

# Arson and Criminal Damage Offences Guideline

## Response to consultation

July 2019

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# Foreword



On behalf of the Sentencing Council I would like to thank all those who responded to the consultation on this guideline. I also extend my thanks to the members of the judiciary who gave their time to participate in the research exercise undertaken to test and inform the development of the guideline.

As with all Sentencing Council consultations, the views put forward by all respondents were carefully considered, and the range of views and expertise were of great value in informing the definitive guideline. Because of those views, a number of changes have been made across the offences including the inclusion of new text that prompts consideration of a community order with mental health, drug or alcohol treatment requirements as an alternative to a short or moderate custodial sentence. The Council has also made changes to individual guidelines to address the issues raised. The detail of those changes is set out within this document.

In developing these guidelines, the Council has recognised and reflected the variation within damage to property offences, from destruction by fire which can cause damage of great value and danger to life, to minor incidents of damage to items of little financial value. However, even damage to items that have little financial value can cause great distress to victims, as the items may be of great sentimental value, and may be irreplaceable. Additionally, property may have a wider public value.

This set of guidelines will provide vital assistance to sentencers across England and Wales, particularly for the offences of criminal damage/arson with intent to endanger life or reckless as to whether life endangered, and the threats to destroy or damage property offence, for which no guidance previously existed.

**Lord Justice Holroyde**  
**Chairman, Sentencing Council**

# Introduction

In March 2018 the Sentencing Council published a consultation on a package of draft guidelines which included: arson, criminal damage/arson with intent to endanger life or reckless as to whether life endangered, criminal damage, including racially or religiously aggravated criminal damage, and threats to destroy or damage property. Previously, there was limited guidance within the Magistrates' Court Sentencing Guidelines (MCSG) for the sentencing of arson and criminal damage.

The Council's aim throughout has been to ensure that all sentences are proportionate to the offence committed and in relation to other offences. The reaction to the draft guidelines was positive.

The guideline will apply to all those aged 18 or over who are sentenced on or after 1 October 2019, regardless of the date of the offence.

# Summary of analysis and research

Several research exercises were carried out to support the Council in developing the guideline. To support the development of the guideline, content analysis was conducted of judges' sentencing remarks for 110 defendants sentenced for all the offences included within this guideline. This provided indicative yet valuable information on some of the key factors influencing sentencing decisions for these cases.

In addition, at an early stage a small-scale survey of magistrates was conducted, to which 25 responded. This provided views on the current guidance where it existed for these offences, and suggestions as to what the Council may want to take into consideration when developing guidance for the remaining offences. Some of the comments from the survey were that revised guidelines should place a greater emphasis on the impact of the offences on victims, as the current guidance relied heavily on the value of the damage caused.

During the consultation stage of guideline development, qualitative research was carried out to help gauge how the guideline might work in practice. Twelve interviews were conducted with Crown Court judges on the draft guideline for the criminal damage/arson with intent to endanger life or reckless as to whether life endangered guideline, and several research exercises were carried out at events with magistrates on the draft guideline for racially aggravated criminal damage.<sup>1</sup>

Because of this research, in combination with consultation responses, a number of changes were made to the draft guidelines, including: adding a reminder to sentencers not to double count factors from step one and step two for the aggravated arson/criminal damage offence, and adding a new mitigating factor of 'Lack of premeditation' for that offence. In addition, for the racially or religiously aggravated criminal damage offence, a note has been added to remind sentencers not to double count 'distress' when considering the basic and aggravated offence. In this way, analysis and research played an important part in the development of the guideline.

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<sup>1</sup> Around 90 magistrates were consulted across three separate events.



From November 2017 to March 2018, a data collection exercise was also conducted in a sample<sup>2</sup> of magistrates' courts across England and Wales. As part of this exercise, sentencers were asked to give details of the sentencing factors they took into account and the final sentence they imposed each time they sentenced an adult<sup>3</sup> for one of a list of offences, which included the offences of criminal damage under £5,000 and over £5,000.<sup>4</sup> The data from this exercise will be used to help assess the impact of the definitive guideline.

