

10 May 2018

Dear Members

## Meeting of the Sentencing Council – 18 May 2018

The next Council meeting will be held in the **Queens Building Conference Suite, 2nd Floor Mezzanine at the Royal Courts of Justice**, on Friday 18 May 2018 at 9:45.

A security pass is not needed to gain access to this building and members can head straight to the meeting room. Once at the Queen's building, go to the lifts and the floor is 2M. Alternatively, call the office on 020 7071 5793 and a member of staff will come and escort you to the meeting room.

### The agenda items for the Council meeting are:

- |                                       |             |
|---------------------------------------|-------------|
| ▪ Agenda                              | SC(18)MAY00 |
| ▪ Minutes of meeting held on 13 April | SC(17)APR01 |
| ▪ Action Log                          | SC(18)MAY02 |
| ▪ Child Cruelty                       | SC(18)MAY03 |
| ▪ Assault                             | SC(18)MAY04 |
| ▪ Mental Health                       | SC(18)MAY05 |
| ▪ Seriousness Phase 2                 | SC(18)MAY06 |
| ▪ Business Plan                       | SC(18)MAY07 |
| ▪ Manslaughter                        | SC(18)MAY08 |

Members can access papers via the members' area of the website. If you are unable to attend the meeting, we would welcome your comments in advance.

Best wishes



**Steve Wade**

Head of the Office of the Sentencing Council

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## COUNCIL MEETING AGENDA

**18 May 2018**  
**Royal Courts of Justice**  
**Queen's Building**

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|---------------|--|
| 09:45 – 10:00 | Minutes of the last meeting and matters arising (papers 1 & 2) |
| 10:00 – 11:00 | Child cruelty – presented by Eleanor Nicholls (paper 3)        |
| 11:00 – 11:30 | Assault – presented by Steve Wade (paper 4)-                   |
| 11:30 – 12:15 | Mental Health – presented by Mandy Banks (paper 5)             |
| 12:15 – 12:45 | Seriousness Phase 2 – presented by Ruth Pope (paper 6)         |
| 12:45 – 13:15 | Lunch  |
| 13:15 – 13:45 | Business Plan – presented by Steve Wade (paper 7)              |
| 13:45 – 14:45 | Manslaughter – presented by Ruth Pope (paper 8)                |

# Sentencing Council

## **COUNCIL MEETING AGENDA**

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## MEETING OF THE SENTENCING COUNCIL

13 APRIL 2018

## MINUTES

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Members present: Colman Treacy (Chairman)  
Rob Butler  
Mark Castle  
Rosina Cottage  
Rebecca Crane  
Rosa Dean  
Julian Goose  
Martin Graham  
Heather Hallett  
Tim Holroyde  
Maura McGowan  
Sarah Munro  
Alpa Parmar

Apologies: Alison Saunders

Representatives: Chief Constable Olivia Pinkney for the police  
Neil Moore, Legal Advisor to DPP for the CPS  
Sophie Marlow for the Lord Chief Justice (Legal  
and Policy Adviser to Sir Brian Leveson, Head of  
Criminal Justice)  
Phil Douglas for the Lord Chancellor (Director,  
Offender and Youth Justice Policy)

Members of Office in  
Attendance: Steve Wade (Head of Office)  
Mandy Banks  
Eleanor Nicholls  
Amber Isaacs  
Sarah Poppleton  
Ruth Pope  
Lisa Frost

## **1. MINUTES OF LAST MEETING**

- 1.1. The minutes from the meeting of 2 March 2018 were agreed.

## **2. MATTERS ARISING**

- 2.1 The Chairman welcomed Rob Butler, Rosa Dean and Alpa Parmar to their first Council meeting since their recent appointments.

## **3. PRESENTATION ON MENTAL HEALTH – PRESENTED BY DR ADRIAN GROUNDS**

- 3.1 Dr Adrian Grounds, a retired senior lecturer at the Institute of Criminology at Cambridge and consultant forensic psychiatrist, addressed the Council on the subject of mental health and sentencing. The Chairman thanked him for an excellent and thought provoking presentation ahead of the Council's consideration of an overarching guideline on Mental Health in May.

## **4. DISCUSSION ON MANSLAUGHTER – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**

- 4.1 The Council considered the consultation responses to the Manslaughter by Reason of Diminished Responsibility guideline. The Council agreed with respondents that further information should be added to step one to ensure that the impact of a mental disorder on an offender's ability to exercise self-control or engage with medical services should be taken into account when assessing the degree of responsibility retained.
- 4.2 The Council also agreed to add a reference to undiagnosed or untreated mental disorders at step one.
- 4.3 The Council agreed to minor changes to aggravating factors and to qualify the factor relating to the offence being committed under the influence of drugs or alcohol in the context of this offence.
- 4.4 The Council discussed step four, the consideration of mental health disposals, in the light of the recent judgment in R v Edwards [2018] EWCA Crim 595. The Council agreed to amendments to step four to clarify that all sentencing options should be considered and that the importance of a penal element should be taken into account.

## **5. DISCUSSION ON INTIMIDATORY OFFENCES – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL**

- 5.1 The Council reviewed the guidance for all five offences, Coercive and Controlling Behaviour, Threats to Kill, Harassment, Stalking and Disclosing Private Sexual Images, ahead of planned publication of the definitive guideline in July 2018. The Council confirmed that it was

content with the guidance, subject to a couple of minor amendments to wording.

**6. DISCUSSION ON ROBBERY EVALUATION– PRESENTED BY SARAH POPPLETON, OFFICE OF THE SENTENCING COUNCIL**

6.1 The Council discussed the initial findings of the Robbery guideline evaluation and agreed to consider a further report when more data is available.

**7. DISCUSSION ON BREACH – PRESENTED BY LISA FROST AND AMBER ISAACS, OFFICE OF THE SENTENCING COUNCIL**

7.1 The Council considered information relating to the resource assessment for the Breach guideline, specifically in relation to findings from the data collection recently conducted in magistrates' courts to address data not being available for breaches of community orders and suspended sentence orders. This provided an indication of current sentencing practice and allowed a comparison with the penalties recommended in the new guideline, in order to inform the final resource assessment to be published alongside the definitive guideline.

7.2 The Council also discussed work undertaken to raise the profile of the Imposition guideline. It was agreed that publication of the Breach guideline should proceed as planned in May/June 2018 with an in force date of October 2018.

**8. DISCUSSION ON CHILD CRUELTY – PRESENTED BY ELEANOR NICHOLLS, OFFICE OF THE SENTENCING COUNCIL**

8.1 The Council discussed sentence levels for the Cruelty to a Child and Causing or Allowing offences and had a first consideration of the guideline for the Failure to Protect a Girl from the Risk of FGM offence post-consultation.

8.2 On sentence levels, following analysis of 2016 sentencing data and transcripts, the Council made some changes to starting points and ranges, particularly for offences at the lower end of seriousness to reflect current sentencing practice. Some of these changes also reflected changes to culpability and harm factors made post-consultation.

