with most assessed as category 2 harm due to a lack of serious physical injury or ongoing impacts. However, these predated the Cook judgement, and the Council is in the process of developing a separate guideline for this offence which will ensure appropriate categorisations of harm in these offences. In other cases; specifically, 4 ABH cases and 9 GBH cases; there were offences in which the risk of harm was higher than the harm caused,

either due to the type of weapon used or good fortune that an injury was not more severe. Details of those cases, and the relevant harm assessments, have been provided below:

ABH Harm assessment

Harm	
Category 1	Serious physical injury or serious psychological harm and/or substantial impact upon victim
Category 2	Harm falling between categories 1 and 3
Category 3	Some level of physical injury or psychological harm with limited impact upon victim

ABH: Offence and Injury description	**Harm categorisation**	**Final sentence**
1) V hit with a car used as a weapon (assessed as highly dangerous weapon) – driven at intentionally and knocked off feet. Cuts and grazes and soft tissue injury only but pain affected V for a number of weeks.	Cat 2	28 mths imp, reduced to 21 mths for plea
2) D used a broken bottle to hit V (one of his co-d's) to head in fight, cut to ear, left small scar. Weapon assessed as highly dangerous. Judge says could have been charged as unlawful wounding and sentence would have been higher.	Cat 2.	20 mths YOI reduced to 15 mths for plea
3) Savage attack on V while he was drunk and passed out. D bashed V's head on kerb and punched repeatedly. Witnesses described it as relentless and vicious. Head wound needing steri strips. Culp A as prolonged and persistent. Judge says injuries could have been more serious and does not suspend sentence as only immediate custody marks seriousness.	Cat 2.	18 mth SP reduced to 16mths imp with mitigation, reduced to 12 mths with credit for plea.
4) DA; D knocked V to the ground, kept coming back. There were stamps, there were kicks. Judge says 'Does not come into category one because the injuries are not as severe as category one demands; that is your good fortune. Very fortunate you are not standing there facing a murder charge, because those of us who regularly sit in these courts have seen people killed with one punch. I mean, it is a miracle the injuries were not far more severe'.	Cat 2.	2 years, reduced to 14 mths for plea and mitigation. Immediate custody.

GBH Harm assessment

Harm All cases will involve 'really serious harm', which can be physical or psychological, or wounding. The court should assess the level of harm caused with reference to the impact on the victim	
Category 1	Particularly grave and/or life-threatening injury caused Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment Offence results in a permanent, irreversible injury or condition which has a substantial and long term effect on the victim's ability to carry out their normal day to day activities or on their ability to work
Category 2	Grave injury Offence results in a permanent, irreversible injury or condition not falling within category 1
Category 3	All other cases of really serious harm All other cases of wounding

GBH S20: Offence and Injury description	**Harm categorisation**	**Final sentence**
1.) V kicked and punched and D plunged knife at her – V grabbed blade and it cut her hand. She was stabbed and kicked in head. Injuries healed but lasting psychological impacts. Pregnant female lead offender (aged 17 at time of offence) charged with s18 not s20. After plea, Petherick and Art 8 considerations 3 yrs 8 mths custody. Co-ds charged with s20 for assaults during attack	Cat 2 towards 3.	D2- 2 yrs 9mths immediate custody; D3 - (aged 16yrs 9mths at time of offence) 18 mths reduced to 10mths YOI (Manning relevant)
2.) V and D on a fishing trip and had argument; D stabbed V with knife being used to gut fish. Stabbed in thigh. Serious injury. Culp A. J said fortunate not more serious – may have resulted in fatality if artery had been cut.	Cat 2 – grave injury	3 yrs reduced to 27mths immediate custody for plea
3.) V attacked by 3 others. Extensive injuries; stab wounds which went in one side and exited other; required surgery and physiotherapy, left with limp and depression – Judge said it	Cat 2 (top of range)	4 years reduced to 3years (for pleas) for all 3 offenders

changed his life. Culp A. J said 'whilst the injuries sustained by Mr King in this case were, indeed, grave and have an impact on his life, they are not so significant as to fall into the particular grave or life-threatening section.'		
4.) Punch outside pub, v head hit ground. V fractured skull, bleeding and bruising to his brain. Lasting impacts, dizziness, slurred speech, psychological effects, can no longer run as makes him dizzy. Judge mentions potential for worse outcome if no medical intervention but in context that he left V there only. V could not work for 3 months.	Cat 2 (nb. This could potentially have been categorised as Category 1 due to lasting impacts, or top of cat 2 as previous case and higher SP).	2 years reduced to 16 mths for mitigation and 12 mths immediate custody for plea
5.) D suffering mental health issues; stabbed brother; single stab wound to abdomen that punctured small bowel; made a full recovery, which Judge said was lucky.	Cat 3	24 mths, reduced to 16mths immediate custody for plea
6.) Shaken baby. Bleeding on brain; unresponsive and floppy. Normal development, no ongoing harm.	Cat 3.	2 yrs reduced to 18 mths immediate custody for plea
7.) D glassed victim in face. Cuts requiring stitches, three to eyebrow four to neck. Some smaller cuts and some permanent scars but not as bad as could have been. Judge says extremely fortunate not to cause loss of eye or cut an artery. Says risk of harm very high.	Cat 2	2 years 6 months reduced to 22 months immediate custody for plea
8.) Punched female in jaw causing her to fall to ground. Broken jaw and small brain bleeds; required surgery for jaw. Judge says brain bleed could have been potentially life threatening but no evidence of that.	Cat 2.	2 years reduced to 21 months immediate custody for plea
9.) Very few facts but car was weapon and D lost temper. Ongoing impacts for V- headaches; loss of vision in one eye so lost driving licence; panic attacks. Judge says some potential harm foreseen and significant caused. Jury had not convicted of s18 and D pleaded to s20. Car was used as a weapon but only assesses as Culp B.	Cat 2.	3 years immediate custody (10 mths concurrent for other offences of dangerous driving and DWD so Judge aggregates criminality)

