Sentencing Council

# Public Order Offences Guideline

## Response to consultation

October 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. They were of great value in informing the definitive Public Order guideline, and have resulted in a number of changes to the draft versions of the guideline. The detail of those changes is set out within this document.

Public Order offences are some of the highest volume offences seen by courts, and span a wide range of offending, from low level disorderly behaviour to incidents involving serious violence and disorder.

Prior to the publication of this guideline some guidance was available for sentencing offenders in the magistrates' courts, but no guidance was available for sentencing offenders in the Crown Court. This set of guidelines will provide vital assistance to sentencers across England and Wales and will cover a wide range of Public Order offences. They will assist in achieving the Council's objective of promoting consistency in sentencing, and provide transparency for the public regarding the possible penalties for these offences.

**Lord Justice Holroyde**

**Chairman, Sentencing Council**

# Introduction

In May 2018 the Sentencing Council published a consultation on a package of draft guidelines for Public Order offences. The guidelines included were: riot; violent disorder; affray; threatening behaviour; disorderly behaviour with intent to cause harassment, alarm or distress; disorderly behaviour causing or likely to cause harassment, alarm or distress, and stirring up hatred on grounds of race, religion or sexual orientation. Previously, there was limited guidance within the Magistrates' Court Sentencing Guidelines (MCSG) for the sentencing of violent disorder, and guidance for sentencing affray, threatening behaviour, disorderly behaviour with intent to cause harassment, alarm or distress and disorderly behaviour causing or likely to cause harassment, alarm or distress in the magistrates' courts.

The Council's aim throughout has been to ensure that the guidelines enable courts to undertake an appropriate assessment of the seriousness of the offences, and that all sentences are proportionate to the offence committed.

The reaction to the draft guidelines was broadly positive, although in relation to the guideline for offences relating to stirring up hatred there was a lack of understanding by some respondents as to the basis of the guideline. These responses are discussed in more detail in the section relating to this particular guideline, at page 32 of this document.

The guideline will apply to all those aged 18 or over who are sentenced on or after 1 January 2020, 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. Analysis of 117 transcripts of judges' sentencing remarks was conducted for all the offences included within this guideline. This provided indicative and 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 and judges was conducted, to which 57 responded. This provided views on any existing guidance for these offences, and suggestions as to what the Council may want to take into consideration when developing guidance for other Public Order offences. One of the findings from this survey was that sentencers would like more guidance on the uplift for racially or religiously aggravated offences.

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 guidelines for violent disorder and affray, and several research exercises were carried out at events with magistrates on the draft guideline for racially aggravated threatening behaviour and disorderly behaviour.[1]

Because of this research, in combination with consultation responses, a number of changes were made to the draft guidelines. These included a number of amendments to factors, sentences and the way in which racial and religious aggravation is provided for by some of the guidelines. In this way, analysis and research played an important part in the development of the 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.

[1] Around 90 magistrates were consulted across three separate events.

# Summary of responses

The consultation sought views from respondents on the seven separate guidelines. In total 95 responses were received, 44 hard copy and 51 online responses

**Breakdown of respondents**

| Type of respondent | Number |
|---|---|
| Charity/not for profit organisations | 2 |
| Legal professionals | 3 |
| Judiciary (including 3 representative body responses) | 12 |
| Other | 3 |
| Academics | 0 |
| Government | 1 |
| Members of the public | 74 |
| **Total** | **95** |

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.

With the exception of a group of respondents who objected to the guideline relating to offences of stirring up hatred, there was a broadly positive response to the majority of the proposals. However, the Council was also grateful for constructive criticism and considered suggestions for amendments to the draft guidelines.

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

- That the wording of some culpability and harm factors could be improved, and some additional factors considered.
- That the guidelines should guard against the risk of double counting of factors, particularly in respect of the offences of riot and violent disorder.
- That some sentences should be higher, particularly in respect of violent disorder offences.

- That the proposed guidance for the racially or religiously aggravated s4 and s4A offences was overly complex and risked disproportionate sentences being imposed.

The Council has responded to these comments by:

- rewording some culpability and harm factors across the guidelines;
- including additional guidance in the riot and violent disorder guidelines to remind sentencers to guard against the double counting of factors;
- including an additional harm category for violent disorder offences and including an additional tier of sentences for the most serious offences;
- including and amending a number of aggravating and mitigating factors across the guidelines and;
- revising the approach to sentencing racially and religiously aggravated disorderly behaviour offences.

In addition, the Council made other changes to each individual guideline. The detailed changes to the individual guidelines, and changes suggested by respondents but not made, are discussed below.

# Riot

## Culpability factors

The draft guideline which was subject to consultation included two levels of culpability.

The consultation document explained that these reflected established principles[2] that the level and scale of the incident is the predominant factor influencing sentences, with the offender's individual role in the incident assessed to a lesser extent. However, cases illustrated that some activity in a riot does inflate a sentence from a 'baseline'. For this reason the factors proposed captured all offenders convicted of riot at culpability category B, with culpability A factors providing for particularly serious activity within the incident by an individual.

Respondents were asked if they agreed to the proposed approach for assessing culpability. They were also asked if they preferred the list of descriptive factors in culpability category B, or an individual factor of 'any incident of riot' in this category.

The majority of respondents agreed with the rationale for the approach to assessing culpability, and preferred the individual culpability B factor providing for 'any incident of riot.' The Law Society and Criminal Bar Association (CBA) suggested this factor be worded as 'any incident of riot where category A factors are not present.' The Council has therefore amended the culpability B factor to 'any incident of riot not including category A factors' in the definitive guideline.

One respondent questioned why the riot guideline did not include the additional factor included in the violent disorder guideline of 'offender participated in incident involving serious acts of violence'. This factor was included in violent disorder to capture offences involving acts of physical violence committed towards others, and it was not thought necessary to include it in the riot guideline as any riot would inherently include the proposed factor.

A small number of individual responses submitted that the factors should provide for lower culpability to be found in incidents where police presence or activity exacerbates an incident. The Council did not agree that this would be appropriate.

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[2] *R v Blackshaw (& others) [2011] EWCA Crim 2312*; *R v Caird [1970] 54 Cr. App. R 499 at 506*

A further issue raised regarding culpability factors related to both the riot and violent disorder guidelines, and the reference to ‘highly dangerous weapons’:

“*where the particularly dangerous weapon explanation is given, we’d ask that it is made clear that where the definition of an offensive weapon is considered, where it falls into the category of offensive weapon where injury is intended, that the intended injury required is serious injury*” - CBA

The wording included is as used in the bladed articles and offensive weapons guideline, and reflects legislation which refers only to ‘injury’ and not to ‘serious injury’.

The Magistrates Association (MA) also requested greater guidance be provided on the term ‘highly dangerous weapon’:

“*The MA would request a firmer definition, or more detail, on what is meant by ‘highly dangerous weapon’ rather than it being defined simply by reference to the fact that the dangerous nature must be substantially above and beyond the statutory definition of an offensive weapon, which is ‘any article made or adapted for use for causing injury, or is intended by the person having it with him for such use*”.- MA

The wording relating to highly dangerous weapons was carefully considered in developing a number of other guidelines, and the wording included reflects that used in those other guidelines. The Council considers that it is not possible to provide an exhaustive list of such weapons given the potential for articles to be adapted (for example, a stick with metal spikes attached which could have the potential to cause serious injury), so it will be for the court to determine whether a weapon is highly dangerous on the facts and circumstances of the case. The types of cases where such a factor is relevant are likely to be sentenced by sentencers in the Crown Court, who are experienced in applying the factor in relation to other guidelines within which it is included.