8.3 On the FGM offence, the Council discussed the approach to culpability, including the scope of the offence and whether any additional culpability factors suggested by consultation respondents should be added.

**9. DIGITAL UPDATE – PRESENTED BY PHIL HODGSON, OFFICE OF THE SENTENCING COUNCIL**

9.1 The Council was updated on the plans for the digitisation of the sentencing guidelines for use in the Crown Court and the additional information mechanisms for the online seriousness guideline.

**10. DISCUSSION ON SERIOUSNESS – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**

10.1 The Council agreed to consult on a General guideline to be used where there is no offence-specific guideline. This guideline will be available in a digital format which will allow for expanded explanations to be provided about the factors to assist courts in applying the guideline to a wide range of offences. The Council considered the factors and their explanations and agreed some changes ahead of consultation.

10.2 The Council agreed to consider providing expanded explanations for factors in offence-specific guidelines at future meetings and to consult on these separately.



## ACTION AND ACTIVITY LOG – as at 10 May 2018

	Topic	What	Who	Actions to date	Outcome
<b>SENTENCING COUNCIL MEETING 20 November 2015</b>					
1	Assault	Council to review decision to postpone assault work in June/ July 2016.	Lisa Frost	The Council discussed and agreed at the March meeting to bring assault back to the September meeting.	<b>ACTION ONGOING:</b> This timetable will now slip as a result of expediting the terrorism guidelines and now likely to be scheduled for Spring 2018
<b>SENTENCING COUNCIL MEETING 15 December 2017</b>					
2	Release of Professor Bottom's report	Bottoms' report to be published January 2018 together with a summary outlining the broad areas of work that the Council is taking forward as a result. Prof. Bottoms to be informed in advance.	Steve Wade		<b>ACTION CLOSED:</b> Report published on 18 April 2018.
<b>SENTENCING COUNCIL MEETING 13 APRIL 2018</b>					
3	Robbery	Full report for the robbery evaluation to be circulated to Council, once the time series analysis has been updated. Council will then decide whether or not to put robbery back on the workplan.	Sarah Poppleton	<b>ACTION ONGOING:</b> The report will be sent to Members in September.	

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**Sentencing Council meeting:** 18 May 2018  
**Paper number:** SC(18)MAY03 – Child Cruelty  
**Lead Council member:** Maura McGowan  
**Lead official:** Eleanor Nicholls  
020 7071 5799

## 1 ISSUE

1.1 This is the final consideration of detail in the child cruelty guidelines. Following decisions taken at this meeting, we will check across the three guidelines for consistency and carry out some further testing against new transcripts before bringing them (and further information on the resource assessment) back for sign off at the meeting in June. Publication is currently scheduled for early September.

1.2 This paper covers those aspects of the FGM Offence guideline (Annex C) which Council members have not yet considered post-consultation, viz: assessment of harm, sentence levels, and aggravating and mitigating factors. The paper then covers some further minor changes to the guidelines for Cruelty to a Child and Causing or Allowing offences.

## 2 RECOMMENDATION

2.1 That the Council considers and agrees the amendments proposed to the FGM Offence guideline and minor changes to the other two guidelines.

## 3 CONSIDERATION

*FGM Offence: assessment of harm*

3.1 The assessment of harm was the most controversial aspect of the FGM guideline for consultation respondents. The draft guideline set out the following harm categories:

<b>Category 1</b>	Cases where the physical and/or psychological harm is particularly severe
<b>Category 2</b>	All other cases

Several respondents agreed with our approach, but two asked us to link the assessment of harm with the four types of FGM set out by the WHO, either using four levels of harm to correspond to the four types, or putting types one to three into Category 1 harm, and type four into Category 2. Some respondents thought that there should only be one category of harm, since all harm caused by this offence is serious. Six respondents asked for further guidance

on the harm which should be classed as “particularly severe”, and especially on how to assess long term harm.

3.2 In developing the draft guideline, the Council decided not to use the four WHO types in determining the level of harm, as they do not necessarily equate with the level of both physical and psychological harm caused, and as they are not the definition of FGM used in the FGM Act 2003. A leading campaigning/education organisation in this field, FORWARD, agreed, saying in their response that they did not think we should link harm to the WHO classification, since the level of harm caused was not necessarily linked to the WHO type.

3.3 Given these responses, I am not proposing to change the guideline harm categories to link them to the WHO classification. However, in response to calls for additional clarification, I am proposing the following wording, adapted from the Causing or Allowing guideline since this FGM offence is also an “allowing” offence:

<b>Category 1</b>	Serious physical, psychological, developmental or emotional harm which has a substantial and/or long term effect.
<b>Category 2</b>	[Serious] harm which does not fall into Category 1

3.4 This wording for Category 1 gives more information than “particularly severe”, and makes this guideline consistent with the Causing or Allowing guideline. The wording also points to some of the factors that would mean certain WHO types of FGM (particularly types 2 and 3) would be most likely to be considered serious, since these are the types likely to have a substantial and/or long-term effect. By giving more detail on the harm necessary for a case to fall into Category 1, it is hoped that fewer of the less serious, cases will mistakenly be placed in that category, a risk highlighted in the consultation response from the Criminal Bar Association.

3.5 In the wording for Category 2, I propose including the word “Serious”, to reflect the fact that, as per the wording above the table in the draft guideline (see below at 3.6) the harm is likely to be serious.

***Question One: Does the Council wish to amend the wording of the harm factors as proposed?***

3.6 Responses referring to assessment of long-term harm also suggest the need to change the wording above the Harm table, which currently reads:

For all cases of failing to protect a girl from the risk of female genital mutilation there will be serious physical and psychological harm (likely both immediately and long-term) but there are factors that may increase it further.

This sentence refers to “factors that may increase” the harm, but the table does not then list separate factors. Furthermore, whilst the aim of this is to remind sentencers that not every apparently serious case should fall into Category 1, it also appears to assume a level of harm which may not be present in every case. Without any cases it is difficult to know what the levels of harm will be and I therefore propose amending the wording as follows, linking it to the proposed wording for Category 1 harm above at 3.3:

For all cases of failing to protect a girl from the risk of female genital mutilation there will be serious physical and psychological harm (~~likely both immediately and long-term~~) but some cases may involve more serious harm which has a substantial and/or long term effect ~~there are factors that may increase it further.~~

***Question Two: Does the Council agree to amending the wording above the Harm table as proposed?***

3.7 To assist sentencers in assessing the level of psychological harm, however, I propose to use the wording already agreed for inclusion in the other two Child Cruelty guidelines:

**Psychological, developmental or emotional harm**

A finding that the psychological, developmental or emotional harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does **not** imply that the harm suffered by the victim is minor or trivial.