A statistics bulletin and draft resource assessment were published alongside the consultation, and updated data tables and a final resource assessment have been published alongside the definitive guideline and consultation response document.

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<sup>2</sup> In total, 80 magistrates' courts were selected to take part in the exercise, based on the volume of offenders sentenced in those courts over the same period the previous year.

<sup>3</sup> Offenders aged 18 and over only.

<sup>4</sup> The data collection also included the following offences/orders: possession of a bladed article or offensive weapon; harassment and stalking, breach of a protective order; breach of a community order; and breach of a suspended sentence order.

# Summary of responses

The consultation sought views from respondents on the five separate guidelines. In total, 26 responses to the consultation were received.

## Breakdown of respondents

Type of respondent	Number
Charity/not for profit organisations	3
Legal professionals	4
Judiciary (2 representative body responses)	2
Other	4
Academics	1
Government	2
Members of the public	2
Magistrates (4 collective and 4 individual responses)	8
<b>Total</b>	<b>26</b>

Feedback received from the Council's consultation events and interviews with sentencers during the consultation period is reflected in the discussion in the text below.

In general, there was a positive response to the proposals. However, the Council was also grateful for constructive criticism and considered suggestions for amending parts of the five draft guidelines.

The substantive themes emerging from the responses to the guidelines included:

- That the wording of factors between culpability A and B was too similar.
- That references to 'recklessness' should be removed from high culpability, and placed in medium culpability.
- Concern with the qualifying wording of the lesser culpability factor of 'Offender's responsibility substantially reduced by mental disorder\* or learning disability'. Which had read:\* 'Reduced weight may be given to this factor where an offender

exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice’.

- That the placing and wording of text relating to psychiatric reports should be reconsidered, that it should appear at culpability at step one, not at step two of the guideline.
- That the proposed guidance for the racially or religiously aggravated offence could risk double counting, with distress potentially being counted twice, for the basic offence and for the aggravated offence.

The Council has responded to these comments by:

- Rewording some factors in culpability A and B.
- Moving any references to ‘recklessness’ to medium culpability, with only references to ‘intent’ in high culpability.
- Removing the qualifying wording which had read ‘\*Reduced weight may be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice’ across all the guidelines.
- The wording relating to psychiatric reports has been moved to step one of the guideline where it appears, and has been reworded, recommending a tiered approach to requesting reports.
- Adding wording to the aggravated offence reminding sentencers not to double count, and putting the wording ‘Over and above the distress already considered at step one’ in bold.

In addition, the Council made several changes to each individual guideline. The detailed changes to the individual guidelines are discussed below.

# Arson

## Culpability factors

This guideline has three levels of culpability, 'A' high, 'B' medium and 'C' lesser culpability. The Crown Prosecution Service (CPS), Magistrates Association (MA) and Law Society commented that the wording of factors between culpability A and B was too similar, (specifically the last two factors within each category), and that references to 'recklessness' should be removed from high culpability, and placed in medium culpability. The Law Society stated that they believed '*...there is risk of sentence inflation and potentially, double counting and injustice, by elevating recklessness on a par with intent in assessing culpability...*' These respondents noted that the structure for culpability for the 'aggravated' arson/criminal damage offence separated out intent into culpability A, and recklessness into culpability B, and asked whether there could be more consistency between the two guidelines.

However, the reason why this particular structure was used for the aggravated offence was because although one offence, cases involving intent are treated more seriously than those involving recklessness, and are sentenced accordingly. This structure allowed for those differences to be clearly reflected within one guideline. For simple arson, less distinction is drawn between recklessness and intent, so such a structure was unnecessary. The Council however agreed that references to recklessness should be removed from high culpability. There are now only references to intent within culpability A, and recklessness within culpability B.