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

## Harm factors

There were a number of points raised in relation to the harm factors. HM Council of Circuit Judges and the Criminal Bar Association both questioned whether any offence of riot would fall outside the factors included in harm Category 1, which were intended to describe impacts considered to be at the very highest level of seriousness. This was an

issue considered during the development of the guideline, where it was evident that all cases analysed did include one or more of the factors described. The factors were therefore qualified with threshold wording added such as ‘very serious’ and ‘substantial’. It was also agreed that the guideline should provide for potential exceptional cases where a lower level of harm could be present, although none were identified in analysis of cases. Some respondents noted that it would be difficult to envisage any offence charged as riot not involving at least one of the harm factors, and that all offences being assessed as harm 1 was extremely likely.

The Council considered these points carefully and agreed that there was potential for all cases to fall within the highest category of harm given the nature and level of harm inherent in a riot. In the definitive guideline the harm model has therefore been amended. Category 1 now provides for multiple or extreme examples of the factors listed, with category 2 providing for all other cases. The Council believes that this will provide for a proportionate harm assessment in sentencing very rare cases of riot.

## Sentence levels

There was broad approval of sentence levels, with very few dissenting views. An exception was the Howard League who thought all sentences were too high, and did not appreciate that the precedent of *R v Blackshaw*[3] established principles for sentencing riot and related offences, believing the higher sentences imposed were specific to that case:

“*The Howard League is especially concerned about the lengthy sentences that are envisaged for riot offences. It is of particular concern that these ranges have been calculated based on sentences handed down in the period which includes 2011 riots, in respect of which the Court of Appeal acknowledged that sentences that were longer than usual were justified due to the serious nature of the that particular incident (Blackshaw and others, 2011). In that case, the Court of Appeal noted that it was permissible to depart from sentencing guidelines. This will have inevitably resulted in an increase in the starting points which sentencers may then feel justified in departing from should a further serious incident arise.”* – Howard League for Penal Reform

The principles established by the Court of Appeal in *R v Blackshaw* to which the Howard League referred were that where other offences (such as burglary and criminal damage)

[3] *R v Blackshaw (& others) [2011] EWCA Crim 2312*

are committed in the context of a riot, this will be a severely aggravating feature of the offence and higher than usual sentences for the specific offence charged may be appropriate. The Council has included additional guidance for other offences committed in the context of a riot to reflect this important principle, and the sentences included in the riot guideline ensure sentences for those convicted of riot offences both punish and deter those who compromise and undermine law and order and the safe functioning of society.

While sentences were not revised in the definitive guideline, other guidance was revised. The point was made that the overall tone of the guideline was too punitive, with additional wording providing for sentences to be increased where particular or multiple features were present. The Council considered and agreed with this view, and to avoid a disproportionately punitive tone has removed some of the wording in question at step two in the definitive version of the guideline.

## Aggravating and mitigating factors

A number of respondents including the Criminal Bar Association and the Howard League raised concerns that the aggravating factors included increased the risk of double counting:

*"We have concerns that for public order offences in particular, a number of the aggravating factors are the basis for the charge itself and/or fall into the culpability and harm assessment. We suggest that it may be particularly important that this guideline reminds sentencers to avoid the dangers of double counting such factors where they have either led to conviction, the culpability assessment or the harm assessment."* - CBA

The Council considered and agreed with this observation in relation to the more serious offences, and in the definitive riot guideline additional wording has been included at step two to remind sentencers of the need to guard against double counting where offender behaviour has been taken into account in assessing culpability as high. The wording reads as follows:

**Care should be taken not to double count aggravating factors which were relevant to the culpability assessment, particularly in cases where culpability is assessed as high.**

## Additional guidance - riot related offending

There was broad approval of the inclusion of guidance instructing courts that in sentencing offences committed during a riot the context should be treated as a severely aggravating feature. The Law Society suggested that the guidance should go further:

*'We refer to the paragraph 'riot related offending', concerning other offences committed in the context of a riot, and consider that it is helpful for the guideline to address this. However, we suggest it ought to be made clear that this may justify sentencing above the normal 'range' for the offence(s) in question'* – Law Society

A similar point was made by the London Criminal Courts Solicitors' Association (LCCSA) who stated;

"*The committee did question the need to state that "where sentencing other offences committed in the context of riot, the court should treat the context as a severely aggravating feature of any offence charged". This is simply stating the obvious and is unhelpful without guidance on what uplift should be applied to a feature that is "severely aggravating."*- LCCSA

The wording included reflects the position established in *R v Blackshaw* in relation to riot related offending. The Council did not wish to include more prescriptive wording as this may fetter the discretion of the sentencing court in determining an appropriate sentence, or undermine principles of totality where there are multiple offences to be sentenced. This section of the guidance therefore remains as originally drafted.

# Violent Disorder

## Culpability factors

The consultation document explained that the factors included in the draft guideline were intended to provide for the broad range of potential activity in this offence. In developing the draft guideline, analysis of cases identified that violent disorder can be charged in relation to offences akin to riot where all the elements of a riot offence may not be made out: football related violence and disorder; fights between groups and group violence towards individuals. Existing MCSG guidance also recognised that violent disorder offences may involve rare cases which involve minor violence or threats of violence leading to no or minor injury. The factors developed were intended to capture all such offences.

Respondents broadly approved the culpability factors, and in particular that the factors provide for cases akin to riot to be captured. The District Judge Legal Committee responded:

*"The committee agree with the Sentencing Council in that experience shows that cases charged as violent disorder are often very similar to riot, often the only difference being the scale of the violence rather than the level of violence. The committee agree that it is rational and appropriate to take a similar approach to assessing culpability as taken within the guideline for riot."*- District Judge Legal Committee

As for the riot guideline, the high culpability factor referring to 'ringleader' was amended to 'instigator'.

A specific issue was raised again relating to the definition of weapons. The consultation document highlighted that the Council considered highly dangerous weapons could have broader application in a violent disorder offence and it was noted that dogs being used or threatened as a weapon was becoming more common. Respondents were asked for views as to whether such a case would be captured by the factor. Respondents noting the point thought that this was unlikely:

*"In discussion of the draft violent disorder guideline the question is posed as to whether 'use of weapons' would be taken to include the use of a dog as a weapon. In our view, this is somewhat tenuous. If it is intended that the use of a dog as a weapon should be*

*included, we would suggest that this should be made explicit in the guideline, to remove any risk of inconsistency in the approach taken by different courts."*- Law Society

The MA shared this view:

*The consultation suggests that a recent issue the Sentencing Council (SC) considered is the use of dogs in a threatening way during an offence. The SC says that the 'highly dangerous weapon' factor is intended to capture such cases where appropriate to do so, but we do not think such a case would or should be captured by the factor. We do not think it is likely that there will be situations where dogs would be considered a highly dangerous weapon. We query whether a dog could be considered as an offensive weapon under the statutory definition, and if it is not covered by the basic definition, it would not be covered by something above and beyond the basic definition. We would argue that even if a dog could be considered an offensive weapon, it is highly unlikely to be considered highly dangerous. We acknowledge that there may be circumstances when use of a dog trained or otherwise particularly threatening might increase culpability. We would therefore suggest that if the SC wish to ensure such circumstances are covered, a separate culpability factor of using a dog to threaten violence should be included.* – MA

As a result of these responses the Council have included the additional aggravating factor of 'attack by animal used or threatened in commission of offence' to provide for these types of offences.