***Question Three: Does the Council wish to adopt the wording used to assist sentencers in assessing psychological, developmental or emotional harm in the other Child Cruelty guidelines?***

*FGM Offence: culpability factors*

3.8 Following the last meeting, I have made the changes you agreed to the culpability factors (see Annex C, pC2). Reviewing these has shown inconsistency between the factors in the three guidelines on failure to protect. In the other two offence guidelines, to make sure that failure to protect was fully covered at all levels, we added in the category C factor from this FGM guideline re steps taken to protect the victim. In the other guidelines we then added related factors to culpability categories A and B. We did not add these to the FGM Offence guideline at the last meeting, and I now propose to add these in, so that the three factors would be:

**Category A:** Failure to take any steps to protect the victim from the FGM offence  
**Category B:** Limited steps taken to protect victim from the FGM offence  
**Category C:** Steps taken to protect victim but fell just short of what could reasonably be expected

**Question Four: Does the Council agree to including these additional culpability factors in Categories A and B?**

*FGM Offence: sentence levels*

3.9 Without any cases, setting sentence levels for this offence has been difficult. Four consultation respondents agreed with all the proposed levels. The Criminal Bar Association felt that the levels for the higher categories were set too high, particularly given the risk that cases would fall into Category 1 for Harm. Three respondents wanted us to increase the starting point for 2C, given the seriousness of the offence. Taking this into account, and looking at the revised sentence levels which you agreed for Causing and Allowing and Cruelty to a Child at your last meeting, I propose the following changes to the sentence levels:

	<b>Culpability A</b>	<b>Culpability B</b>	<b>Culpability C</b>
<b>Harm Category 1</b>	<p><b>Starting point</b> 4.5 years' custody</p> <p><b>Category range</b> 3 – 6 years' custody</p>	<p><b>Starting point</b> 2.3 years' custody</p> <p><b>Category range</b> 1 year 6 months 2– 5 years' custody</p>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> High level community order – 3.2 years' custody</p>
<b>Harm Category 2</b>	<p><b>Starting point</b> 2.3 years' custody</p> <p><b>Category range</b> 1 year 6 months 2– 5 years' custody</p>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> High level community order – 3.2 years' custody</p>	<p><b>Starting point</b> <del>High</del> Medium level community order</p> <p><b>Category range</b> Low level community order – 1 year's custody</p>

3.9 Most of these changes are made so that this FGM offence, which is similar to the Causing or Allowing offence but with a lower maximum penalty (7 as opposed to 10 years), has slightly lower sentence levels than the comparable categories for the Causing or Allowing offence. However, I have proposed increasing the starting point of 2C as proposed by consultation respondents, to reflect the seriousness of the FGM offence.

**Question Five: Does the Council agree with the proposed changes to sentence levels for this FGM offence?**

*FGM Offence: aggravating factors*

3.10 Many comments in response to consultation related to statutory aggravating factors, or asked us to remove factors which are standard in many guidelines without providing a good reason. There were, however, some comments and suggestions which require consideration, as follows.

3.11 For aggravating factor three, “Blamed others for the offence”, I propose to change the wording to match that agreed for the other Child Cruelty offences, “Blame wrongly placed on others”.

***Question Six: Does the Council agree to change the wording of this factor?***

3.12 The fourth aggravating factor “Victim particularly vulnerable” caused several respondents to ask for further clarification, since victims of this offence are all likely to be vulnerable. The Council decided to remove this factor from the other two Child Cruelty guidelines, so I am proposing to remove it from this guideline as well.

***Question Seven: Does the Council agree to removing this factor?***

3.13 The Criminal Bar Association suggested a new factor “Offender had given positive assurances that FGM would not take place”. I believe that this is adequately covered by the factors “Failed to respond to warnings”, “Subject to FGM protection order”, and “Concealment of the offence” though these positive assurances would be concealment of intent prior to the offence taking place. I therefore do not propose to add this factor.

***Question Eight: Does the Council agree that these circumstances are adequately covered by existing factors and no new factor is needed?***

3.14 The South Essex Bench suggested one further aggravating factor, where the “Offender is a community leader/in a position of authority”. This was presumably suggested because of the example which such an individual could set by their behaviour in failing to protect a girl from the risk of FGM. However, as any position as “community leader” would be difficult to define, as would the impact of the offender’s position and potential for aggravating this offence, I do not propose to add this factor.

***Question Nine: Is the Council content not to add this new aggravating factor?***

*FGM Offence – mitigating factors*

3.15 Most of the comments from consultation respondents on mitigating factors were, as usual, asking for removal of standard factors which were not considered relevant to the offence. Such comments were often based on a misunderstanding of the concept of “personal mitigation” and I do not propose to remove the majority of factors.

3.16 One factor which attracted significant comment was factor seven, “Good character/exemplary conduct”. Four respondents felt that this should be removed, or adapted, since good character by the standards of a community where FGM was widely practised would not necessarily be helpful here. In relation to this factor the NSPCC referred to the complexity of sentencing for this offence where the offender may be an otherwise loving and “exemplary” parent. This issue was also reflected in comments from FORWARD, which asked us to consider sentencing in cases where the offender cared about the victim’s wellbeing and believed (however wrongly) that they were acting in the victim’s best interests. In light of these, a mitigating factor from Gross Negligence Manslaughter might be relevant here:

The negligent conduct was a lapse in the offender’s otherwise satisfactory standard of care.

3.17 This factor could be adapted for this guideline as follows (factor 6 in Annex C):

Commission of the offence was a lapse in the offender’s otherwise satisfactory standard of care.

***Question Ten: Does the Council agree to replace the “Good character” mitigating factor with the above wording?***

*Good character – Cruelty to a Child and Causing or Allowing offences*

3.18 At last month’s Council meeting, following comments from the Justice Select Committee, you asked me to look again at the mitigating factor re good character (factor 5 at pA6, Annex A, or pB5, Annex B), and particularly at the wording used in the overarching Domestic Abuse guideline, to see whether it could be adapted for the Child Cruelty guidelines. The wording used in the Domestic Abuse guideline is as follows:

Positive good character - as a general principle of sentencing, a court will take account of an offender’s positive good character. However, it is recognised that one of the factors that can allow domestic abuse to continue unnoticed for lengthy periods is the ability of the perpetrator to have a public and a private face. In respect of offences committed within a domestic context, an offender’s good character in relation to conduct outside these offences should generally be of no relevance where there is a proven pattern of behaviour.

3.19 As in some Domestic Abuse cases, good character may be considered irrelevant, or could be used to conceal the offending behaviour. In child abuse cases social workers describe the phenomenon of “disguised compliance” where parents suddenly appear to cooperate with authorities to prevent them looking too closely into what is happening within the home. However, this is more specifically about “concealment” than in Domestic Abuse cases,



and using “good character” as a disguise would be covered by the "concealing" factor, so I do not propose to use or adapt the DA wording for the Child Cruelty guidelines. For further guidance on good character, I would still suggest using the explanatory wording in the sex offences guideline:

Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed, and such conduct may constitute an aggravating factor.