The Council also decided to make some changes to culpability B, to address the concern raised that the factors are too similar between A and B. During the development of the draft guideline two factors in category B 'Intention to cause significant damage to property' and 'Recklessness or intention to create a significant risk of injury to persons' were developed to try and provide more guidance to sentencers as to what kind of cases might fall into medium culpability. However, respondents commented that 'Very serious damage to property', and 'A high risk of injury' in category A are too similar to 'Significant damage to property' and a 'Significant risk of injury' in category B, and that court time would be wasted in arguing the difference between the two.

Accordingly, the Council has made some changes to address these concerns. Culpability B has been reworded so it reads: 'Cases that fall between categories A and C because: factors are present in A and C which balance each other out **and/or** the offender's culpability falls between the factors described in A and C'. As noted above, references to intent have been removed from this category, there are only references to recklessness. Therefore, 'Intention to cause significant damage to property' has been reworded to 'Recklessness as to whether very serious damage to property caused', and 'Recklessness or intention to create a significant risk of injury to persons' reworded to 'Recklessness as to whether serious injury to persons caused'.

In addition, a new factor of 'Some planning' has been added to medium culpability, to assist sentencers in the appropriate categorisation of cases, as there is a factor of 'High degree of planning' in high culpability, and 'Little or no planning: offence committed on impulse' in low culpability. In lesser culpability a new factor of 'Recklessness as to whether some damage to property caused' has been added, again to assist in the categorisation of cases, as there is a high culpability factor of 'Intention to cause very serious damage to property' and a medium factor of 'Recklessness as to whether very serious damage to property caused.'

A number of respondents expressed concern about the wording of the lesser culpability factor of 'Offender's responsibility substantially reduced by mental disorder\* or learning disability'. The wording next to the asterisk qualified the factor, stating '\*Reduced weight may be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice.' This wording appeared across all the offences in this guideline. The Criminal Bar Association (CBA), MA, Prison Reform Trust (PRT), London Criminal Courts Solicitors' Association (LCCSA) and the Justice Committee all objected, particularly to the qualifying wording, the LCCSA calling it 'draconian' and others saying it failed to take into account the use of drugs or alcohol to self-medicate, or to alleviate distress.

It was also queried whether, given the aggravating factor of 'Commission of offence whilst under the influence of alcohol or drugs' and the fact that a high number of people with mental disorders have drug/alcohol problems, that would be double counting, and these offenders would be doubly penalised. The Justice Committee noted that the wording was not the same as used in the definitive manslaughter guideline, and suggested that the wording here should reflect that of the manslaughter guideline. The Council took note of these concerns, and decided to remove the qualifying wording, leaving the factor

unqualified, as it appears in many other guidelines. This change has been made throughout the guidelines where this factor appears. The Council is currently consulting on a draft guideline for sentencing offenders with mental health conditions or disorders, in due course when finalised it will be cross referred to in all offence guidelines, and will offer more guidance to courts on assessing culpability in these circumstances.

The rest of the culpability factors remain unchanged from the consultation version of the guideline.

## **Psychiatric reports**

In all the offences apart from criminal damage there was wording under the sentence table suggesting to sentencers that they consider asking for psychiatric reports, to assist in sentencing. The inclusion of this wording met with general approval by respondents, except for the PRT, who questioned the positioning of the text. They stated that sentencers need to be fully informed of any mental health disorder/learning disability whilst considering culpability at step 1, yet the wording appears at step 2 of the draft guideline, and is focused on sentencing disposals. They suggested that the wording should appear at step 1, right at the very start of the guideline. They recommended a tiered approach, so that a report is requested from Liaison & Diversion services, followed by a medical practitioner, and finally, if required and appropriate, a psychiatric report. The Council agreed with this suggestion, and placed revised wording above culpability at step 1 which reads:

<p>'Courts should consider requesting a report from: liaison and diversion services, a medical practitioner, or where it is necessary, ordering a psychiatric report, to ascertain both whether the offence is linked to a mental disorder or learning disability (to assist in the assessment of culpability) and whether any mental health disposal should be considered'</p>
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This wording also appears in the 'aggravated' arson and criminal damage offence, and the threats to destroy or damage property offence.