The MA raised a further issue regarding the factor 'targeting of individual by a group':

*"Culpability A factors include 'targeting of individual(s) by a group'. We presume this means targeting of a 'specific' individual or group, ie not an individual chosen at random but a specifically targeted individual, so it might be clearer if 'specific' was added."*- MA

It was the Council's intention that the factor be capable of capturing both an opportunistic attack on an individual randomly attacked by a group as well as a specifically targeted individual, so this factor has not been rephrased in the definitive guideline.

## Harm factors

The draft guideline included two categories of harm. Research into the draft guidelines suggested that, in the absence of a third category of harm, there was a risk that all cases involving more than a low level of harm would be placed into the category of highest harm. To mitigate that risk, an additional harm category was included to provide for the most

serious cases. In the definitive guideline the highest harm category now provides for multiple or extreme examples of category 2 factors, with the lower harm category retained to provide for cases involving lower level violence or threats only.

## Sentence levels

In researching the draft guideline it was noted that sentencers thought the sentences included were too low, and did not adequately provide for the most serious offences.

The sentences in the draft guideline were based on sentencing practice and statistics available during the guideline development. However, updated statistics examined post consultation illustrated that the distribution of sentences in the draft guideline did not properly reflect current sentencing practice. These illustrated that an estimated 25 per cent of immediate custodial sentences imposed in 2017 were above three years (before any discount for guilty plea), and reflected the concerns of judges who tested the guideline that the starting point for an offence of the highest seriousness was only three years. Given that an additional tier of sentences had been created for the most serious offences, the Council decided that the highest starting point in the definitive guideline should be four years for offences within this category. The Council consider that this more appropriately reflects the offence statutory maximum sentence of five years' custody.

## Aggravating and mitigating factors

The same points raised for aggravating and mitigating riot factors were raised in relation to violent disorder offences. As for riot offences, the factors included were all found to aggravate offences in transcripts analysed and it was decided that none should be removed. However, the Council did agree the guideline should include the additional wording included for riot to remind sentencers to exercise caution in relation to double counting factors.

# Affray

## Culpability factors

The principle that the sentence should relate to the overall incident and not the offender's individual role in an incident does not apply to the offence of affray as it does for riot and some cases of violent disorder. As the offence requires the use or threatening of unlawful violence, the factors in the draft guideline reflected gradations of this type of conduct.

While there was broad approval of the culpability factors included, some issues were raised.

The CBA thought that the guideline should be clearer that the individual's role in an offence is key to sentencing an affray, unlike in riot and some cases of violent disorder:

*"The guidelines should make it clear that offenders convicted of involvement in the same offence of violent disorder and affray, can be sentenced differently. In other words, individual involvement is more important when sentencing for violent disorder and affray than it is when sentencing for riot. The CBA respectfully suggests that this should be reflected in some way in the culpability and harm assessments for violent disorder and affray."* - CBA

Given that a person acting alone can be convicted of affray, the factors were drafted to provide for individual application. Other respondents including the District Judge Legal Committee noted this and approved of the way factors are drafted:

*"This is an offence which is routinely tried and sentenced in magistrates' and youth courts. The committee endorses the principles set out in the preamble to culpability factors, in so far as that the sentence should relate to the incidence as it bears with riot and violent disorder but rather reflecting the gradation of conduct. This reflects the different nature of elements required to prove the different charges. Similarly, the committee agree with the approach to culpability factors and the rationale therein."* – District Judge Legal Committee

The CBA went on to note that:

*"The culpability factors would be simpler if culpability B stated 'culpability A and C factors not present."* - CBA

However, other respondents including HM Council of Circuit Judges and the District Judge Legal Committee approved of the categorisations and factors included:

*"The categorisation of culpability into A, B and C as suggested provides flexibility for sentences whilst recognising the many ways in which this offence can be committed. Again, the committee concurs with the approach proposed."* – District Judge Legal Committee

*"'A', 'B' and 'C' cover all reasonably anticipated scenarios of 'culpability'."*– HM Circuit Judges

On balance, the Council decided to retain the factors as worded.

The category B factor 'threat of weapon (whether or not produced)' prompted the following comments from the LCCSA:

*"The committee was genuinely split upon whether or not a weapon should actually be produced in order for offence to fall into the Culpability B bracket. One view was that it was reasonable for an offence to be placed into this category even if a weapon was not produced because this would be in keeping with the essence of an affray i.e. the intention to cause fear of serious violence, and a person of reasonable firmness present at the scene would undoubtedly feel more afraid when encountering a threat of the use of a weapon. The counter view was that if a weapon is not produced then a defendant could be treated more severely for issuing what amounts to a purely empty threat. The committee was unable to resolve the impasse*."- LCCSA

The MA thought the 'whether or not produced' element of the factor should be left to the discretion of sentencers:

*"In the culpability B factor 'threat of violence by any weapon (whether or not produced)' we would suggest that 'whether or not produced' is not required, as it is appropriate to allow sentencers to decide how valid the threat was and therefore apportion the appropriate weight."* - MA

As noted by the LCCSA, the Council's rationale for the culpability B factor applying whether or not a weapon is produced relates to the causing of fear, which is the very essence of affray. This factor was present in a number of cases analysed in development of the guideline where offenders stated they had a weapon which they would use, significantly increasing the fear of their victims. The Council considered this issue very carefully in developing the guideline, and decided that the culpability in intending to cause fear was the same whether the weapon was produced or not. The Council carefully considered if the factor should be retained as worded, or if the MA's suggestion should be accepted. However, it was decided that removing the wording 'whether or not produced' to

provide discretion to sentencers presented a risk of inconsistency of application of the factor. The wording of the factor in the draft guideline was therefore retained.

The culpability A factor 'intention to cause fear of serious violence' was discussed by a number of respondents. The District Judge Legal Committee approved of the factor as worded, stating:

*"The guidelines recognise that intention to cause fear of very serious violence can often be a feature of this offence and the guidelines should reflect this. The committee is in full agreement with this approach."*

However, the Law Society questioned the wording of this factor, believing this should be clarified as fear caused to a specific identifiable victim:

*"In the affray guideline discussion, the paper says that 'intention to cause fear of very serious violence' is intended to capture cases where an innocent victim is on the receiving end of the threats, rather than those cases where an equally enthusiastic opponent in a fight is concerned; with the case analysis showing the latter attracts a lesser sentence than the former. We are not sure that the suggested wording will succeed in establishing this distinction and would suggest instead 'intention to cause victim to fear very serious violence*.'"- Law Society

The Council considered this but decided the factor should be retained as drafted, as this had been appropriately and consistently applied in research of the draft guideline.

