

## Final Resource Assessment

### Public Order Offences

#### Introduction

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.<sup>1</sup>

#### Rationale and objectives for new guideline

In August 2008, the SGC published *Magistrates' Court Sentencing Guidelines* (MCSG) guidelines on sentencing the offence of affray and summary offences relating to threatening and disorderly behaviour provided for by section 4, section 4A and section 5 of the Public Order Act 1986 (POA 1986). There was also a brief reference to violent disorder offences which may be sentenced in magistrates' courts. This guidance did not include guidelines for sentencing these offences in the Crown Court, and also did not include guidance on sentencing the public order offences of riot, or offences relating to stirring up racial or religious hatred and hatred based on sexual orientation. The Council has published new sentencing guidelines for all these offences.

The Council's aim in developing these guidelines has been to ensure that the sentences are proportionate to the offence committed and in relation to other offences, and additionally to promote a consistent approach to sentencing.

#### Scope

As stipulated by section 127 of the Coroners and Justice Act 2009, this assessment considers the resource impact of the guideline on the prison service, probation service and youth justice services. Any resource impacts which may fall elsewhere are therefore not included in this assessment.

This resource assessment covers the following offences:

- Riot;
- Violent Disorder;
- Affray;
- Threatening Behaviour;

---

<sup>1</sup> Coroners and Justice Act 2009 section 127: [www.legislation.gov.uk/ukpga/2009/25/section/127](http://www.legislation.gov.uk/ukpga/2009/25/section/127)

- Disorderly Behaviour with intent;
- Disorderly Behaviour;
- Racially or religiously aggravated threatening behaviour;
- Racially or religiously aggravated disorderly behaviour with intent;
- Racially or religiously aggravated disorderly behaviour; and,
- Stirring up hatred based on race, religion or sexual orientation.

## Current sentencing practice

The offences covered by the public order guideline are relatively high in volume. There were 18,600 offenders sentenced for the public order offences covered by the guideline in 2018.<sup>2</sup>

### Riot

Riot is a low volume offence, with around 30 offenders sentenced for this offence over the past decade (2008-2018). All offenders sentenced for this offence received an immediate custodial sentence, with an average custodial sentence length<sup>3</sup> of 5 years 6 months. The statutory maximum sentence for this offence is 10 years' imprisonment.

### Violent disorder

Violent disorder is a relatively low volume offence, with 300 offenders sentenced for this offence in 2018. The majority of offenders sentenced for this offence receive custodial sentences (58 per cent of offenders sentenced in 2018 received an immediate custodial sentence, and a further 38 per cent of offenders received a suspended sentence order). The average custodial sentence length for offenders given an immediate custodial sentence in 2018 was 1 year 9 months. The statutory maximum sentence for this offence is five years' imprisonment.

### Affray

Affray is a relatively high volume offence, with 2,400 offenders sentenced for the offence in 2018. The majority of offenders are sentenced in the Crown Court (79 per cent of offenders sentenced in 2018 were sentenced in the Crown Court). The majority of offenders sentenced for this offence receive custodial sentences (35 per cent of offenders sentenced in 2018 received a suspended sentence order, and a further 35 per cent of offenders received an immediate custodial sentence). The average custodial sentence length for offenders given an immediate custodial sentence in 2018 was 11 months. The statutory maximum sentence for this offence is three years' imprisonment.

---

<sup>2</sup> The Court Proceedings Database (CPD), maintained by the Ministry of Justice (MoJ), is the data source for these statistics. Further information about this data can be found in the accompanying data tables published here: <http://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>

<sup>3</sup> The averages presented in this report are mean average custodial sentence length values for offenders sentenced to determinate custodial sentences, after any reduction for guilty plea.

## **Threatening behaviour, disorderly behaviour with intent and disorderly behaviour**

There were around 12,000 offenders sentenced for threatening behaviour, disorderly behaviour with intent and disorderly behaviour offences in 2018. Around 4,800 offenders were sentenced for the offence of threatening behaviour (fear or provocation of violence, s4 POA 1986), and community orders were the most frequently used disposal for this offence, followed by fines (35 per cent of individuals received a community order, with a further 24 per cent receiving a fine). Around 16 per cent of offenders sentenced received an immediate custodial sentence, while 10 per cent received a discharge.