## **Harm factors**

Respondents were supportive of the proposed structure for harm, and the harm factors. The only suggested amendment was from Historic England, who wanted a specific reference to 'cultural' inserted into the category 1 harm factor of 'Serious consequential

economic or social impact of offence' as they felt this would better capture heritage assets. They also suggested that the same amendment should be made in harm in the aggravated arson offence. The Council considered this suggestion carefully, but decided that the factor as drafted already could include consideration of cultural issues, within the social impact of the offence. However, the Council did decide to include a reference to 'cultural' within the aggravating factor of 'Damage caused to heritage assets' throughout the guidelines, so that factor reads: 'Damage caused to heritage and/or cultural assets'.

## Community orders

The CBA suggested that given the proportion of offenders with mental health issues within these offences, there should be a reference inserted above the sentence table that prompts consideration of a community order with a mental health treatment requirement as an alternative to a short or moderate custodial sentence. They pointed to the sexual offences guideline which has similar wording relating to community orders, where there is a sufficient prospect of rehabilitation. The Council agreed with this suggestion, and decided that as drugs and alcohol are also common features within this type of offending, and offenders with mental health problems frequently also have drug/alcohol problems, a reference to community orders with drug rehabilitation or alcohol treatment requirements should be included. The new wording is shown below, and is included throughout the offences within this guideline.

Where the offender is dependent on or has a propensity to misuse drugs or alcohol, which is **linked to the offending**, a community order with a drug rehabilitation requirement under section 209, or an alcohol treatment requirement under section 212 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Where the offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

## Sentence levels

Generally, consultation respondents agreed with the proposed sentence ranges. The Council of HM Circuit Judges thought that there should be a custodial option within every custody range. As the proposed ranges have a custodial option within every range except for one at the very bottom of the range, the Council decided to leave the proposed ranges

as drafted. The Legal Committee of the Council of District Judges commented that the wording above the sentence table should not just refer to 'exceptional cases'. They argued that, because arson is such an easy crime to perpetuate, but that the effects can be devastating, going above the top of the range of eight years should be available for the most serious of cases – not just 'exceptional cases'. The Council decided not to change the proposed wording. The top of the range in A1 goes to eight years' custody, and although the maximum for this offence is life imprisonment, current sentencing data shows that very few offenders are getting sentences above eight years. As the Council does not intend to change current sentencing practice for these offences, it was decided that the wording was appropriate.

## **Aggravating and mitigating factors**

### **Aggravating factors**

Very few comments were received regarding the proposed aggravating and mitigating factors. Two new aggravating factors were suggested, the Law Society and the National Fire Chiefs Council suggested 'Offence committed for financial gain', to destroy commercial rivals, or for the insurance, for example, and 'Offence committed to conceal other offences', such as burglary. The Council agreed with these suggestions so these two factors have been added.

### **Mitigating factors**

The Law Society and the CBA suggested a new mitigating factor, 'Offender lit fire accidentally and/or tried to minimise its effect'. The Council agreed that such a factor was appropriate to include, but changed the wording slightly so it reads: 'Steps taken to minimise the effect of the fire or summon assistance'. A slight amendment to the factor of: 'Age and/or lack of maturity where it affects the responsibility of the offender' has been made, the wording 'where it affects the responsibility of the offender' has been removed, as age or lack of maturity may be a broader consideration, other than just where it affects responsibility. This change has been made across all the offences within this guideline.



# Criminal damage/arson with intent to endanger life or reckless whether life endangered

## Culpability factors

As noted on page 10, for this offence culpability was separated into two fixed categories, culpability A for cases involving intent, and culpability B for recklessness cases, to reflect the fact that intent cases are treated more seriously by the courts and generally attract longer sentences. Other factors that might make the offence more serious, such as use of an accelerant, or less serious, such as a mental disorder, appear as aggravating or mitigating factors at step 2. Respondents were overwhelmingly supportive of this approach to culpability, so there are no changes to culpability.