Finally, some questions were raised as to the description of factors such as 'minimal' and 'prolonged'. The Council consider that these are familiar terms to sentencers, who are experienced in assessing their applicability and relevance.

**Harm factors**

The factors in the draft guideline reflected that harm in these offences will be fear/distress or physical injury or both to varying degrees. Nearly all respondents approved the harm factors, although one individual respondent doubted the relevance of the lowest harm category believing that harm would be caused in every case:

*"I do agree, but I do not think there should be a Harm Category 3 - if there is very little harm caused to anyone, then the charge of Affray then becomes irrelevant. Affray creates victims and causes harm to them - in every case. We need to reflect that in this approach."* – Individual respondent (Probation Service)

The Council considered this and agreed that it would be unlikely affray would be charged in cases where minimal fear or distress is caused and little or no physical injury is inflicted, and this presented a risk that category 3 may be very rarely applicable. To address this and ensure the relevance of factors included, the lowest category of harm relating to fear/distress was amended from ‘minimal fear/distress’ to ‘some fear/distress’.

**Sentence levels**

The majority of respondents had no observations relating to sentences, and thought they were appropriate. An exception was the District Judge Legal Committee, who disagreed that a fine should be within the range for the lowest category of offence:

*“In the hierarchy of Public Order Offences affray is implicitly serious as it requires the use or threat of unlawful violence in a public place.*

*It is hard to envisage a conviction for Affray where a sentence of a fine would be commensurate with the offending. Any case where the appropriate sentence is a fine should be properly charged under Section 4 of the POA 86 and not Section 3 of the POA 86. It follows therefore that the appropriate range for offences falling into category 3C should be a low-level community order and not a fine.”* – District Judge Legal Committee

Statistics of sentences imposed in the period 2013-2018 illustrate that fines are imposed in an average 2 per cent of cases. While this is a very low proportion, in developing the guideline it was agreed that for a very low level offence a fine should be available, as it is in the existing MCSG guidance for affray. A fine is only available at the very bottom of the category range for an offence assessed to be at the lowest category of seriousness.

The Council did reconsider the top of the category range for offences at the highest level of seriousness, and to provide for offences in this category where multiple aggravating factors are present, the top of the range was increased from 2 years 6 months to 2 years 9 months.

**Aggravating and mitigating factors**

The consultation sought views on whether the aggravating and mitigating factors for affray were appropriate. Respondents overwhelmingly approved of the factors included, although the MA suggested a number of amendments or additions:

*"An aggravating factor of targeting vulnerable people may be useful as distinct from cases where a child or vulnerable person is present. For s4, s4A and s5 offences the following aggravating factor is included: 'victim is targeted due to a vulnerability (or a perceived vulnerability)' and so we would suggest that this should be inserted here for consistency across offences."* – MA

The factor was specifically included in the s4, 4A and 5 offences as it was thought to have relevance as these offences are usually committed against specific individuals. Analysis of affray cases did not identify this as an issue, and it is thought the aggravating factor 'vulnerable persons or children present during incident' will capture any cases where it is relevant.

The MA also suggested an aggravating factor be included for affray to achieve consistency with some other Public Order draft guidelines:

*"In addition to 'threats or violence directed towards public servants in the course of their duty' we would suggest that 'injury to animal carrying out public duty' be included. This would be consistent with the guidelines for riot and public disorder."* – MA

The Council agreed that this factor should be included in the Affray guideline, and it has been added. The factor has been rephrased across the guidelines to 'injury to service animal'.

The MA also proposed the mitigating factor relating to mental disorder or learning disability should not be restricted to being applicable where it relates to the commission of the offence:

*The heading for mitigating factors is: 'Factors reducing seriousness or reflecting personal mitigation'. With regard to mental disorders/learning disability the mitigating factor is defined as 'mental disorder or learning disability where linked to commission of offence'. This should reflect the age/lack of maturity mitigation point which is 'age and/or lack of maturity where it affects the responsibility of the offender' and so we would suggest that the wording be amended to 'mental disorder or learning disability where it affects the responsibility of the offender or where it is linked to commission of offence'* – MA

The Council agreed that the qualifying wording 'where related to the commission of the offence' was relevant when this factor is included at step one in assessing the seriousness of the offence and determining the offence category. At step two the factor relates to personal mitigation and should be expressed as 'mental disorder or learning disability'. This change has been made to all definitive public order offence guidelines where it is included.

HM Council of Circuit Judges disapproved of one of the mitigating factors:

*“No members of public present other than those participating in violence’ should not always amount to a factor ‘reducing seriousness or reflecting personal mitigation’. The absence of members of the public may be a matter of pure chance that does not always reduce the seriousness of the offending behaviour.”* – HM Circuit Judges

This factor was relevant in a number of cases analysed. As incidents occurring in busy, populated areas can aggravate an offence, the Council considers that including this mitigating factor ensures a fair and balanced approach. As a step two factor sentencers will take it into account only where appropriate.

Finally, an issue which was identified in testing the guideline was that provocation was not available as a mitigating factor. A number of sentencers took the view that provocation is often highly relevant in affray cases and a factor they would take into account in sentencing. Due to the potential for affray to be charged in circumstances similar to assault and the assault guideline providing for such a factor, the Council agreed ‘significant degree of provocation’ should be included as a mitigating factor.

# Disorderly behaviour offences: s4, s4A and s5 Public Order Act

The draft guidelines related to summary offences providing for a range of disorderly behaviour. Prior to the introduction of the definitive Public Order guideline guidance existed within the MCSG for sentencing these offences. There is significant overlap between the offences in relation to the type of conduct required to constitute an offence. The section 4 offence of threatening behaviour is similar to the offence of affray in that it requires the threat or provocation of unlawful violence towards another person. The section 4A and section 5 offences relate to disorderly behaviour with intent to cause harassment alarm or distress (section 4A), and disorderly behaviour likely to cause harassment alarm or distress (section 5).

**Culpability factors**

To provide for the overlap between offences, the culpability factors in the draft guideline were broadly similar across the three guidelines, save for one or two additional factors included for the more serious offences; these are ‘missiles thrown’ in section 4 and ‘production of a weapon’ in section 4 and section 4A.

Given that a section 4 offence can involve an intention to cause a person to believe that immediate unlawful violence will be used, and the potential for a section 4 offence to be admitted as an alternative to affray, an additional culpability factor ‘intention to cause fear of serious violence’ was included as in the affray guideline.

All offences in the draft guideline included ‘use of force’ as a culpability factor, although for the section 4 and section 4A offences this is qualified as ‘use of substantial force’. It was agreed that while use of any force would make a section 5 offence more serious, a higher threshold would be required for the more serious offences to avoid potentially inflating sentences in section 4 and section 4A offences where force may be a more common feature of the offence.

The CPS, HM Council of Circuit Judges, DJ Legal Committee and CBA all approved of the proposed factors and suggested no changes.