3.9 It should be noted that in some cases the harm categorisation did not appear to be as high as it should have been. However, this appeared to be due to the interpretation and

application of the harm assessment by the Judge rather than the factors not providing for a higher categorisation.

3.10 While some Judges did mention harm risked and foreseen and the good fortune that harm was not more serious in some cases, categorisations were based on the harm caused. However, in those (and indeed all) cases where risk was higher than actual harm, immediate custody was imposed and the offences all considered too serious to consider suspending the custodial sentence. It was agreed when this matter was last considered that work would be undertaken to estimate the impact of any change in approach to assessing harm; specifically if foresight or risk of harm is assessed.

Analysis

3.11 Some analysis was undertaken to illustrate what the impacts could be of amending the harm model for ABH and s20 offences if sentencers were to assess harm as higher than currently. This analysis considered the impact of a movement from harm category 3 to 2 and from harm category 2 to 1, for cases falling into culpability A or B. Any cases categorised as culpability C were not considered in scope for this analysis.

3.12 The guideline starting points for offence categories A1 to B3 were taken as purely indicative sentences and the proportion of offenders within each of the six offence categorisations were estimated from the most recent data collection. Three different scenarios were modelled for each offence: a high, medium and low scenario in terms of movement between harm categories (assuming that assessing risk or foresight of harm rather than actual harm would elevate harm categorisations above their current harm category). The findings and the scenarios are summarised in Table 1 below.

3.13 **Table 1: Estimated additional prison places a year**

Offence	Prison place estimates		
	High scenario (40% movement)	Medium scenario (25% movement)	Low scenario (10% movement)
ABH	800	500	200
GBH S20	300	200	100

3.14 These additional prison place impacts are rounded to the nearest 100 places and are indicative only. The three scenarios have been generated to show the potential for impacts arising from a change to the harm model resulting in sentencers increasing the harm category, for cases falling into culpability A or B. For example, if one quarter of offenders (medium scenario) sentenced for GBH S20 and categorised as culpability A or B moved

from either harm category 3 to 2 or from harm category 2 to 1, the impact on the prison estate has been estimated to be up to 200 additional prison places a year.

3.15 It is not recommended that the harm assessment be revised to provide for assessment of harm risked or foreseen, not only because of the potential impact of doing so. As discussed previously, the offender's intention and foresight of harm likely to be caused is assessed by the method of the assault or vulnerability of the victim. Use of a more dangerous weapon is highly indicative that the offender intends to cause a higher degree of harm, even where an offence is committed recklessly. There is a risk that any foresight will be double counted if the harm assessment is broadened to include risk of harm. A further concern is the subjectivity which would be introduced into the harm assessment, and the difficulty of defining how risk should be assessed. While some risks are obvious, others are remote, and risk assessments would likely be inconsistent potentially leading to unjust sentences and increased appeal volumes.

Question 1: Does the Council agree the harm assessment should be clarified as relating to harm caused, or should harm risked be assessed?

4 IMPACT AND RISKS

4.1 As noted, there is a risk that providing for harm foreseen in an assault offence will have an inflationary impact upon sentences, which were developed to ensure proportionality of sentence and address some of the inflationary aspects found in the evaluation of the original guideline.

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Sentencing Council

External communication evaluation

November 2023

Visits to www.sentencingcouncil.gov.uk

	This month	Last month
Users*	160,894	155,000
Engaged sessions per user**	2.2	2.2
Ave engagement time	8m 10s	8m 10s

Announcements

8th	User testing of sentencing guidelines
15th	Sentencing Council business plan 2023/24 update
29th	Imposition of community and custodial sentences guideline to be revised

*Users: Number of people who have visited the website at least once within the date range
**Engaged sessions are visits to the website that lasted longer than 10 seconds or had 2 or more page views

Most visited pages	Pageviews	Unique pageviews
Magistrates' court guidelines search page	146,344	27,549
Fine calculator	20.232	9,866
Website homepage	19,674	8,826
offences/magistrates-court/item/ common-assault-racially-or-religiously-aggravated-common-assault-common-assault-on-emergency-worker/	18,344	9.750
offences/magistrates-court/item/supplying or offering to supply a controlled drug/possession of a controlled drug with intent to supply to another	13,459	8,325
offences/magistrates-court/item/ assault occasioning actual bodily harm	12,464	7,784
Magistrates' court homepage	11,543	5,159
offences/magistrates-court/item/excess alcohol (drive/attempt to drive)	11,457	6,062