Around 3,200 offenders were sentenced for disorderly behaviour with intent (s4A, POA 1986) in 2018. Fines were the most frequently used disposal for this offence (40 per cent of offenders sentenced received a fine in 2018), followed by community orders (26 per cent). Around 13 per cent of offenders sentenced received a discharge. For both offences, the average custodial sentence length was two months in 2018, and the statutory maximum sentence is six months' imprisonment.

There were around 3,900 offenders sentenced for disorderly behaviour (s5, POA 1986) in 2018. Around 62 per cent of offenders sentenced for this offence received a fine, and a further 33 per cent of offenders received an absolute or conditional discharge. The statutory maximum sentence for this offence is a level 3 fine.<sup>4</sup>

## **Racially or religiously aggravated threatening behaviour, racially or religiously aggravated disorderly behaviour with intent and racially or religiously aggravated disorderly behaviour**

Around 3,900 offenders were sentenced for racially or religiously aggravated threatening or disorderly behaviour offences in 2018. Racially or religiously aggravated threatening behaviour was the lowest volume offence, with around 450 offenders sentenced in 2018. Almost half of offenders sentenced for this offence received a custodial sentence (24 per cent received an immediate custodial sentence, while 22 per cent received a suspended sentence order). A further 35 per cent received a community order. The average custodial sentence length for offenders sentenced to immediate custody was four months, while the statutory maximum sentence for this offence is two years' imprisonment.

Around 2,400 offenders were sentenced for the offence of racially or religiously aggravated disorderly behaviour with intent in 2018. Around 33 per cent of offenders received a community order for this offence, with 29 per cent receiving fines and 30 per cent receiving a custodial sentence (either a suspended sentence order or an immediate custodial sentence). The average custodial sentence length for offenders sentenced to immediate custody was three months, while the statutory maximum sentence for this offence is two years' imprisonment.

There were around 1,000 offenders sentenced for racially or religiously aggravated disorderly behaviour in 2018. Around 79 per cent of offenders sentenced for this

---

<sup>4</sup> A level 3 fine represents a fine with a statutory limit of £1,000, see here for more details: <https://www.sentencingcouncil.org.uk/explanatory-material/item/fines-and-financialorders/approach-to-the-assessment-of-fines-2/9-maximum-fines/>

offence received a fine, and a further 12 per cent of offenders received an absolute or conditional discharge. The statutory maximum sentence for this offence is a level 4 fine.<sup>5</sup>

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

The offences of racial hatred and hatred against persons on religious grounds or grounds of sexual orientation are very low in volume, with around 80 offenders sentenced over the period 2008-2018. Some data quality issues were identified when looking at the data for these offences,<sup>6</sup> therefore this figure should be treated with caution, and sentence outcome figures are not provided in this report so as not to mislead. The statutory maximum sentence for these offences is seven years' imprisonment.

### **Key assumptions**

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 development of the guideline. However, some 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 guideline are therefore subject to a substantial degree of uncertainty.

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 proposed new guideline, and an assessment of the effects of changes to the structure and wording of the guideline where a previous guideline existed.

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.

In developing sentence levels for the guideline, data on current sentence levels have been considered. Existing guidance and transcripts of judges' sentencing remarks have also been reviewed.

While data exists on the number of offenders and the sentences imposed, assumptions have been made about how current cases would be categorised across the levels of culpability and harm proposed in the new guideline, due to a lack of

---

<sup>5</sup> A level 4 fine represents a fine with a statutory limit of £2,500, see here for more details: <https://www.sentencingcouncil.org.uk/explanatory-material/item/finer-and-financialorders/approach-to-the-assessment-of-fines>

<sup>6</sup> For these offences, there were inconsistencies between the offences recorded in the CPD and an analysis of transcripts of Crown Court sentencing remarks. Therefore the CPD data presented here only looks at overall volumes and demographic information, which should be considered as indicative.

available data regarding the seriousness of current cases. As a consequence, it is difficult to ascertain how sentence levels may change under the new guideline.

To support the development of the guideline and mitigate the risk of the guideline having an unintended impact, findings from the consultation stage research were considered in the development of the definitive guideline.<sup>7</sup> However, despite this, it remains difficult to estimate with any precision the impact the guideline may have on prison and probation resources.

## Resource impacts

This section should be read in conjunction with the guideline available at: <https://www.sentencingcouncil.org.uk>.

The *Public Order Definitive Guideline* aims to improve consistency of sentencing but for the majority of cases it is not anticipated to change sentencing practice.

For *riot and stirring up hatred based on race, religion or sexual orientation*, the number of offenders sentenced is low, and sentence ranges have been set based on a review of a number of transcripts of sentencing remarks for these offences (where available). It is not anticipated that there will be any impact on prison and probation resources.

