

Final Resource Assessment: Intimidatory Offences

1 INTRODUCTION

1.1 This document fulfils the Council's statutory duty to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services.¹

2 RATIONALE AND OBJECTIVES FOR NEW GUIDELINE

2.1 In May 2008, the Sentencing Guidelines Council (SGC) published *Magistrates' Court Sentencing Guidelines* (MCSG), covering most of the offences regularly going before magistrates' courts. These included the offences of harassment (putting people in fear of violence), harassment (without violence), racially or religiously aggravated harassment (putting people in fear of violence), racially or religiously aggravated harassment (non-violent) and threats to kill. The MCSG only apply to sentences passed at magistrates' courts, and so there are no existing guidelines for these offences for use in the Crown Court. The Council has published new sentencing guidelines for these offences, for use at all courts.

2.2 The Council has also published guidelines for a number of new offences that have come into force in recent years:

- Several offences related to stalking that came into force in November 2012 as part of The Protection of Freedoms Act 2012;
- The offence of disclosing private sexual images (often termed "revenge porn") which came into force in April 2015 as part of the Criminal Justice and Courts Act 2015;
- The offence of controlling or coercive behaviour in an intimate or family relationship, which came into force in December 2015 under the Serious Crime Act 2015.

¹ Coroners and Justice Act 2009 section 127: www.legislation.gov.uk/ukpga/2009/25/section/127

2.3 The offences related to harassment, stalking, threats to kill, disclosing private images and controlling or coercive behaviour have therefore been brought together to form a new package of Intimidatory Offences guidelines.

3 SCOPE

3.1 This resource assessment covers the following offences:

- Harassment;
- Harassment (putting people in fear of violence);
- Stalking;
- Stalking (involving fear of violence or serious alarm or distress);
- Racially or religiously aggravated harassment and stalking offences;
- Threats to kill;
- Disclosing private sexual images;
- Controlling or coercive behaviour in an intimate or family relationship.

4 CURRENT SENTENCING PRACTICE

Simple statistics are provided in this section to give an indication of the volume of intimidatory offences and the sentences received. A more detailed breakdown has been published on the Sentencing Council website in a separate bulletin.²

Harassment offences

4.1 The number of offenders sentenced for the offence of harassment without violence has generally increased over the last decade, from around 3,400 in 2007 to 5,400 in 2015. Since 2015 the number of offenders sentenced has decreased slightly, to 4,800 in 2017. Community orders were the most common sentencing outcome, with 42 per cent of offenders sentenced to community orders for this offence in 2017. Around 11 per cent of offenders were given an immediate custodial sentence, with an average (mean) custodial sentence length of 3 months.

² The intimidatory offences statistical bulletin can be found here: <https://www.sentencingcouncil.org.uk/publications/?type=publications&cat=statistical-bulletin&s&topic=intimidatory-offences>

4.2 The number of offenders sentenced for the more serious offence of harassment with fear of violence increased year-on-year from 2012 to 2015, from around 520 in 2012 to 810 in 2015. Since 2015 the number of offenders sentenced has decreased, to 540 offenders sentenced in 2017. Custodial sentences were the most common outcome in 2017, with 36 per cent of offenders given suspended sentence orders, and 42 per cent sentenced to immediate custody (with an average (mean) custodial sentence length of 12 months).

Stalking offences

4.3 Since coming into force in November 2012, the number of offenders sentenced for stalking offences has increased, with 630 offenders sentenced in 2017. The majority of sentences (67 per cent in 2017) are for stalking without fear/alarm or distress. Community orders are the most frequently used sentence for these types of offences (40 per cent in 2017) followed by suspended sentence orders (30 per cent). The average (mean) custodial sentence length for those sentenced to immediate custody has consistently been 3 months since the first sentences were given.

4.4 For stalking involving fear of violence or serious alarm/distress, custodial sentences were the most common outcome in 2017, with 38 per cent of offenders given suspended sentence orders, and 42 per cent sentenced to immediate custody (with an average (mean) custodial sentence length of 14 months).