***Question Eleven: Does the Council agree to adding this explanatory wording to the mitigating factor on “Good character/exemplary conduct” in the Cruelty to a Child and Causing or Allowing offence guidelines?***

3.20 In Cruelty to a Child, “Good character” is more relevant in cases where the parents/carers are in general good parents, and the particular circumstances of the offence were “out of character” or a “one off”. This is often seen in transcripts of “over-chastisement” cases, where an otherwise loving parent has, perhaps on only one occasion, used excessive force to punish their child. The wording proposed above for the FGM guideline would therefore also be relevant here, and I propose to amend the “Momentary lapse in judgement” factor in Culpability Category C of the Cruelty to a Child guideline as follows:

Commission of the offence (including in cases of neglect) was a Momentary or brief lapse in judgement the offender’s otherwise satisfactory standard of care including in cases of neglect.

3.21 Removing the words “momentary” and “brief” from this factor gives the sentencer discretion to consider the length and nature of the lapse in the circumstances of each case, including cases of neglect where the lapse (for example, failure to seek medical help for a minor condition) may have lasted a short period of time rather than being “momentary”, but where the offender’s standard of care was otherwise good.

***Question Twelve: Does the Council wish to adapt this culpability factor as proposed in the Cruelty to a Child guideline?***

**4. Risks and Impact**

4.1 We have now analysed the 2016 case transcripts we have received for the causing or allowing offences, and also looked again at more of the 2014 transcripts. Analysis suggests that sentence levels may be too high in some cases. Following this meeting, we will again check consistency of factors and levels between guidelines. Any further changes needed as a result of this analysis, and a draft resource assessment will be presented to Council at your meeting in June alongside the guidelines for sign-off.

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## **Child Cruelty – Assault and ill treatment, abandonment, neglect and failure to protect.**

### **Cruelty to a child**

Children and Young Persons Act 1933 (S1(1))

Triable either way

Maximum: 10 years' custody

Offence range: Low level community order – 9 years' custody

This guideline applies only to offenders aged 18 and older

## Annex A: revised draft guideline

### STEP ONE Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

**Culpability** demonstrated by one or more of the following:

#### **A - High culpability:**

- Prolonged and/or multiple incidents of serious cruelty, including serious neglect
- Gratuitous degradation of victim and/or sadistic behaviour
- Use of very significant force
- Use of a weapon
- Blatant and deliberate disregard to the welfare of the victim
- Failure to take any steps to protect the victim from offences in which the above factors are present
- Offender with professional responsibility for the victim (where linked to the commission of the offence)

#### **B - Medium culpability:**

- Use of significant force
- Limited steps taken to protect victim in cases with Category A factors present
- Other cases falling between A and C because:
  - Factors in both high and lesser categories are present which balance each other out and/or
  - The offender's culpability falls between the factors as described in high and lesser culpability

#### **C - Lesser culpability:**

- Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- Victim of domestic abuse, including coercion and/or intimidation (when linked to the commission of the offence)
- Steps taken to protect victim but fell just short of what could reasonably be expected
- Commission of the offence (including in cases of neglect) was a momentary or brief lapse in judgement the offender's otherwise satisfactory standard of care including in cases of neglect.
- Use of some force or failure to protect the victim from an incident involving some force
- Low level of neglect

## Annex A: revised draft guideline

### Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

#### Psychological, developmental or emotional harm

A finding that the psychological, developmental or emotional harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does **not** imply that the psychological/developmental harm suffered by the victim is minor or trivial.

<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Serious psychological, developmental, and/or emotional harm</li> <li>• Serious physical harm (including illnesses contracted due to neglect)</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Cases falling between category 1 and 3</li> <li>• A high likelihood of category 1 harm being caused</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• Little or no psychological, developmental, and/or emotional harm</li> <li>• Little or no physical harm</li> </ul>

### STEP TWO

#### Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Harm	Culpability		
	A	B	C
<b>Category 1</b>	<p><b>Starting point</b> 6 years' custody</p> <p><b>Category range</b> 4 – 8 years' custody</p>	<p><b>Starting point</b> 3 years' custody</p> <p><b>Category range</b> 2 – 6 years' custody</p>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> High level community order– 2 years 6 months' custody</p>
<b>Category 2</b>	<p><b>Starting point</b> 3 years' custody</p> <p><b>Category range</b> 2 – 6 years' custody</p>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b></p>	<p><b>Starting point</b> High level community order</p> <p><b>Category range</b></p>

## Annex A: revised draft guideline

		High level community order – 2 years 6 months' custody	Medium level community order – 1 year's custody
<b>Category 3</b>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> High level community order – 2 years 6 months' custody</p>	<p><b>Starting point</b> High level community order</p> <p><b>Category range</b> Medium level community order – 1 year's custody</p>	<p><b>Starting point</b> Medium level community order</p> <p><b>Category range</b> Low level community order – 6 months' custody</p>

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

### Factors increasing seriousness

#### **Statutory aggravating factors:**

1. Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
2. Offence committed whilst on bail

#### **Other aggravating factors:**

1. Failure to seek medical help (where not taken into account at step one)
2. Commission of offence whilst under the influence of alcohol or drugs
3. Deliberate concealment and/or covering up of the offence
4. Blame wrongly placed on others
5. Failure to respond to interventions or warnings about behaviour
6. Threats to prevent reporting of the offence
7. Failure to comply with current court orders
8. Offence committed on licence or post sentence supervision
9. Offences taken into consideration
10. Offence committed in the presence of another child

## Annex A: revised draft guideline

### Factors reducing seriousness or reflecting personal mitigation

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. Determination and demonstration of steps having been taken to address addiction or offending behaviour, including co-operation with agencies working for the welfare of the victim
4. Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
5. Good character and/or exemplary conduct (~~the more serious the offence, the less weight should normally be attributed to this factor~~ where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed, and such conduct may constitute an aggravating factor)
6. Serious medical condition requiring urgent, intensive or long-term treatment
7. Mental disorder or learning disability (where not taken into account at step one)
8. Co-operation with the investigation

#### STEP THREE

##### Consider any factors which indicate a reduction for assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

#### STEP FOUR

##### Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

#### STEP FIVE

##### Parental responsibilities for sole or primary carers

In the majority of cruelty to a child cases the offender will have parental responsibility for the victim. When the case is on the cusp of custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children the offender may care for). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lesser culpability/harm cases involving a momentary lapse in judgement where the offender has otherwise been a loving and capable parent/carers.

## Annex A: revised draft guideline

### **STEP SIX**

#### **Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Offences Taken into Consideration and Totality guideline.

### **STEP SEVEN**

#### **Ancillary orders**

In all cases the court should consider whether to make ancillary orders.

### **STEP EIGHT**

#### **Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

### **STEP NINE**

#### **Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.



## **Causing or allowing a child to suffer serious physical harm**

### **Domestic Violence, Crime and Victims Act 2004 (section 5)**

Indictable only

Maximum: 10 years' custody

Offence range: High level community order – 9 years' custody

## **Causing or allowing a child to die**

### **Domestic Violence, Crime and Victims Act 2004 (section 5)**

Indictable only

Maximum: 14 years' custody

Offence range: 1 year's custody – 14 years' custody

This guideline applies only to offenders aged 18 and older and when the victim of the offence is aged 17 or under.