## Harm factors

As culpability is fixed for this offence, the proposed harm factors were quite expansive, with a number of medium harm category factors to try to assist courts to assess harm effectively. As well as considering the *actual* harm caused, within harm for this offence there is also a factor to try and capture the risk posed by the offending (the second bullet point in each of the harm categories). This approach to harm was generally supported by respondents, except the CPS who questioned the use of both 'high' and 'very high' within category 1, and 'significant' in category 2. They said these factors were too similar, would lead to uncertainty and make it difficult for courts to decide whether harm should fall into category 1 or 2. They proposed instead using the harm factors from 'simple' arson which just has category 2 as 'Harm that falls between categories 1 and 3'. The LCCSA also made similar comments.

However, wherever possible, factors are included in medium levels of harm and culpability in response to requests by sentencers, who say that deciding what falls into the medium level can be difficult without specific factors. The Council felt particularly for this offence, with its fixed culpability structure that there is a strong argument for retaining the specific

medium harm factors, particularly as most respondents did not raise any objections to the proposals. Accordingly, the harm factors remain unchanged.

## Sentence levels

As with arson, most of the consultation respondents agreed with the proposed sentence ranges. The Council of HM Circuit Judges disagreed however, stating that the starting points in the sentencing table were too low. They said that eight years as a starting point in A1 is not sufficiently high for the most serious cases of intent to endanger life, that most judges would be looking at starting in double figures where there has been intent to endanger life, very serious physical/psychological harm caused or risked, and a great deal of damage caused. They suggested that the starting point in A1 should at least be 10 years, category 2 at least 7 years and category 3, three years. They stated that they had less problem with the ranges in B, for reckless, although they thought they should each start a year higher.

When setting the ranges for consultation, alongside considering current sentencing data, the Council was also mindful of the case of *Myrie*.<sup>5</sup> In *Myrie*, the court said that the starting point for arson with intent was in the range of eight to 10 years, following a trial, and in cases involving reckless arson, that the range would be rather below that.

The Council considered the point raised by the Council of HM Circuit Judges carefully, but decided not to make any changes to the starting points. Increasing the starting points would also mean having to increase the top of the sentence ranges, for example, if the starting point in A1 was increased from eight to 10 years, the category range would probably need to increase from 12 to 14 years, giving a range of nine years, from five years to 14 years. The ranges would then become so wide that they then would offer little guidance to sentencers.

The Council was also mindful of the possible risk that making increases to the top of the ranges for this offence may increase sentencing severity, as current sentencing data shows that 93 per cent of all offenders sentenced to immediate custody in 2015 for arson endangering life offences received an estimated pre-guilty plea sentence of 8 years or less, and 98 per cent received a sentence of 12 years or less.<sup>6</sup> In addition, there is the

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<sup>5</sup> AG's reference no 68 of 2008 (*Myrie*) [2008] EWCA Crim 3188

<sup>6</sup> The sentence length information available in the Ministry of Justice's Court Proceedings Database is the final sentence imposed, after any reduction for guilty plea. Sentence lengths have been adjusted using data from the Crown Court Sentencing Survey (CCSS) to provide estimates of the sentence length before the application of a reduction for any guilty plea. These estimates provide a better indication of the use of sentencing guidelines as the category ranges specified in the guidelines are those before any guilty plea reduction is applied.

wording above the sentence table that says that for exceptional cases within category A1, sentences above the top of the range may be appropriate.

The Council did, however, decide to increase the top of the range in category A3, from three to four years, deciding that the top of the range should meet the bottom of the range above in A2.

### **Aggravating and mitigating factors**

Several judges during research into the guideline mentioned the risk of double counting, stating that some of the aggravating factors, e.g. multiple people endangered, may have already been considered when determining the harm category. They suggested putting a note in to remind sentencers not to double count. The Council agreed this was a sensible precaution, so new wording has been inserted above the factors to read: 'Care should be taken to avoid double counting factors already taken into account in assessing the level of harm at step one'.