For *violent disorder*, the guideline sentence ranges have been based on transcripts of sentencing remarks for this offence and the latest available sentencing statistics. A review of this information suggests that the definitive guideline is reflective of current sentencing practice, and therefore it is not expected to have an impact on prison or probation resources.

For *affray*, the guideline ranges were set with current sentencing practice in mind, and the consultation stage research found that sentencing was generally similar under the existing guideline and under the draft guideline. Sentence levels in the definitive guideline are the same as in the draft guideline, and therefore the guideline is not expected to have an impact on prison or probation resources.

For *threatening behaviour and disorderly behaviour with intent*, there have been some reductions to sentencing ranges and starting points for the different levels of offence seriousness, compared to the MCSG. It is possible that the decrease to sentence levels in the guideline could lead to a decrease in sentencing severity for these offences, whereby some individuals who currently receive a custodial sentence may now receive a community order. However, it is also possible that much of the decrease in sentencing severity could come from offenders currently receiving suspended sentence orders now receiving community orders. Therefore there is an upper estimate that the guideline will not have an impact on the requirement for prison places or probation resources, and a lower estimate that the guideline could

---

<sup>7</sup> 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. Around 90 magistrates were consulted across three separate events.

lead to a reduction in the requirement for up to 30 prison places per year and a small increase in the use of community orders.

For *racially or religiously aggravated threatening behaviour* and *racially or religiously aggravated disorderly behaviour with intent*, sentencers are first asked to sentence the basic offence, and then increase the sentence considering the level of racial or religious aggravation involved. This ‘uplift’ approach reflects Court of Appeal guidance on how aggravated offences should be sentenced, and aligns with current practice in relation to assessing the level of aggravation present in offences. This is the same process as used in the Council’s Arson and Criminal Damage guideline, where the consultation stage research found that there was a risk that the guideline could result in slightly higher sentences.<sup>8</sup> It is therefore possible that the guideline could cause an increase to sentencing severity. However, as noted at the start of the preceding paragraph, some of the starting points and sentence ranges for the basic offence are lower than under the current guideline, which could offset these potential increases. Therefore there is a lower estimate that the guideline will not have an impact on the requirement for prison places or probation resources, and an upper estimate that the guideline could lead to a requirement for up to 40 additional prison places per year and a small decrease in the use of community orders.

For the offences of *disorderly behaviour* and *racially or religiously aggravated disorderly behaviour*, the maximum sentence is a fine and therefore the guideline will not have an impact on prison and probation resources. For the offence of *disorderly behaviour*, the guideline introduces a new higher category of offending with a higher level of fine than in the existing MCSG guidance (a Band C fine). The guideline may therefore increase fine values for this offence. Also, because a fine is included for all levels of offending for racially or religiously aggravated disorderly behaviour - whereas data suggests that around 12 per cent of offenders sentenced for this offence received an absolute or conditional discharge in 2018 (after any reduction for guilty plea) – it is also possible that the guideline could increase the number of offenders sentenced to a fine for this offence.

## Risks

### **Risk 1: The Council’s assessment of current sentencing practice is inaccurate**

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 risk is mitigated by information that is gathered by the Council as part of the guideline development and consultation phase. This includes providing case scenarios as part of the consultation exercise which are intended to test whether the guideline has the intended effect and inviting views on the guideline. However, there

---

<sup>8</sup> See Arson and Criminal Damage resource assessment, paragraph 6.26:

<https://www.sentencingcouncil.org.uk/wp-content/uploads/Arson-and-criminal-damage-final-resource-assessment.pdf>

are limitations on the number of factual scenarios which can be explored, so the risk cannot be fully eliminated.

**Risk 2: Sentencers do not interpret the new guideline as intended**

If sentencers do not interpret the guideline as intended, this could cause a change in the average severity of sentencing, with associated resource effects.

The Council takes a number of precautions in issuing a new guideline to try to ensure that sentencers interpret it as intended. Sentencing ranges are agreed on by considering sentencing data in conjunction with Council members' experience of sentencing. Transcripts of sentencing remarks for 117 cases have also been studied to ensure that the guideline is developed with current sentencing practice in mind. Research with sentencers carried out during the consultation period has also enabled issues with implementation to be identified and addressed prior to the publication of the definitive guideline.

Existing guidance, transcripts of judges' sentencing remarks and media reports of cases have also been reviewed.