Racially or religiously aggravated harassment and stalking offences

4.5 Since 2007, the number of racially or religiously aggravated harassment and stalking offences has fluctuated, with between 130 and 180 offenders sentenced each year between 2010 and 2017.

4.6 For the offence without violence, the most common sentence in 2017 was a community order, comprising 36 per cent of offenders sentenced. For the 13 per cent who received immediate custodial sentences in 2017, their average (mean) custodial sentence length was 4 months.

4.7 For the offence of putting people in fear of violence, the numbers sentenced each year are low, with around 30 to 50 offenders sentenced each year, and therefore sentence outcomes fluctuate over time. Over the past five years (2012 - 2017), there has been a fairly even split between immediate custody (34 per cent) and suspended sentence orders (30 per cent), with a further 22 per cent receiving community orders. The average (mean) custodial sentence length over this period was 9 months.

Threats to kill

4.8 Since 2007 there have been around 400-500 offenders per year sentenced for threats to kill. The majority are given immediate custodial sentences (54 per cent in 2017), followed by suspended sentence orders (26 per cent). The average (mean) custodial sentence length for those who received an immediate custodial sentence was 18 months in 2017.

Disclosing private sexual images

4.9 The offence of disclosing private sexual images (often referred to as “revenge porn”) came into force on 13th April 2015.

4.10 In 2017, 240 offenders were sentenced for disclosing private sexual photographs and films. Suspended sentence orders are the most frequently used sentence outcome (40 per cent in 2017), with 32 per cent receiving community orders, and 18 per cent receiving immediate custodial sentences. The average (mean) custodial sentence length for those who received an immediate custodial sentence was 6 months.

Controlling or coercive behaviour in an intimate or family relationship

4.11 The offence of controlling or coercive behaviour in an intimate or family relationship came into force in December 2015. In 2017, 220 offenders were sentenced for this offence. The majority of offenders sentenced were given immediate custodial sentences (56 per cent in 2017), followed by suspended sentence orders (28 per cent). The average (mean) custodial sentence length for those who received an immediate custodial sentence was 17 months in 2017.

5 KEY ASSUMPTIONS

5.1 To estimate the resource effect of a new guideline, an assessment is required of how it will affect aggregate sentencing behaviour. This assessment is based on the objectives of the new guideline, and draws upon analytical and research work undertaken during guideline development. However, assumptions must be made, in part because it is not possible precisely to foresee how sentencers’ behaviour may be affected across the full range of sentencing scenarios. Any estimates of the impact of the new guidelines are therefore subject to a large degree of uncertainty.

5.2 Historical data on changes in sentencing practice following the publication of guidelines can help inform these assumptions, but since each guideline is different, there is no strong evidence base on which to ground assumptions about behavioural

change. The assumptions thus have to be based on careful analysis of how current sentencing practice corresponds to the guideline ranges presented in the new guideline, and an assessment of the effects of changes to the structure and wording of the guideline where a previous guideline existed.

5.3 The resource impact of the new guideline is measured in terms of the change in sentencing practice that is expected to occur as a result of it. Any future changes in sentencing practice which are unrelated to the publication of the new guideline are therefore not included in the estimates.

5.4 In developing sentence levels for the intimidatory offences guidelines, data, where available, on current sentence levels has been considered. Current guidance, transcripts of cases and media reports of cases have also been reviewed.

5.5 However, while data exists on the number of offenders sentenced for intimidatory offences and the sentences imposed, it is difficult to establish how current cases would be categorised across the levels of culpability and harm in the new guidelines, due to a lack of data available regarding the categories of seriousness of current cases. As a consequence it is difficult to ascertain how sentence levels may change under the new guideline.

5.6 It therefore remains difficult to estimate with any precision the impact the guideline may have on prison and probation resources. During the consultation process views were sought regarding the potential impact of the draft guideline. Findings from consultation stage research were also considered in the development of the final guideline, to mitigate the risk of the guideline having an unintended impact.

6 RESOURCE IMPACTS

This section should be read in conjunction with the definitive guideline available at: <https://www.sentencingcouncil.org.uk/publications/?s&cat=definitive-guideline>.