Top searches

This month	Last month
Theft	Theft
Burglary	Assault
Assault	Burglary
Dangerous driving	Speeding
Speeding	Dangerous driving
Robbery	Criminal damage
Murder	Sexual assault
Fraud	Compensation

YouTube

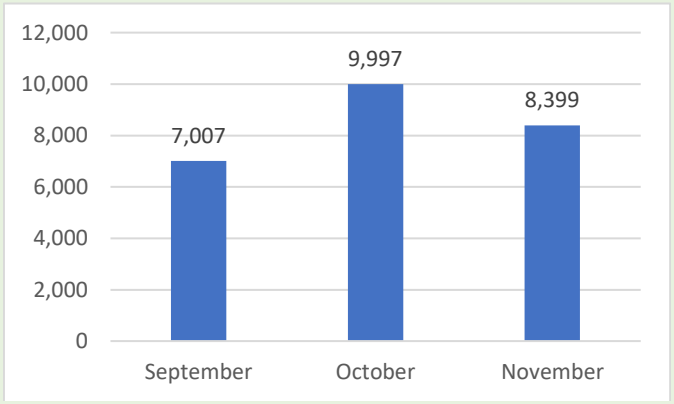
Subscribers

+17 = 1,443

Watch time average

01:54

Video views per month



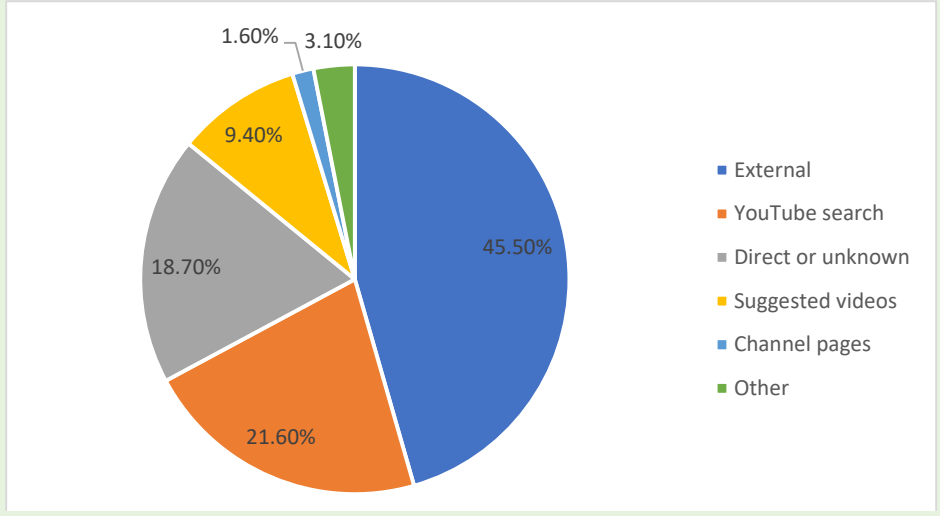
Impressions*

This month	Last month
40,077	39,669

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

YouTube

How viewers find our videos



Top referring sites for videos

Sentencingcouncil.org.uk	49.1%
Google search	8.7%
Google docs	5.4%
Judiciary.uk	3.6%

- External: Traffic from websites and apps embedding or linking to our videos on YouTube
- Direct or unknown: using direct link or bookmark to our YouTube channel or unknown
- Suggested videos: suggested to users viewing other videos on YouTube

Subscription email bulletin

Subscribers

+199 = 7,942

Most clicked-through links

Imposition of community and custodial sentences guideline - consultation

Minutes of October meeting

Imposition of community and custodial sentences consultation news item

All bulletins

	This month	Last month
Sent	5	5
Delivered	94.3%	94.0%
Opened	30.1%	30.6%
Engagement rate*	3.3	3.7

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

Sentencing Council

OFFICIAL - SENSITIVE

Twitter

Followers

+0 = 6,064

Highlights

	Tweets	Impressions	Engagement	Engagement rate (ave)
This month	**2**	2,182	104	5%
Last month	**4**	Not available for October		

Top tweet

We're consulting on proposed changes to the guideline for imposing community and custodial, incl suspended, sentences. Changes cover guidance on sentencing young adult and female offenders and when courts should request pre-sentence reports bit.ly/49MDMtw

Impressions: 1,439	Total engagements: 60

Top mention

Thanks to @AyshahTull & @mayaelese @Channel4News 4 your excellent report & the opportunity to talk about @UniofHerts pregnancy in prison research. Rianna's bravery sheds light on the need 4 **@SentencingCCL** to ensure pregnancy is a mitigating factor. In memory of baby Aisha, RIP

Dr Laura Abbotgt @midwifeteacher

Associate Professor, Pregnancy in Prison research, Midwife, Uni of Herts #goherts. FRCM. PI - ESRC Lost Mothers Project. Co-founder PiPPI #NoBirthsBehindBars
3,170 followers

- 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

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