## Annex B: Revised draft guideline

### STEP ONE

#### Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

**Culpability** demonstrated by one or more of the following:

#### **A - High culpability:**

- Prolonged and/or multiple incidents of serious cruelty, including serious neglect
- Gratuitous degradation of victim and/or sadistic behaviour
- Use of very significant force
- Use of a weapon
- Deliberate disregard for the welfare of the victim
- Failure to take any steps to protect the victim from offences in which the above factors are present
- Offender with professional responsibility for the victim (where linked to the commission of the offence)

#### **B - Medium culpability:**

- Use of significant force
- Limited steps taken to protect victim in cases with Category A factors present
- Other cases falling between A and C because:
  - Factors in both high and lesser categories are present which balance each other out and/or
  - The offender's culpability falls between the factors as described in high and lesser culpability

#### **C - Lesser culpability:**

- Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- Victim of domestic abuse, including coercion and/or intimidation (when linked to the commission of the offence)
- Steps taken to protect victim but fell just short of what could reasonably be expected
- Momentary or brief lapse in judgement
- Use of some force or failure to protect the victim from an incident involving some force
- Low level of neglect

## Annex B: Revised draft guideline

### Harm

The court should consider the factors set out below to determine the level of harm that has been caused to the victim.

### Psychological, developmental or emotional harm

A finding that the psychological, developmental or emotional harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does **not** imply that the psychological/developmental harm suffered by the victim is minor or trivial.

<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Death</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Serious physical harm which has a substantial and/or long term effect</li> <li>• Serious psychological, developmental or emotional harm</li> <li>• Significantly reduced life expectancy</li> <li>• A progressive, permanent or irreversible condition</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• Serious physical harm that does not fall into Category 2</li> </ul>

### STEP TWO

#### Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Harm	Culpability		
	A	B	C
<b>Category 1</b>	<b>Starting point</b> 9 years' custody  <b>Category range</b> 7 – 14 years' custody	<b>Starting point</b> 5 years' custody  <b>Category range</b> 3 – 8 years' custody	<b>Starting point</b> 2 years' custody  <b>Category range</b> 1 year– 4 years' custody

## Annex B: Revised draft guideline

<b>Category 2</b>	<p><b>Starting point</b> 7 years' custody</p> <p><b>Category range</b> 5 – 9 years' custody</p>	<p><b>Starting point</b> 3 years' custody</p> <p><b>Category range</b> 1 year 6 months' – 6 years' custody</p>	<p><b>Starting point</b> 1 year 6 months' custody</p> <p><b>Category range</b> 6 months – 3 years' custody</p>
<b>Category 3</b>	<p><b>Starting point</b> 3 years' custody</p> <p><b>Category range</b> 1 year 6 months' – 6 years' custody</p>	<p><b>Starting point</b> 1 year 6 months' custody</p> <p><b>Category range</b> 6 months – 3 years' custody</p>	<p><b>Starting point</b> 9 months' custody</p> <p><b>Category range</b> High level community order – 2 years' custody</p>

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

### Factors increasing seriousness

#### **Statutory aggravating factors:**

1. Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
2. Offence committed whilst on bail

#### **Other aggravating factors:**

1. Failure to seek medical help (where not taken into account at step one)
2. Prolonged suffering prior to death
3. Commission of offence whilst under the influence of alcohol or drugs
4. Deliberate concealment and/or covering up of the offence
5. Blame wrongly placed on others
6. Failure to respond to interventions or warnings about behaviour
7. Threats to prevent reporting of the offence
8. Failure to comply with current court orders
9. Offence committed on licence or post sentence supervision
10. Offences taken into consideration
11. Offence committed in the presence of another child

## Annex B: Revised draft guideline

### Factors reducing seriousness or reflecting personal mitigation

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. Determination and demonstration of steps having been taken to address addiction or offending behaviour, including co-operation with agencies working for the welfare of the victim
4. Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
5. Good character and/or exemplary conduct (where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed, and such conduct may constitute an aggravating factor ~~the more serious the offence, the less weight should normally be attributed to this factor~~).
6. Serious medical condition requiring urgent, intensive or long-term treatment
7. Mental disorder or learning disability (where not taken into account at step one)
8. Co-operation with the investigation

#### STEP THREE

##### Consider any factors which indicate a reduction for assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

#### STEP FOUR

##### Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

#### STEP FIVE

##### Parental responsibilities for sole or primary carers

In the majority of cases the offender will have parental responsibility for the victim. When the case is on the cusp of custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children the offender may care for). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lesser culpability/harm cases, particularly “failure to protect” offences, where the offender has otherwise been a loving and capable parent/carer.

## Annex B: Revised draft guideline

### **STEP SIX**

#### **Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Offences Taken into Consideration and Totality guideline.

### **STEP SEVEN**

#### **Ancillary orders**

In all cases the court should consider whether to make ancillary orders.

### **STEP EIGHT**

#### **Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

### **STEP NINE**

#### **Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

## **Child Cruelty – Failing to protect a girl from female genital mutilation**

**Failure to protect a girl from risk of genital mutilation**  
Female Genital Mutilation Act 2003 (S3A)

Indictable only

Maximum: 7 years' custody

Offence range: Community order – 6 years' custody

This guideline applies only to offenders aged 18 and older

**STEP ONE**  
**Determining the offence category**

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

**Culpability** demonstrated by one or more of the following:

**A - High culpability:**

- Child was subject to an FGM Protection Order
- Failure to respond to interventions or warnings including, but not limited to, those from medical professionals/social services
- Involving others through coercion, intimidation or exploitation
- Failure to take any steps to protect the victim from the FGM offence

**B - Medium culpability:**

- Limited steps taken to protect victim from the FGM offence
- Other cases falling between A and C because:
  - Factors in both high and lesser categories are present which balance each other out and/or
  - The offender's culpability falls between the factors as described in high and lesser culpability

**C - Lesser culpability:**

- Steps taken to protect child but fell just short of what could reasonably be expected
- Offender victim of domestic abuse (where linked to commission of the offence)
- Subjected to coercion, intimidation or exploitation
- Offender's responsibility substantially reduced by mental disorder or learning disability

**Harm**

The court should consider the factors set out below to determine the level of harm that has been caused to the victim.

**Psychological, developmental or emotional harm**

A finding that the psychological, developmental or emotional harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does **not** imply that the harm suffered by the victim is minor or trivial.