*"Incidents of offences under section 4 of the POA (threatening behaviour offences) can vary greatly as the offence is capable of being committed in many ways. It is therefore helpful that the many ways that culpability can be raised is reflected in the categorisation suggested for high culpability. The proposed factors capable of placing a case within the category of high culpability have been recognised and included in the proposed guideline. The committee concurs with this approach*."- District Judge Legal Committee

At the research events held with magistrates, participants agreed that the factors included were appropriate and that the high culpability factors included would make an offence more serious.

The MA made the following points regarding factors which are included across the three guidelines:

*"Culpability A factors include 'targeting of individual(s) by a group'. We presume this means targeting of a 'specific' individual or group, ie not an individual chosen at random but a specifically targeted individual, so it might be clearer if 'specific' was added. We would also propose that this factor is divided into two separate culpability A factors, firstly, offender acting as part of a group, and secondly, targeting of specific individual(s)."*

This point was made by the MA in relation to other guidelines which include the factor, and as discussed earlier the Council preferred to retain the factor as worded.

A further point noted by the MA was as follows:

*"A high culpability factor is 'sustained incident'. The consultation document states that this phrase is intended to encapsulate both 'substantial disturbance caused' and 'lengthy incident'. Although it does cover a lengthy incident, it does not necessarily cover a 'substantial disturbance' and therefore we would propose that the phrase 'sustained and/or substantial incident' is used."*

The consultation specifically mentioned substantial disturbance in respect of section 5 offences only, as the existing MCSG guideline for this offence includes 'substantial disturbance' as a high culpability factor. It was not included for a section 4 offence as the offence relates to the causing of fear or provocation of violence and sustained incident would capture a more serious incident of this type, while a substantial disturbance would not necessarily be a feature of the offence. However, the Council saw the merit in the factor being available for a section 4A as well as a section 5 offence has included it in the definitive guideline for both offences.

**Harm factors**

The harm factors included in the draft guidelines reflect the statutory definitions of the offences. The consultation document explained that the section 4A and section 5 offences are made out if the offences cause or are likely to cause harassment, alarm or distress. The section 4 offence involves causing fear or provocation of violence. The high harm factors for sections 4A and 5 captured serious distress or alarm, or distress or alarm to multiple persons. The section 4 high harm factors related to the fear of violence caused and incidents which escalate into violence. Category 2 of all three guidelines captured all other cases (not in category 1).

The following points were raised in respect of section 4 factors only.

The Law Society thought that the section 4 offence factor 'incident escalated into violence' should be subject to a qualification:

*"In relation to the offence of threatening behaviour, the category 1 harm factors include 'incident escalated into violence'. In such a case it is likely that additional charges will be included on the indictment reflecting the violence, so that the factor should contain the qualification '(if not subject to separate charge)', so as to remove the risk of double-counting.*
*If the facts warrant an additional charge the CPS are likely to advise that it be added. However, there are instances where there is no 'victim' of the offence, because the victim will not wish to cooperate with the prosecution or cannot be found, but the CCTV of the incident clearly shows an assault taking place. These instances are cases where the additional offending can properly be reflected in the sentence for the disorder offence(s)."*
– Law Society

The LCCSA thought the factor should not even be included:

*"The committee could not see why "incident escalated into violence" was a factor at all, given that if the incident escalated into actual physical violence a different offence to a s 4 POA would have been committed."*

This factor was included as it was considered that where violence is provoked and occurs this would make the harm caused more serious and the guideline should provide for that. It is possible a section 4 offence would still be charged where it results in actual violence whether or not assault charges arise, and as the Law Society note there may not be a victim willing to support an assault prosecution and a court may only be sentencing a section 4 charge in such situations. If other offences were charged, the fact that an incident escalated into violence would be highly relevant to the seriousness of the section

4 offence and provocation of violence would be a separate element to any resulting assault. The Council do not consider there is a risk of double counting and in the event of multiple charges the overall sentence would be adjusted according to totality principles.

The LCCSA went on to raise a further point:

*"The committee took the view that the only factor that needed to be included in Category 1 harm was "victim feared serious violence". The committee did not see why a defendant who causes fear of serious violence to one person should be treated the same as a defendant who causes fear of violence to multiple people. The committee took the view that fear of serious violence should be the primary determinant of which cases fell into the highest category, and the number of people who were caused that fear should have no bearing upon which category the offence falls in to."* – LCCSA

The distinction between the factors is in the level of fear caused, and in development it was considered that a threat to an individual victim causing fear of serious violence would be equal to a high level of harm where multiple victims fear any violence. The Council decided this principle should be maintained in the definitive guideline and did not wish to include only one factor of 'victim(s) feared serious violence' in the highest category of harm. The point regarding level of fear required for single or multiple victims is also relevant to section 4A and section 5 offences, as the harm factors include two factors of 'serious distress or alarm caused' and 'distress or alarm to multiple persons present'.

The MA also questioned the factors relating to fear being caused to one or multiple persons, although specifically questioned why fear caused to a single victim does not need to be immediate to attract a high culpability categorisation:

*"Category 1 includes: 'Victim feared serious violence or fear of immediate violence caused to multiple persons present'. It is not clear why fear of violence has to be immediate for multiple people and not for a single victim? We would suggest that 'immediate' should be removed, particularly as 'immediate' is already included in the offence definition."* – MA

The Council considered that the MA's point regarding the offence requirement that the threat of violence be immediate was a valid one, and agreed that as phrased the factors could imply that a threat towards a single victim does not need to be immediate, which is not the case. The word 'immediate' has therefore been removed from the multiple victims' factor in the definitive guideline.

The MA also suggested 'serious distress' should be included as a harm or aggravating factor:

*"We also query whether causing serious distress should be a category 1 level of harm, or referenced as an aggravating factor."* - MA

'Serious distress' is included as a harm factor for section 4A and section 5 offences, but these offences specifically relate to the causing of harassment, alarm or distress. As the section 4 offence relates to the causing of fear or provoking violence, the Council considered it would not be appropriate to include a 'distress' related factor for this offence, and there was potential for the factor to be present in a high number of cases and have an inflationary effect on offence categorisation.

**Aggravating and mitigating factors**

Almost all respondents approved the aggravating and mitigating factors. The MA suggested the same changes to the mental health or learning disability factor as made in relation to the affray guideline, suggesting removal of the qualifying 'where related to the commission of the offence' which the Council agreed in relation to other guidelines.

One respondent thought the aggravating factor 'incident occurred in victim's home' should be included for these offences as they are for violent disorder and affray. While all offences can be committed in a private or public place they cannot be committed where the offender and the victim are in a dwelling, so this factor was not included.

A further issue raised was the treatment of alcohol within the guideline as an aggravating factor. This matter was subject to considerable discussion by the Council in the guideline development, as it was noted that often offenders behave out of character under the influence of drink and analysis of cases identified that for that reason the factor is often used as mitigation. The Council took the view that it should not be.

The Law Society agreed with the Council's position that the influence of alcohol on the offender should be an aggravating factor:

*"The factors for the various s4, s4A and s5 offences include the clear statement that acting under the influence of alcohol or drugs is an aggravating, and not mitigating, factor. We acknowledge that there is some inconsistency in the courts' approach to intoxication, and indeed that of defence lawyers, but think it would be correct to say that, nowadays, most sentencers regard intoxication as aggravation not mitigation. In any event, a clear statement in the guideline will at least encourage consistency on this point."* – Law Society

**Sentence levels**

Sentence levels in the draft guidelines were intended to achieve proportionate sentencing across the range of offences, including aggravated offences. While ranges provide for custody in a number of categories for more serious offences, the Council took the view that only the most serious section 4 offences should attract a custodial starting point.