Summary

6.1 The expected impact of each guideline is provided in detail below, but as a summary, the following effects are anticipated:

- Harassment (without violence) and stalking – no impact expected;
- Harassment (putting people in fear of violence) and stalking (involving fear of violence or serious alarm or distress) – no impact expected. A small number of

offenders falling in the highest category of seriousness are likely to receive higher sentences as a result of new legislation that has doubled the statutory maximum, but any increase as a result of this would not be attributable to the guideline;

- Racially or religiously aggravated harassment and stalking offences – the guidelines are expected to increase some sentences, however these are low volume offences and therefore this is anticipated to have a very small impact on the prison population, with a requirement for fewer than 10 additional prison places per year. As with the basic offences, any increase as a result of the new legislation that has doubled the statutory maximum sentence for the section 4 offences would not be attributable to the guideline;
- Threats to kill, disclosing private sexual images and films with intent to cause distress, and controlling or coercive behaviour in an intimate or family relationship – no impact expected;

Harassment (without violence)

6.2 The new guideline aims to improve consistency of sentencing but not to cause changes in the use of disposal types.

6.3 The existing Sentencing Guideline Council's MCSG guideline for harassment (without violence) contains three categories of seriousness reflecting the 'nature of activity'. The new guideline adopts the Sentencing Council's standard approach and applies to all courts. It is based on three levels of harm and three levels of culpability.

6.4 The sentencing ranges have been set with current sentencing practice in mind, and findings from the consultation stage research suggested that sentencing levels were similar under the existing guideline and under the new guideline. Therefore it is not anticipated that there will be any impact on prison and probation resources.

Harassment (putting people in fear of violence)

6.5 The existing Sentencing Guideline Council's MCSG guideline for harassment (putting people in fear of violence) contains three categories of seriousness reflecting the 'nature of activity'. For offences that fall into the highest level of seriousness (where the offender made sexual threats or where a vulnerable person was targeted) the existing guideline advises the sentencer to send the offender to the Crown Court for

sentencing. The new guideline is for use at all courts and so includes guidance for sentencing the most serious offences.

6.6 In general, the sentencing ranges have been set with current sentencing practice in mind and findings from the consultation stage research suggested that sentencing levels were similar under the existing guideline and under the new guideline. Therefore it is not anticipated that there will be any impact on prison and probation resources in the majority of cases. The exception to this is for the most serious cases. New legislation came into force as part of the Police and Crime Act 2017, which doubles the statutory maximum for this offence, from five to ten years in custody.

6.7 To reflect the increased sentences at the top end, a new 'very high culpability' level has been added. The increase above the previous maximum of five years is contained within one box, A1, and gives a sentencing range up to eight years, allowing some 'headroom' to the maximum available of ten years. It is expected that only the most serious cases of harassment will fall within this box.

6.8 It is not possible to accurately identify the proportion of cases that this will apply to, as it is not yet clear from the data available whether any offenders have been sentenced under the new statutory maximum (sentencing statistics suggest that no offenders were sentenced to over four years' custody in 2017). However, any impact on prison or probation services as a result of this is expected to be due to the legislative change and not as a result of the guideline, and so it is anticipated that the guideline itself will have no impact.

6.9 There is a risk that the higher statutory maximum will cause sentencers to sentence this offence more harshly for all offenders, and not just those who have been convicted of the most serious forms of the offence, as intended. If there was any such impact then this would be due to the legislative change and not as a result of the guideline. However, this risk is mitigated by the fact that the guideline has been produced in a way that should make it clear to sentencers that only the most serious offences should fall within the range that includes the new higher maximum, and so this impact is not anticipated.

Stalking

6.10 While this is the first time that a guideline has been produced for stalking (without violence), the consultation stage research with sentencers suggests that the existing harassment guideline has been widely used when sentencing this offence.

6.11 However, although offenders sentenced for this offence receive a similar range of sentences to those sentenced for harassment, sentences for stalking are generally slightly higher, with a higher proportion of offenders sentenced to immediate custody for stalking (14 per cent for stalking compared to 11 per cent for harassment in 2017), and average (mean) custodial sentence lengths generally higher for stalking (3.3 months compared to 2.6 months in 2017).