A suggestion was made during the research with judges of an additional mitigating factor: 'Lack of premeditation'. The Council agreed that this should be included, to provide a counter balance to 'Significant degree of planning or premeditation' as an aggravating factor.

The draft guideline also contained a 'step three' which gave information on mental health disposals. This has been removed as it has been superseded by the development of the new mental health guideline, which all guidelines will link to in due course.

# Criminal damage (other than by fire) value exceeding £5,000

## Structure of the guideline

Two separate guidelines for this offence were consulted on, one for offences not exceeding £5,000, (which are summary only, with a maximum of 3 months' custody), and one for offences exceeding £5,000, (triable either way, with a maximum on indictment of 10 years' custody). Consultation respondents strongly supported this approach of having two guidelines, so the Council decided to retain the two separate guidelines.

However, although the CBA agreed with the approach, they commented that there is potential for confusion by virtue of the fact that, where there has been no sending for trial on a charge of criminal damage, and the indictment is amended to add a count of criminal damage, the maximum is 10 years' custody even if the amount does not exceed £5,000.

The Council decided that it would be helpful to provide some guidance on this point.

Therefore, new text has been added to this guideline as shown below:

***Where an offence of criminal damage is added to the indictment at the Crown Court the statutory maximum sentence is 10 years' custody regardless of the value of the damage. In such cases where the value does not exceed £5,000 regard should also be had to the 'not exceeding £5,000' guideline.***

Wording has also been added to the not exceeding £5,000 guideline as shown below:

***Where an offence of criminal damage is added to the indictment at the Crown Court the statutory maximum sentence is 10 years' custody regardless of the value of the damage. In such cases where the value does not exceed £5,000, the 'exceeding £5,000 guideline' should be used but regard should also be had to this guideline.***

## Culpability factors

The comments made by respondents on the culpability factors were very similar to those made in relation to the arson offence. Therefore, all the changes outlined within the discussion on arson on pages 9 and 10 have also been made to the factors for this offence (culpability factors were the same within both criminal damage and arson offences, save for an accelerant factor in arson).

## **Harm factors**

Respondents generally agreed with the proposed structure and harm factors, save for a few suggested amendments. The Law Society felt that the factor 'Damaged items of great sentimental value' should be removed from category one harm. They said that although they accepted that damage to sentimental value could be distressing to victims, its inclusion within category one could lead to sentence inflation. They suggest that it should be an aggravating factor instead. The Council agreed with this suggestion and created a new aggravating factor as shown below:

'Damaged items of great value to the victim (whether economic, commercial, sentimental or personal value)'

The MA suggested that if the damage meant a victim's property is no longer secure, i.e. through broken locks/windows, which in turn leads to them feeling unsafe in their home, this should be reflected within harm. The Council considered this point but decided that it could already be captured by the category one harm factor 'Serious distress caused'.

## **Sentence levels**

Consultation respondents generally agreed with the proposed sentence levels, except for the Legal Committee of District Judges, who argued that the starting points in categories one and two were a little too low. Current sentencing data shows that 63 per cent of all offenders sentenced to immediate custody in 2017 received an estimated pre-guilty plea sentence of nine months or less, the estimated pre-guilty plea mean sentence length was one year, and the median six months' custody. Therefore, the only change the Council decided to make was to reduce the top of the range in C1, B2 and A3 from one year to nine months' custody.

## **Aggravating and mitigating factors**

There were no further changes to these factors save for those already discussed on page 13.

## **Racially or religiously aggravated criminal damage**

Consultation respondents were generally in agreement with the proposed approach to sentencing racially or religiously aggravated offences. However, Professor Mark Walters raised an issue with the guidance on hate crime in the explanatory materials to the MCSG, which also relates to the approach taken within these offences.

The approach to sentencing both these offences adopted the approach taken within the MCSG. This states that courts should not treat an offence as racially or religiously aggravated for the purposes of section 145 of the Criminal Justice Act (CJA) 2003, where a racially or religiously aggravated form of the offence was charged but resulted in an acquittal.<sup>7</sup> Also, that the court should not normally treat an offence as racially or religiously aggravated if a racially or religiously aggravated form of the offence was available but was not charged.<sup>8</sup> Accordingly, where a racially or religiously aggravated form of the offence was available, the list of statutory aggravating factors for the basic offence does not include religion or race, whereas these factors were included for the offences without an aggravated form of the offence.