## Annex C: Draft Guideline

For all cases of failing to protect a girl from the risk of female genital mutilation there will be serious physical and psychological harm (~~likely both immediately and long term~~) but some cases may involve more serious harm which has a substantial and/or long term effect ~~there are factors that may increase it further.~~

<b>Category 1</b>	<ul style="list-style-type: none"> <li><del>Cases where the physical and/or psychological harm is particularly severe</del></li> <li><u>Serious physical, psychological or developmental harm which has a substantial and/or long term effect</u></li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li><del>All other cases</del> <u>Serious harm which does not fall into Category 2</u></li> </ul>

### STEP TWO

#### Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Harm	Culpability		
	A	B	C
<b>Category 1</b>	<b>Starting point</b> <del>4</del> 5 years' custody  <b>Category range</b> 3 – 6 years' custody	<b>Starting point</b> <del>2</del> 3 years' custody  <b>Category range</b> <u>1 year 6 months</u> <del>2</del> – 5 years' custody	<b>Starting point</b> 1 year's custody  <b>Category range</b> High level community order – <del>3</del> 2 years' custody
<b>Category 2</b>	<b>Starting point</b> <del>2</del> 3 years' custody  <b>Category range</b> <u>1 year 6 months</u> <del>2</del> – 5 years' custody	<b>Starting point</b> 1 year's custody  <b>Category range</b> High level community order – <del>3</del> 2 years' custody	<b>Starting point</b> <del>High</del> Medium level community order  <b>Category range</b> Low level community order – 1 year's custody

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

### Factors increasing seriousness

#### **Statutory aggravating factors:**

1. Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
2. Offence committed whilst on bail

#### **Other aggravating factors:**

1. Failure to seek medical help when necessary
2. Deliberate concealment and/or covering up of the offence
3. Blame wrongly placed on others~~others for the offence~~
4. ~~Victim particularly vulnerable~~
5. Threats to prevent reporting of the offence
6. Failure to comply with current court orders (where not taken into account at step one)
7. Offence committed on licence or post sentence supervision
8. Offences taken into consideration

### Factors reducing seriousness or reflecting personal mitigation

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. Offender particularly isolated with limited access to support
4. Appropriate medical care sought for victim
5. Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
6. Commission of the offence was a lapse in the offender's otherwise satisfactory standard of care.
7. ~~Good character and/or exemplary conduct~~
8. Serious medical condition requiring urgent, intensive or long-term treatment
9. Age and/or lack of maturity where it affects the responsibility of the offender
10. Mental disorder or learning disability (where not taken into account at step one)
11. Co-operation with the investigation

### **STEP THREE**

#### **Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

### **STEP FOUR**

#### **Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

### **STEP FIVE**

#### **Parental responsibilities**

In the majority of failing to protect a child from female genital mutilation cases the offender will have parental responsibility for the victim. When the case is on the cusp of custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children the offender may care for). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lower culpability cases or where the offender has otherwise been a loving and capable parent/carer.

### **STEP SIX**

#### **Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Offences Taken into Consideration and Totality guideline.

### **STEP SEVEN**

#### **Ancillary orders**

In all cases the court should consider whether to make ancillary orders.

### **STEP EIGHT**

#### **Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

### **STEP NINE**

#### **Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

## Annex C: Draft Guideline

**Sentencing Council meeting:** 18 May 2018  
**Paper number:** SC(18)MAY04 – Assault  
**Lead Council member:** Julian Goose  
**Lead officials:** Lisa Frost & Caroline Nauth-Misir  
0207 071 5784

## 1 ISSUE

1.1 In March 2015 the Council decided to revise comprehensively the existing assault guideline, following consideration of early findings from the assessment of the guideline. A number of issues have since caused delays, but work on revising the guideline is now ready to commence.

## 2 RECOMMENDATION

That the Council:

- considers and agrees the scope of revising the assault guideline and;
- considers and notes the approach to be taken in the policy development of the guideline.

## 3 CONSIDERATION

### Background

3.1 On 22 October 2015 the full assessment of the assault guideline was published on the Council's website;<sup>1</sup> the synthesis is attached at **Annex A**. Work was due to commence on revising the guideline in the Summer of 2016, but this was paused pending the outcome of the Law Commission review on assault offences which was published on 3 November 2015, and was anticipated to result in legislative changes to assault offences. In summary, the Commission carried out a project, at the request of the Ministry of Justice (MOJ), to look at modernising and restating the main offences of violence. It recommended the adoption of a modified version of the Home Office's 1998 draft Bill to replace the outdated Offences Against the Person

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<sup>1</sup> <http://www.sentencingcouncil.org.uk/publications/item/assault-offences-assessment-of-guideline/>.

Act of 1861, which would include a logical hierarchy of offences and a requirement that the defendant must have foreseen the level of harm caused. In addition, they proposed including within the new legislation a new summary only offence of aggravated assault, carrying a maximum sentence of 12 months' custody. This new offence would be intended to bridge the gap between the existing offences of common assault and Actual Bodily Harm (ABH). The Council has been informed since that date that the Government has no current plans to revise legislation following the proposals, and agreed to commence work on revising the guidelines in the absence of potential legislative changes. This was due to commence in Autumn 2016, but this timescale was reviewed due to the need to expedite work on the guideline for Terrorism offences.

3.2 There is now sufficient capacity within the Council's workplan to commence the revision.

### Scope

3.3 In November 2015, the Council considered other offences which could potentially be considered for inclusion in the assault guideline, including domestic violence, child cruelty offences and threats to kill. Since that date other projects have been undertaken to develop guidelines for these offences. It is proposed that the scope of the guideline is therefore the existing offences covered within it, as well as attempted murder, which it was agreed would be more appropriately covered in the assault guideline than in the manslaughter guideline.

3.4 The guideline would therefore cover the following offences;

- Attempted murder (no existing guideline)
- Causing grievous bodily harm (GBH) with intent to do grievous bodily harm/Wounding with intent to do grievous bodily harm (s18)
- Inflicting grievous bodily harm/Unlawful wounding (s20) and racially/religiously aggravated GBH/Unlawful wounding (s 29)
- Assault occasioning actual bodily harm (ABH) (s47) and racially/ religiously aggravated ABH (s 29)
- Assault with intent to resist arrest (s38)
- Assault on a police constable in execution of his duty (s89)
- Common assault (s39) and racially/religiously aggravated common assault

- Assaults on Emergency workers (potentially)

3.5 During the development of the guideline officials will closely monitor the development of the Private Members Bill on Assaults on Emergency Workers which is currently in its final stages of transition through Parliament. If, as expected, it becomes an offence, it will be necessary to consider whether there is likely to be any wider impact on other assault offences that the guideline should provide for. Should it be enacted prior to the consultation on the revised guidelines a draft guideline is likely to be required to complete the package of assault offences provided for by the guideline.

**Question One: Does the Council agree with the proposed scope of the guideline?**

#### Issues with existing guidelines

3.6 The assault guideline was the first definitive guideline the Sentencing Council published, in 2011. The evaluation highlighted an overall decrease in sentence severity, which is largely thought to be attributable to sentences for common assault which are high volume. Despite this, two offences, Grievous Bodily Harm (GBH) with intent s18 and ABH s47 were found to have impacts different to those expected. For GBH with intent, the guideline resulted in sentences increasing in excess of that estimated. For ABH sentences increased, despite the estimate that the guideline would result in less severe sentences.

3.7 The assessment of the guideline showed that while most users were positive about the guideline, the following issues will also merit consideration as part of revision of the guideline:

- There was general confusion on how to interpret and apply the step one factors of *'injury which is serious in the context of the offence'* and *'injury which is less serious in the context of the offence'*, across all the assault offences.
- The potential for differing interpretations of the step one factors *'sustained or repeated assault on the same victim'* and *'significant degree of premeditation'*.