In researching the guidelines at events with magistrates no issues were identified with sentences proposed for the basic offences. However, one consultation respondent raised concerns.

The Howard League for Penal Reform criticised nearly all custodial sentences in the guideline and referred to the political consideration of short term custodial sentences:

*"In May 2018, the justice secretary David Gauke stated that short prison sentences of less than 12 months do not rehabilitate prisoners and should be a last resort. He noted that prisoners held for less than a year have a recidivism rate of about 66%, higher than the reoffending rate of those handed non-custodial sentences.*
*In the same month, the prisons minister, Rory Stewart called for a "massive reduction" in the number of people sent to prison for a short sentence, saying incarceration of under 12 months makes offenders more likely to commit crime. Research published by the Ministry of Justice showed that short prison sentences have significantly worse outcomes than community sentences.*
*The Sentencing Council guidelines will have an impact on sentencing practice. The guidelines should be encouraging the use of effective community programmes, rather than expensive and ineffective short term prison sentences. The Sentencing Council appears to be out of step with government thinking, research and evidence."* – Howard League

Sentencing guidelines are developed within the statutory framework determined by Parliament, and at the time of publishing the guideline no steps have been taken by Parliament to amend the existing legislation which includes statutory maximum sentences of six months' custody for section 4 and section 4A offences.

Concerns were expressed by other respondents that some sentences included in the guideline were too low:

*“Again the committee is concerned to see the range for the lowest type of offending (for a s4) to start at a discharge. Less serious offending could and should be captured by a charge under Section 5 POA 86 and not S4 POA 86*.” – DJ Legal Committee

In developing sentence levels, the Council considered current sentencing practice and statistics of sentences imposed for all offences. For section 4 Public Order Act offences in 2018 10 per cent of disposals were conditional or absolute discharges, even though the existing MCSG guidance does not include discharges within any of the category ranges for this offence. The Council considered that as courts are currently imposing a discharge in a significant proportion of cases, and statistics illustrate that this has been the case for some time, the guideline should reflect this and provide for a discharge for an offence at the lowest level of seriousness.

The MA noted the starting point of the most serious category of section 4A offence represented a decrease from the comparable starting point in the MCSG guideline:

*“We note that the starting point at the highest level is now a high level community order whereas previously it was 12 weeks’ custody”* – MA

In developing the guideline the Council initially considered that the MCSG starting point for a section 4A offence should be retained. However, this was later revised to a high level community order to reflect that section 4 is a more serious offence, and it was agreed a 12 week starting point should be maintained for a serious section 4 offence. Updated statistics illustrated that while there are a fairly high proportion of custodial sentences (18 per cent immediate and suspended in 2018) imposed for a section 4A offence, the highest proportion of sentences imposed for this offence are fines. While custodial sentences remain available in three of the four section 4A category ranges the Council took the view that a high level community order was a more proportionate starting point for this offence.

In the definitive guideline, a further revision has been made to the starting point of a section 4 offence of highest seriousness. Since the Public Order guidelines were developed work has commenced on revising the assault guidelines. The Council has taken the opportunity to consider relativity of proposed section 4 offence sentences with sentences for common assault. Common assault is considered more serious than section 4 as it will often involve use of violence rather than the threat or provocation of violence. The Council noted that the existing guideline’s highest category sentences for common assault and s4 do not reflect this distinction, with a high level community order starting point for a serious common assault and a 12 week custodial starting point for a serious section 4.

The Council considered that this should be rectified. While one option would be to increase the starting point of a common assault offence, the Council decided that this would be unjustifiably inflationary, and would then require adjustment to starting points of other assault offences.

The MCSG includes custodial starting points of less than six months for a number of offences as these guidelines relate to offences with a six month statutory maximum. However, in developing recent definitive guidelines the Council has generally avoided including starting points of custodial sentences of 12 weeks or less, preferring to provide the option of custody within the category range where the court deems this appropriate and aggravating factors apply. After careful consideration of this issue, the Council has decided to revise the section 4 starting point in the definitive guideline to a high level community order. The Council recognises that this decision may be unpopular with some sentencers, but the discretion of the court to impose a custodial sentence in appropriate cases where aggravating factors are present is unfettered, with custody available in three of the four category ranges.

## Racially or religiously aggravated offences

The racially aggravated approach in the draft guidelines for the section 4 and section 4A offences included a separate sentencing table specifying a starting point and range for aggravated offences, dependent upon the level of aggravation. This attracted a wide variation of views. On the one hand many respondents agreed with the principle of a separate sentencing table, and approved the approach:

*"We concur with the Council's conclusion that it is impossible for each element of an aggravated offence to be adequately provided, for the reasons as set out in the draft guideline on page 33. We agree that assessing seriousness of the basic offence at step one and assessing related elements as a second step is a pragmatic and sensible solution to the difficulty highlighted at page 33. We also agree that whilst the level of aggravation is identified, sentencers should use a separate sentencing table to identify the appropriate starting point and sentence range."* - DJ Legal Committee

*"The MA welcomes the addition of a separate sentencing table."* – MA

*"We consider that all the guidance in the draft guidelines on racial and religious aggravation is in line with an appropriate and consistent approach to sentencing."* – Law Society

HM Circuit Judges thought the sentences in some categories were too low:

*"The draft guideline proposes three levels of 'racial or religious aggravation'. For a Category 1 harm/high level of racial aggravation case the starting point is suggested at 36 weeks custody with a range of 16 weeks' - 18 months' custody. The starting point may be too low for 'top end' cases where:*

*(i) Racial/ religious aggravation was the predominant motivation for the offence;*

*(ii) The offender was a member of, or was associated with, a group promoting hostility base on race or religion;*

*(iii) The racial/religious aggravation was intended to cause and does cause severe distress to an individual, a local or wider community.*

*The draft guideline for a Category A1/High racially aggravated S4A offence has a starting point of 26 weeks' custody. Again, having regard to the maximum sentence of two years' imprisonment in the Crown Court, the starting point may be too low for a 'top end' offence with one or more of the aggravating features set out at (i), (ii) and (iii) above*." - HM Circuit Judges

In research the opposite view was found, and when the guidelines were used by magistrates who would usually deal with these offences, the sentences they arrived at were almost universally thought to be too high. Some respondents also thought they were too high:

*"The committee took the view that the proposed uplifts were too severe. A Category A1 section 4 offence has a starting point of 12 weeks imprisonment, but a Category A1 section 4 has a starting point of 36 weeks' imprisonment, a 200% uplift. The difference was deemed to be especially severe given that the practical difference between a section 4 offence and a racially aggravated section 4 offence can often be a single racially abusive word uttered at the time of commissioning the offence." - LCCSA*

The LCCSA also thought the approach was overly complex:

*"The committee took the view that the proposed approach to assessing the level of aggravation was unnecessarily complex, unduly prescriptive and would pose a problem for benches sentencing offences of this nature. The committee took the view that there should simply be a further step in the sentencing process that obliged the sentencer to apply an uplift to the basis that there was racial or religious aggravation."* - LCCSA

This was also a research finding, that the additional table approach caused sentencing to take longer, and in some examples tested sentencers noted it was difficult for the elements of the basic and aggravated offences to be individually assessed.