Professor Walters says that... *'exceptionally s.145 of the CJA may still apply in cases involving racial or religious aggravation so long as the indictment at no point included an aggravated form of the offence in question; the defence had an opportunity to challenge the issue at a trial; the judge concludes to the criminal standard that the offence was racially or religiously aggravated; and the Judge's finding is not so inconsistent with a jury verdict, this reflects the decision of O'Leary.'*<sup>9</sup>

Professor Walters suggests that additional wording to reflect his point is added to the guidelines. The Council considered this point carefully, but noting the exceptional nature of the situation in *O'Leary* decided that the approach used in the consultation should be maintained.

The testing of this guideline with sentencers highlighted an issue with distress, and the risk of double counting. Some participants felt unable to distinguish the distress caused by the aggravated offence from the distress caused overall, so they in effect counted distress twice, and arrived at a higher categorisation, compared to those who focused on other factors. Distress is considered at harm in step one, in considering the basic offence, and then within the aggravated offence, there is a factor relating to distress in all the levels of aggravation, which states 'Aggravated nature of the offence caused distress to the victim or victim's family over and above the distress already considered at step one'.

The Council decided not to remove the distress factors from the aggravated offences, as they are an integral consideration within this offence. Instead it was decided that the wording 'Over and above the distress already considered at step one' is put in bold, and

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<sup>7</sup> R v Gillivray [2005] EWCA Crim 604 (CA)

<sup>8</sup> R v O'Callaghan [2005] EWCA Crim 317 (CA)

<sup>9</sup> R v O'Leary [2015] EWCA Crim 1306

there is some wording added to remind sentencers to take care not to double count, as shown below. This should then mitigate against the risk of double counting.

Care should be taken to avoid double counting factors already taken into account at step one

# Criminal damage (other than by fire) value not exceeding £5,000

As noted in the discussion on page 17, additional wording has been added to reflect the point raised by the CBA.

## **Culpability factors**

The comments made by respondents on the culpability factors were very similar to those made in relation to the arson offence. Therefore, all the changes outlined within the discussion on arson on pages 9 and 10 have also been made to the factors for this offence (culpability factors were the same within both criminal damage and arson offences, save for an accelerant factor in arson).

## **Harm factors**

For this offence there were only two harm categories proposed. Respondents generally agreed with the proposed structure and harm factors. The only change made has been the one outlined in the discussion on page 18 moving 'Damaged items of great sentimental value' from category one harm to become an aggravating factor instead.

## **Sentence levels**

Most of consultation respondents agreed with the proposed sentence levels, one of the few comments made was by a magistrate who stated he thought the starting point in A1 should cross the custody threshold. The ranges were reconsidered, but the Council decided not to make any changes. With a maximum of three months' custody, it would be quite difficult to alter the ranges. Potentially the starting point in A1 could increase from a high-level community order to six weeks' custody, but that would be such a short custodial sentence the Council decided it was appropriate to leave the starting point as it is and have a reasonably wide sentencing range.



**Aggravating and mitigating factors**

There were no further changes to these factors save for those already discussed on page 13.

**Racially or religiously aggravated criminal damage**

Please see pages 18 and 19 for a discussion on this guidance.

# Threats to destroy or damage property

## Culpability factors

Respondents generally agreed with the draft guideline for this offence, save for some suggested amendments and additions. The National Fire Chief's Council (NFCC) suggested that motivation should extend beyond revenge, the factor in high culpability, to include references to offenders using the threat to destroy/damage property to intimidate or coerce victims for financial gain or control purposes, in the context of modern day slavery or organised crime. The Council agreed with this suggestion and has now included: 'Offence committed to intimidate, coerce or control' as a factor in high culpability.