- Whether there is potential to double count victim vulnerability in the guideline (victim vulnerability is a factor in both harm and culpability in the guideline).
- The model and structure of the guidelines, and changing to the format we have progressed to since early guideline development. This could address an issue in the existing guideline which cannot currently accommodate cases of 'medium' harm: harm that is neither the most or the least serious, which may lead to an inaccurate categorisation of harm when using the guideline.
- Whether '*spitting*' should be reintroduced as a factor increasing seriousness, particularly within the assault on a police officer (s89) cases, where there has been a shift towards less severe disposal types (although this was anticipated).
- Whether the starting points/ranges within the GBH s18 guideline are too high, particularly the starting point in category one of 12 years.
- Whether the sentence ranges in ABH s47 cases are too low (the ranges were lower than those in the preceding SGC guideline) possibly causing some sentencers to go outside the category range.

**Question Two: Does the Council agree that these are the key issues that require addressing? Are there any other issues that ought to be considered?**

#### Approach to revising guideline

3.8 Work undertaken in relation to revising the guideline will be much more extensive and resource intensive than standard guideline development. As well as considering current sentencing practice and the policy landscape such as CPS charging guidance, offending trends and the original evaluation findings, evidence of sentencing practice both pre and post guideline will need to be considered in a much more detailed way than was the case for the evaluation.

3.9 The A&R team will be undertaking significant work to explore evidence from the Crown Court Sentencing Survey (CCSS), including analysis of the prevalence of sentencing factors; changes in offence categorisation; and changes in sentence outcomes and average custodial sentence lengths (ACSLs) within offence categories. This detailed analysis will help to supplement the earlier findings on overall trends, with more specific information on which aspects of the guideline/s may be causing any of the changes seen in sentencing severity, and will provide a robust evidence base to inform Council decisions in the guideline revision.



3.10 Due to the wider range of evidence and additional work required to revise an existing guideline effectively, it is possible that developing each guideline may take longer than usual. Officials will consider how to best present the evidence outlined above to inform the Council's consideration of the extent and scope of the revised guidelines.

**Question Three: Is the Council content with the proposed approach?**

#### **4 IMPACT /RISKS**

4.1 As this is the first evaluation based revision of a guideline, it will be important reputationally to ensure a thorough assessment of the evidence available and for principled decisions regarding sentencing practice to be made and reflected in the revised guidelines. There are risks to the timescale of the guideline due to the additional work involved, and the potential for other factors, such as the Private Members Bill, to delay work. This will be mitigated by regularly reviewing the priority of revisions and available evidence.

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## Assessing the impact and implementation of the Sentencing Council's Assault Definitive Guideline

### Summary

- A 3-staged approach was undertaken to assess the impact of the Sentencing Council's Assault Definitive Guideline on sentencing outcomes and whether there were any implementation issues.

- The assumption was that where impacts occur that differ from those expected, sentencers may be implementing the guideline in a way not anticipated by the Council.

- Looking at assault offences as a whole, the guideline has slightly decreased sentencing severity. This is likely to be as a result of the downward impact of the guideline on common assault, which makes up the largest group of assault offences.

- However, despite this overall decrease in sentence severity, two offences in particular – GBH with intent (s18) and ABH (s47) – were found to have impacts different to those expected. For GBH with intent, the guideline resulted in sentences increasing in excess of that estimated. For ABH, sentences increased, despite the estimate that the guideline would result in less severe sentences. For both, issues with applying the step 1 factors in the guideline *“injury which is serious in the context of the offence”/ “injury which is less serious in the context of the offence”* may be one explanation for this.

- For assault on a police officer (s89) offences, there was a shift towards less severe disposal types, as anticipated. Sentencers attributed this to the removal of “spitting” as a factor increasing seriousness. The offence range has also slightly decreased. Likewise, for common assault (s39) offences, sentencing severity decreased and was broadly consistent to that anticipated.

- For GBH (s20) offences, there were minor increases in sentencing severity, but these had been anticipated and were within the bounds of historic fluctuations in sentencing levels; as a result there is no strong statistical evidence that the guideline has caused a change in sentencing practice for these offences.

- In interview, sentencers and lawyers were positive about the guideline and cited many benefits it had brought about. However, the evaluation suggests that there are areas where issues with implementation exist and to support this, sentencers and lawyers highlighted a number of areas that may need clarifying.

- The areas for further consideration include:

\* when to apply the factor of *“injury which is serious in the context of the offence”/ “injury which is less serious in the context of the offence”*;

\* what constitutes *“sustained or repeated assault on the same victim”* and *“a significant degree of pre-meditation”*;

\* whether there is the potential to double count victim vulnerability in the guideline and how this should be interpreted in a domestic context;

\* whether “spitting” should be reintroduced as a factor increasing offence seriousness.

## Introduction

The Sentencing Council was set up in 2010 and produces guidelines for use by all members of the judiciary who sentence criminal offences. The first guideline to be issued was the Assault Definitive Guideline which came into force in June 2011.<sup>1</sup>

One of the Sentencing Council's statutory duties under the Coroners and Justice Act 2009 is to monitor the operation and effect of its sentencing guidelines and to draw conclusions from this information.<sup>2</sup> Research and analysis was therefore undertaken to assess the impact of the guidelines on sentencing outcomes and whether there were any implementation issues.

A staged approach to evaluation was undertaken in order to ensure that the work covered all aspects necessary and to provide the flexibility needed to tailor resources to these areas. The work therefore comprised:

- Stage 1: Assessment of the resource implications of the assault guideline;<sup>3</sup>
- Stage 2: A descriptive analysis and time series analysis of changes in sentencing outcomes before and after the guideline came into effect;<sup>4</sup>
- Stage 3: Collection and analysis of qualitative data to explore some of the potential reasons for the issues found in stage 2.

## Approach

In conducting this assessment, a distinction has been made between ***impact*** and ***implementation*** issues. The Council's resource assessments are concerned with anticipating any *impact* on sentencing practice that is expected to occur as a result of the guideline, over and above any changes caused by unrelated issues (e.g. changes in the volume and nature of cases coming before the courts).

In this sense, some of the observed impacts of the guideline outlined below were expected and were identified in the resource assessment. Where this is the case, the evaluation has therefore gone no further in investigating these. Likewise, where the guideline has had no impact and none was expected, no further work has been conducted.

However, in cases where either an impact has occurred that was not expected in the Council's resource assessment, or no impact has occurred where one was expected, further work has been conducted; the assumption is that where impacts differ from those expected, this is as a result of sentencers *implementing* the guideline in a way not anticipated by the Council.<sup>5</sup>

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<sup>1</sup> See <http://www.sentencingcouncil.org.uk/publications/item/assault-definitive-guideline/>

<sup>2</sup> The Council must (a) monitor the operation and effect of its sentencing guidelines, and (b) consider what conclusions can be drawn from the information obtained by virtue of paragraph (a) (*Coroners and Justice Act 2009, Section 128*).