During the Public Order consultation period the Council was also consulting on a draft guideline for arson and criminal damage offences, which used a different approach to

assess racial and religious aggravation. This approach used the same factors to assess the level of aggravation, but included less prescriptive guidance on how the sentence should be uplifted to reflect the aggravation present in the offence. This ‘uplift’ approach reflected Court of Appeal guidance on how aggravated offences should be sentenced. It was also included in the section 5 draft guideline, as due to the very low statutory maximum of a fine for both the basic and aggravated offences, it was not possible to include a separate sentencing table for a section 5 offence. The Council reviewed the research findings of both approaches and decided that given the issues identified with the model used to sentence section 4 and section 4A offences, the uplift approach used in section 5 and the Arson and Criminal Damage guidelines should be used for all aggravated offences. This ensures a consistent approach to assessing aggravation present in an offence.

# Stirring up hatred based on race, religion or sexual orientation

Part 3 of the Public Order Act prohibits activities intended or likely to stir up racial hatred. Part 3A of the Act prohibits activities based on hatred against persons on religious grounds or grounds of sexual orientation. The consultation document explained that the legislation prohibits a range of activity intended to stir up hatred on the grounds of race, religion or sexual orientation. In racial hatred cases this can be broader and the offence can be committed if, having regard to all the circumstances, hatred is likely to be stirred up**.** The offences contain an important distinction in that the racial hatred offences can include use of threatening, abusive or insulting words or behaviour, while the offences relating to hatred against persons on religious grounds or grounds of sexual orientation provide for threatening words or behaviour only, and do not extend to activity which is abusive or insulting.

This guideline elicited the majority of responses to the Public Order consultation. The vast majority were from individual members of the public, with almost 40 being an identical template response from members of an organisation who disapproved of the inclusion of the guideline.

The majority of these individual respondents may have missed the explanation of the offences included in the consultation document. These respondents wholly misunderstood the purpose of the guideline and thought that new laws were being created, rather than sentencing guidelines relevant to existing offences created by Parliament some time ago. These responses referred to censorship of speech, the undermining of democracy and believed the guideline to be an interference in political considerations.

The Council would like to reassure concerned respondents that the guideline is not politically influenced or motivated. The offence is provided for by legislation, and the Council considers that a comprehensive guideline on Public Order offences must therefore include this offence. The guideline was included predominantly to provide for a number of terrorism related offences and other serious examples of hate crime which were

considered during the guideline development. Such cases included Abu Hamza,[4] the Imam who incited jihadist activity among those attending the mosque at which he preached, and other cases which involved illegal dissemination of holocaust denial material.

The guideline on hate crime offences has been retained in the definitive version of the guideline, as these constitute Public Order offences and the Council considers that sentencers will benefit from guidance in these rare cases. The Council is grateful to have the opportunity to consider a number of relevant submissions in respect of the draft guideline proposals, which are discussed below.

## Culpability factors

Culpability factors related to the intention to stir up hatred, as this is the essence of these offences, rather than the level or content of threats, abuse or insults which are captured as aggravating factors.

The first high culpability factor relates to persons in positions of trust, authority or influence. This factor is included in the Terrorism guideline and was relevant in the case of Abu Hamza, who was convicted of the offence of stirring up hatred as well as other offences. Consideration of this case in the development of the guideline influenced the inclusion of this factor. However, some respondents thought this was specifically drafted to capture high profile individuals and spokespeople or activists of groups holding particular views. Others questioned how the status of the individual would be determined or measured:

*"What exactly do you mean by position of trust, authority and influence? The Nolan principles on public life already set a series of standards for those in public service. If we are talking outside of people in public service, how are you defining a position of trust, authority and influence? Are you looking at YouTube views?"* - Individual respondent

There were observations that this factor could extend to politicians and members of the press. The Council would again highlight that these offences require the stirring up of hatred towards particular groups, and consider that influential figures bear a greater responsibility not to use their position to incite hatred. The Council did, however, consider that the factor as worded in the draft guideline could be improved as it included a

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[4] *R v Abu Hamza* [2006] EWCA Crim 2918

qualification that the offender abuses their position, which on reflection was considered unnecessary. In the definitive guideline the wording of this factor has therefore been slightly revised to ‘offender uses position of trust, authority or influence to stir up hatred’.

There was little dissent specifically directed at the other two high culpability factors ‘intention to incite serious violence’ and ‘persistent activity’, and these factors have been retained in the definitive guideline.

The lesser culpability factor ‘reckless as to whether hatred would be stirred up’ would only be relevant to the racial hatred offences, as the other offences require intention. It was envisaged this would be relevant where an offender may have recklessly shared or added commentary to a social media post which included threats or encouragement of violence towards particular groups. The factor attracted significant criticism that it could be too far reaching and difficult to assess objectively:

*“Given that the internet has billions of potential viewers how can a person when discussing a controversial subject on a website, or YouTube video not be “reckless” as to the reaction from some viewers? -* Individual respondent

*“You are asking a Judge to decide how careful people should be about sharing information and to imagine if some unidentified persons may feel a strong emotion and to imagine what the consequence of that could be on society. This goes beyond what a Judge should be expected or allowed to decide*.” - Individual response

Again, it is important to consider the requirements of the offences to provide context to the factor. As legislation provides that racial hatred offences can be committed recklessly, the guideline provides for an appropriate seriousness assessment. The Council did note in reviewing factors that the applicability of recklessness to racial hatred offences only was not clear in the guideline as drafted. The Council has rectified this in the definitive version of the guideline by qualifying the recklessness factor with ‘applicable to racial hatred offences only’.

This does mean that as there is a higher threshold of intention required to commit the offences relating to hatred based on religion or sexual orientation, only two levels of culpability are available in the assessment for those offences. Given the high threshold of intention necessary in these offences, the Council consider the factors appropriately reflect culpability.

The Campaign against Anti-Semitism response made the following point regarding culpability factors:

*“The assessment of culpability should include the persistent use of social media to*

*disseminate to a wide audience hateful slurs about the behaviour of specific racial or religious groups. Such slanders would include the use of inaccurate stereotypes to portray the targeted group as a threat to society. For example, antisemitic conspiracy theories such as Jews exerting a control of global finance that allows them to profit at the expense of others is clearly designed to encourage hatred of Jewish people. In the same vein, slanders that Jews are allowed to kill non-Jews and are permitted to engage in paedophilia are widely disseminated across social media, and are clearly designed to incite hatred."*

The high culpability factor 'persistent activity' would capture persistent dissemination of material. The guideline also includes a high harm factor included relating to widespread dissemination, and the Council took into account the submission of the Campaign against Anti-Semitism in considering this factor, which is discussed below.