The MA queried why the factor of 'Involved through coercion, intimidation or exploitation' which was included as a lesser culpability factor in the other offences consulted on, was not included for this one. They stated that this factor could also apply to those sentenced for this offence. The Council agreed and has now added this factor to lesser culpability.

In the discussion on page 11 the changes to the wording requesting psychiatric reports was discussed. The wording is slightly different for this guideline than that for the other guidelines, with the addition of the words 'In cases of threats to cause damage by fire', to the wording discussed on page 11, so that it reads:

'In cases of threats to cause damage by fire, courts should consider requesting a report from: liaison and diversion services, a medical practitioner, or where it is necessary, ordering a psychiatric report, to ascertain both whether the offence is linked to a mental disorder or learning disability (to assist in the assessment of culpability) and whether any mental health disposal should be considered'

## Harm factors

The NFCC suggested that a consequential financial impact on the victim, through measures they may have to take because of such threats, should also be a harm factor. There is a factor within the assessment of harm for all the rest of the offences covered within this guideline, 'Serious consequential economic or social impact of the offence'. The Council agreed there was an argument for a similar factor for category one harm for this offence, if a victim incurs considerable costs, and inconvenience because of having to move address, for example. For this offence the potential social impact is less relevant, so a new factor of 'high level of consequential financial harm and inconvenience caused to the victim' has been added.

## Sentence levels

Most of the responses agreed with the proposed ranges, two magistrates who commented on the ranges said they thought they were too high. After careful consideration, the Council decided to lower some of the sentence ranges for this offence. Current sentencing data shows the estimated pre-guilty plea mean sentence length in 2017 was eight months, with the median three months. 80 per cent of offenders received an estimated pre-guilty plea custodial sentence of nine months or less, and there was only one sentence over four years (pre-guilty plea). The Council also considered the draft ranges in the over £5,000 criminal damage offence, given they both have a statutory maximum of 10 years. The Council carefully considered how serious the threat to destroy or damage property offence is, particularly at the most serious end, an offender threatening to burn or bomb a victim's house for example. However, an equally serious offence could be a criminal damage case in which extensive damage was intended, carefully planned and *actually* caused (as opposed to threatened).

In conclusion the Council decided to align the sentence ranges for both offences, so some of the sentence ranges in this offence have been slightly reduced. This better reflects current sentencing practice and reduces the risk of sentence inflation for this offence.

## Aggravating and mitigating factors

The Law Society suggested that there should be a factor of 'Offence connected to some other unlawful activity and/or pursued for personal gain.' The Council considered this but

decided that it was unnecessary due to the new culpability factor of 'Offence committed to intimidate, coerce or control'.

The Law Society also suggested a mitigating factor of 'Positive conduct of offender since offence committed'. The Council considered this but decided on balance not to include it. As the list of factors is non-exhaustive a court could consider it if it is relevant in a case where appropriate.

The Council did decide to include 'Damage threatened to heritage and/or cultural assets', as there was a similar mitigating factor included in the rest of the offences consulted on.

# Conclusion and next steps

The consultation has been an important part of the Council's consideration of this guideline. Responses received from a variety of sources informed changes made to the definitive guideline.

The guideline will apply to all adults aged 18 or over sentenced on or after 1 October 2019, regardless of the date of the offence.

Following the implementation of the definitive guideline, the Council will monitor its impact.

# Annex A: consultation respondents

CPS

Sophie (Member of the Public)

The Association of Youth Offending Team Managers

Criminal Bar Association

Merseyside Fire and Rescue Service

South East London Magistrates Bench

CLSA

Prison Reform Trust

The Magistrates Association

LCCSA

The Council of HM Circuit Judges

The National Fire Chiefs Council

Historic England

London Fire Brigade

The Heritage Alliance

Ben Payne

Ben Damazer

Ian Allott

Leicestershire & Rutland Magistrates Bench

Julia Hurrell

Deborah Backhaus

South Derbyshire Magistrates Bench

Council of District Judges

Professor Mark Walters

The Law Society

Justice Committee