6.12 The Council anticipates that the new guideline will improve consistency of sentencing but not cause any changes to average sentencing severity, as the guideline has been based on current sentencing practice (although offenders sentenced for stalking will continue to receive slightly higher sentences, these sentences will still fall within the sentencing ranges provided within the guideline). Findings from the consultation stage research suggested that sentencing levels were similar under current sentencing practice and under the new guideline and therefore, there is not expected to be any impact on prison and probation resources.

Stalking (involving fear of violence or serious alarm or distress)

6.13 As with the stalking (without violence) offence, this is the first time that a guideline has been produced for stalking (involving fear of violence or serious alarm or distress). Within the new guideline, harassment and stalking (involving fear of violence) are grouped together within one guideline.

6.14 In general, the Council anticipates that the new guideline will improve consistency of sentencing but not cause any changes to average sentencing severity for the majority of cases, as the guideline has been based on current sentencing practice and findings from the consultation stage research suggested that sentencing levels were similar under current sentencing practice and under the new guideline.

6.15 However, this offence of stalking (involving fear of violence or serious alarm or distress) is covered by the new legislation under the Police and Crime Act 2017, increasing the statutory maximum from five to ten years in custody. In the same way as for harassment (with fear of violence), it is expected that a small number of offenders

would now fall into the highest culpability and harm box (A1) and therefore be given a higher sentence than previously.

6.16 It is not possible to accurately identify the proportion of cases that this will apply to, as it is not yet clear from the data available whether any offenders have been sentenced under the new statutory maximum (sentencing statistics suggest that no offenders were sentenced to over four years' custody in 2017). The same risk as for harassment applies here for stalking: that sentencers may interpret the higher maximum as a requirement to sentence all offenders more harshly for this offence, but the guideline mitigates this risk by clearly explaining that only the most serious offences should fall within the highest culpability box.

6.17 Any impact on prison or probation services as a result of this is expected to be due to the legislative change and not as a result of the guideline, and so it is anticipated that the guideline itself will have no impact.

Racially or religiously aggravated harassment and stalking offences

6.18 The racially or religiously aggravated versions of each of the four offences described above are covered within the same guidelines as the basic offences, but with additional provisions for the elements of aggravation.

6.19 Sentencers are first asked to sentence the basic offence, and then make an addition to the sentence considering the level of aggravation involved. This is a similar process to that used within the existing MCSG harassment guidelines, but as there was no previous guideline available for use in the Crown Court, the new guideline also includes guidance for sentencing the most serious offences.

6.20 Far fewer offenders are sentenced each year for the racially or religiously aggravated offences than for the basic offences. In 2017, 160 offenders were sentenced in total for the racially or religiously aggravated harassment or stalking offences, compared to 6,000 offenders in total for the basic offences.

6.21 Some indicative evidence from the consultation stage research suggests that a racially or religiously aggravated offence may be seen as more harmful than a non-aggravated offence, which means it may be categorised at a higher level of harm at step one of the guideline (than a non-aggravated equivalent case), before the uplift for the racial or religious aggravation is applied. This may result in an increase to sentences for these offences, with an increase to sentence lengths for offenders sentenced to immediate custody. However, these are low volume offences with around

30 offenders sentenced to immediate custody each year. Therefore any increase to sentences as a result of the guideline is expected to have a very small impact on the prison population, with a requirement for fewer than 10 additional prison places per year.

6.22 As with the basic offences, the Police and Crime Act 2017 has doubled the statutory maximum for these offences (from seven to fourteen years in custody), but for the same reasons as described for the basic offences, any impact on prison or probation services as a result of this increase in sentences is expected to be due to the legislative change and not as a result of the guideline. Therefore, it is anticipated that the guideline itself will have no further impact.

Threats to kill

6.23 The existing magistrates' court sentencing guideline for threats to kill has three levels of seriousness based on the 'nature of activity'. The new guideline for threats to kill follows the Council's standard approach, with three levels of culpability and three levels of harm.