## Harm factors

There were few issues raised with the category 1 harm factor 'encouragement of activity threatening or endangering life.' However, concerns were raised regarding the second high harm factor relating to 'widespread dissemination'. Specific concerns related to the threshold of 'widespread' and how this could be assessed. Some respondents thought that an individual may not intend for a statement, publication or broadcast to be widely shared but this may occur anyway. A number of responses cited a Scottish case, *PF v Meechan,* as an example. This case involved an offender posting a video on You Tube of a dog he had taught to respond to Nazi commands, which was widely shared across the internet:

*"In R V Meechan (2018), Meechan made a video aimed at a small group of around 10 people, but which went viral subsequently obtaining several million views outside Meechan's control."* - Individual respondent

It should be noted that the offender in this case was not charged with the offence of stirring up hatred, but with a telecommunications offence. However, the Council noted the point being made. In developing the guideline the cases that influenced the inclusion of this factor included the sharing of information on the internet by setting up websites and sharing videos on YouTube encouraging others to harm particular racial or religious groups and individuals. The Council carefully considered the potential for wider sharing by others of material originally published by an offender, and took the view that the content of the material would still be the responsibility of the offender. The Council agrees with and notes the view of the Campaign against Anti-Semitism that widespread dissemination

would represent a greater level of harm to those affected, and the guideline should therefore provide for this.

The MA thought the factor should be separated into two points:

*"The second limb of Category 1 is: 'Widespread dissemination of statement/publication/performance or broadcast and/or strong likelihood that many would be influenced'– this phrasing seems unclear, and we query whether the 'influence' needs to be tied to intention to stir up racial hatred or cause harm. We suggest that this limb be broken down into two separate points, firstly the widespread dissemination, and secondly the strong likelihood of influence."* - MA

However, they also raised concerns regarding a risk of double counting if the factor was applied where high culpability is present:

*"We have some concern that the high culpability factor 'in position of trust, authority or influence and abuses their position' may, if considered together with the high harm factor relating to widespread dissemination, result in double counting for the purposes of determining the sentencing starting point. It is probably easiest to illustrate our concern by way of example: someone may be considered to fall into the high culpability factor as holding a position of influence because they have a large social media following, and any comment that person makes on social media is thereby disseminated widely. This would then automatically mean that the person falls into the A1 sentencing range, as having fulfilled the Category A culpability requirement and Category 1 harm*." – MA

The Council considers that offenders publishing items online do so in the knowledge that it may be viewed widely, and this would be more obvious to an offender with a large social media following, and the factor requires widespread dissemination of material. However, the Council did reconsider the requirement of a 'strong likelihood that many would be influenced', noting that this could present too subjective an assessment and be difficult for the court to determine. The Council therefore decided to remove the second limb of the factor and reword the factor as 'widespread dissemination'.

## Sentence levels

Some respondents considered the sentences far too high, although the highest starting point in the guideline of three years' custody is considerably lower than the seven year statutory maximum sentence.

The Council did review the starting point of the lowest seriousness category, and decided to revise it to a high level community order rather than a custodial sentence. These offences would be recklessness offences applicable to racial hatred offences involving lower levels of harm. The Council considers that this is a more proportionate starting point,

and the category range still allows for an increase if aggravating factors are present. To provide for relativity of sentences in other categories, the bottom of the range of categories B2 and C1 have also been reduced from one year to six months' custody.

## Aggravating and mitigating factors

As noted in the discussion regarding harm factors, the Council noted concerns that offenders who cause publications to go viral may be captured by the widespread dissemination factor. To recognise that offenders may take steps to remove or limit access to offending material they may have initiated or shared, an additional mitigating factor of 'offender took steps to limit dissemination' has been included in the definitive guideline. This factor has been qualified with 'the court should examine the offender's true motive in limiting dissemination before applying this factor' to ensure that offenders who remove content soon after uploading it purely to prevent closure of a website or social media account do not unjustly benefit.

All other factors in the draft guideline have been retained.

# Equality and Diversity

Views were sought as to whether there are any other equality or diversity issues the guideline had not considered.

As a public body the Council is subject to the Public Sector Equality Duty (PSED) which means it has a legal duty to have due regard to:

- the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010;
- the need to advance equality of opportunity between those who share a "protected characteristic" and those who do not;
- foster good relations between those who share a "protected characteristic" and those who do not;

Under the PSED the relevant protected characteristics are: race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment.

Section 149 of the Equality Act 2010 contains further detail about what is meant by advancing equality of opportunity and fostering good relations.

In the Public Order draft guidelines the PSED was particularly considered in the approach to sentencing offences which are aggravated by reasons of being related to a protected characteristic. In particular these are the section 4, section 4A and section 5 racially or religiously aggravated offences, and the guideline for other hate crime offences which involve offences demonstrating hatred based on the protected characteristics of race, religion and sexual orientation. The guidelines also include statutory aggravating factors at step two, relating to offences motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or transgender identity.

The consultation document confirmed that the Council considered data available in relation to offenders sentenced for Public Order offences. This data included volumes of offenders sentenced grouped by gender, ethnicity and age. There are many and varied reasons for the distribution of offender types and prevalence towards a particular type of offending, including wider social issues such as education, poverty and addiction. The Public Order guidelines are intended to apply equally to all demographics of offenders.

No relevant issues were raised by respondents in respect of other equality and diversity issues that the guideline should consider.

# 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 January 2020, regardless of the date of the offence.

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

# Annex A: consultation respondents

Crown Prosecution Service

Magistrates' Association

Legal Committee of Her Majesty's District Judges

Campaign Against Antisemitism

HM Council of Circuit Judges

English Democrats

LCCSA

Law Society

Criminal Bar Association

Justice Committee

P Robson

Charles Ross Illingworth

Thomas Walker

D Waring

Stephen Cooke

Vincent Gray

Graham Bryant

Terrance Patrick MacDougall

Simon Towler

Johan Holmgren

Stephanie Robinson

Matt Johnston

Sebastien Watling

Robin Tilbrook

Aaron Fitzgerald

Reed Burch

Joan Wright

Rob Aibhistein

John White

Ashley Brierley

Keith Cameron

Andrew Matthews

Anthony Obertelli

Emma Barker

Dawn Holliday

Tania Thompson

Heidi Campbell

Brian Kendry

Mark Winter

Natalie Barton

Wayne Poole

Les Seavor

Sue Davey

Garry Ashbridge

John Tucker

Frank Fisher

Anne Bodman

Benjamyn H Damazer JP DL

John Pagan

Nathan Taylor

Sam Moulton

Martin Beagley

Simon Towler

Mark Jones

Mike Prouten

Alice Date

Adam Lawson

Daniel O'Flaherty

Charlotte Mirams

David Booth

Tom Worrall

Sam A Dutton

Rick

Lex Winter

Christopher Webster

Chris Davies

Benjamin Stevens

Steven Pippin

William Byrne

David Webb

Adrian Halfyard

Andrew Werner

Robert Rance

Daniel Baguley

V Outram

Larry Whitehouse

Michael Coleman

defeating absurdity

Colin Browne

William Tuckwell

J.Barrington

David Kalugerovich

George Gentilis

David Critchley

Stephen Cowley

Tim Dieppe

Jonny

Mark Dell

Sara Pye

Jonathan Rainey

6 anonymous responses