6.24 For offences that fall into the highest level of seriousness (where the offender made repeated threats and where there was a visible weapon) the existing guideline advises the sentencer to send the offender to the Crown Court for sentencing. The majority of offenders are sentenced in the Crown Court (64 per cent in 2017) and the new guideline is for use at all courts and so includes guidance for sentencing the most serious offences.

6.25 The sentencing ranges have been set with current sentencing practice in mind and therefore it is not anticipated that there will be any impact on prison and probation resources.

Disclosing private sexual images

6.26 This offence came into force on 13th April 2015. There were 240 offenders sentenced for this offence in 2017.

6.27 The guideline has been produced with the aim of maintaining current sentencing practice, whereby the majority of offenders are given custodial sentences (59 per cent in 2017) and around a third (32 per cent) are given community orders. Therefore there is not expected to be any impact on prison or probation services.

Controlling or coercive behaviour in an intimate or family relationship

6.28 This offence came into force on 29th December 2015. There were 220 offenders sentenced for this offence in 2017.

6.29 The guideline has been produced with the aim of maintaining current sentencing practice, whereby the vast majority of offenders are given custodial sentences (85 per cent in 2017) and a small proportion (13 per cent) are given community orders. Findings from the consultation stage research suggested that sentencing levels were similar under current sentencing practice and under the new guideline. Therefore there is not expected to be any impact on prison or probation services. As this is a new offence, any increases in the prison population are expected to be due to a gradual increase in the number of offenders sentenced under the new legislation and not due to the guideline changing sentencing practice.

7 RISKS

7.1 Two main risks have been identified:

Risk 1: The Council's assessment of current sentencing practice is inaccurate

7.2 An important input into developing sentencing guidelines is an assessment of current sentencing practice. The Council uses this assessment as a basis to consider whether current sentencing levels are appropriate or whether any changes should be made. Inaccuracies in the Council's assessment could cause unintended changes in sentencing practice when the new guideline comes into effect. This is a bigger risk for the newer offences (the coercive or controlling behaviour offence, and disclosing private sexual images) where only limited information has been available on current sentencing practice.

7.3 This risk is mitigated by information that was gathered by the Council as part of the guideline development and consultation phase. This included providing case scenarios as part of the consultation exercise which were intended to test whether the guideline had the intended effect, and inviting views on the guideline. Case scenarios were also provided to sentencers to test their understanding and use of the guideline. However, there are limitations on the number of factual scenarios which can be explored, so the risk cannot be fully eliminated.

7.4 The risk is also mitigated by the collection and analysis of sentencing information from courts. By comparing sentence outcomes to those that may result

from the new guideline, it is possible to detect and amend problematic areas of the new guideline.

Risk 2: Sentencers do not interpret the new guidelines as intended

7.5 If sentencers do not interpret the guidelines as intended, this could cause a change in the average (mean) severity of sentencing, with associated resource effects (including the potential for anticipated changes to some categories of the guidelines to affect other categories where no change was intended).

7.6 The Council takes a number of precautions in issuing new guidelines to try to ensure that judges interpret them as intended. Sentencing ranges are agreed on by considering sentencing data in conjunction with Council members' experience of sentencing. Research with judges carried out during the consultation period also enabled issues with implementation to be identified and addressed prior to the publication of the definitive guideline.

7.7 The Council also uses data from the Ministry of Justice to monitor the effects of its guidelines to ensure any divergence from its aims is identified as quickly as possible. In addition, the Council will monitor the harassment (S.2) and stalking (S.2A) guidelines through the collection of data before and after the guideline comes into force.³ In due course, as with other guidelines, an assessment of the impact of the guideline will be conducted and published, incorporating the data collected along with other sources.

³ From November 2017 to the end of March 2018, a data collection exercise was conducted in a sample of magistrates' courts across England and Wales (in total, 80 magistrates' courts were selected to take part in the exercise). A similar exercise is planned for 2019/20, to collect data once the guideline is in place.