<sup>3</sup> The resource assessment associated with the definitive assault guideline can be found at:

<http://www.sentencingcouncil.org.uk/publications/item/assault-final-resource-assessment/>

<sup>4</sup> All offences in the guideline except assault with intent to resist arrest, due to the low volume of these offences.

<sup>5</sup> This assessment did not explore the issue of consistency in sentencing in any quantitative way. Previous research on this issue has been published (Pina-Sanchez, J. and Linacre, R. (2013) *Sentence Consistency in England and Wales*, British Journal of Criminology; Pina-Sanchez, J. and Linacre, R.

## Methodology

### Stage 1

A resource assessment to accompany the publication of the assault definitive guideline was issued in March 2011. This was undertaken as part of guideline development work and to fulfil the Sentencing Council's statutory duties under s.127 of the Coroners and Justice Act 2009 to consider the likely effect of its guidelines on prison, probation and youth justice resources.

To do this, an analytical model was developed to estimate the change in sentencing practice which might result from the new sentencing guideline. As part of this, the aims and objectives of the new guideline were taken into account.<sup>6</sup> Assumptions were also made about how sentencers would respond to, and interpret, the new guideline and what sentencing practice would be in the absence of a new guideline. The outcomes were then combined with information on the costs of sentencing to produce an estimation of likely resource impact.

More detail on the methodology employed for this resource assessment can be found at: <http://www.sentencingcouncil.org.uk/publications/item/assault-final-resource-assessment/> and for resource assessments in general at: <http://www.sentencingcouncil.org.uk/publications/item/the-sentencing-council-resource-model/>.

### Stage 2

The second stage of the work initially used the Ministry of Justice's Court Proceedings Database<sup>7</sup> to produce descriptive statistics to observe changes in the type of disposals being imposed for different types of assault offences and the Average Custodial Sentence Length (ACSL)<sup>8</sup> for each offence, in the 12 months before and the 12 months after the guideline came into effect.

However, this does not account for any fluctuations in the average severity of sentencing over time due to changes in sentencing practice which are unrelated to guidelines – e.g. the changing number and seriousness of cases coming before the courts, changing in charging practice etc. The data was therefore used to produce time series models to help distinguish between the normal fluctuations which are inherent in all sentencing data, and changes in sentencing that, statistically speaking, within the model parameters can be attributed to the new assault guideline. This was designed to assess whether it was likely that the observed changes to sentencing practice would have occurred if no guideline had been released.<sup>9</sup>

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(2014) *Enhancing Consistency in Sentencing: Exploring the Effects of Guidelines in England and Wales*, Journal of Quantitative Criminology.

<sup>6</sup> The principal aims were to promote greater consistency in sentencing and increase public confidence in sentencing; sentences should also relate appropriately to the differing degrees of gravity within the specific offence, the context of other offences of violence and the wider sentencing framework relating to other offences.

<sup>7</sup> Data covers sentences in all courts, for offenders aged 18 or over. Data has been adjusted to account for potential differences in the rate of guilty pleas between the periods. This adjustment was made using guilty plea rates and reductions from the Crown Court Sentencing Survey database, to estimate pre-guilty plea sentences, to make the figures presented comparable to the sentence ranges in the guideline.

<sup>8</sup> The average custodial sentence length (ACSL) is the average (mean) sentence length for determinate custodial sentences only. It therefore excludes indeterminate sentences (life or Imprisonment for Public Protection, IPPs). This approach for calculating ACSL is consistent with that used for sentencing statistics produced by the Ministry of Justice. Finally, the ACSLs have been adjusted using data from the CCSS to provide estimates of the sentence length *before* the application of a reduction for any guilty plea. These estimates allow a better assessment of the use of sentencing guidelines as the category ranges specified in the guidelines are those before any guilty plea reduction is applied.

<sup>9</sup> Additional analyses were also undertaken to ascertain whether the guideline consultation period, beginning on 13 October 2010, affected actual sentencing practice.

The type of time series models which were used required sentencing data to be comparable - but the data was a mix of sentences comprising different sentence types and sentence lengths. To overcome this, sentences were converted into a continuous “severity scale” with scores ranging from 0 to 100, representing the full range of sentence outcomes from a discharge (represented by 0) to 20 years’ custody (represented by 100); this allowed the creation of a consistent and continuous measure of sentencing severity that could be used to evaluate changes in sentencing. However, the scale should **not** be interpreted as an absolute objective measure of sentencing severity.<sup>10</sup>

Several time series models were created in order to forecast the likely range of values, and size of average changes, that sentencing severity could take for 18 months after the guideline came into force (the period June 2011 to December 2012), assuming no guideline had been released. These estimates are represented on the graphs in this document as the “*forecasted severity region*”. The actual trend in sentence severity is represented by the red line; by comparing the two, the difference between actual and expected sentencing changes can be seen. This can then be referenced back to the changes (or absence of changes) estimated in the resource assessment. Where differences were found between actual practice and that estimated, regression analysis of Crown Court Sentencing Survey (CCSS)<sup>11</sup> data relating to these offences was undertaken to explore whether any of the guideline factors might have been influencing these outcomes.<sup>12</sup>

### Stage 3

The third stage of the assessment comprised qualitative research, conducted by Opinion Research Services (ORS), to gather evidence about the operation and perceived effectiveness of the assault definitive guideline and to explore some of the issues emerging from the earlier strands of work.<sup>13</sup> Sixty-nine individual depth telephone interviews and three small group discussions were conducted with 30 Crown Court judges, 28 magistrates, 14 district judges, six prosecution lawyers and six defence lawyers.<sup>14</sup> Interviewees came from all seven court regions in England and Wales and had varying degrees of experience in their role.

Around half (14) of the Crown Court judges were recruited from the Office of the Sentencing Council’s existing ‘research pool’ and the remainder through a ‘snowballing’ approach whereby those already interviewed were asked to nominate fellow judges to take part. For district judges, a member of the Sentencing Council facilitated recruitment. Six magistrates were accessed via the Magistrates’ Association e-bulletin, and the remainder via a sample of magistrates’ court clerks in each judicial region asking for volunteers (five) and then ‘snowballing’ from these individuals.

To stimulate discussion, participants were presented with a scenario – either representing a case of grievous bodily harm with intent (Crown Court judges only),

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<sup>10</sup> The sentencing severity scale was created with reference to previous sentencing guidelines to try to ensure it had an empirical basis. However, there is no single, straightforward way to do this, so there is no guarantee of its robustness.

<sup>11</sup> See <http://www.sentencingcouncil.org.uk/analysis-and-research/crown-court-sentencing-survey/> for further information on the Crown Court Sentencing Survey.

<sup>12</sup> This analysis used unadjusted CCSS data (see footnote 8).

<sup>13</sup> Some data collection was also undertaken in the magistrates’ courts in January 2015 to complement the CCSS data from the Crown Court and examine some of the factors taken into account by sentencers when sentencing common assault, actual bodily harm, assault on a PC and assault with intent to resist arrest. The methodology largely followed that of the CCSS. In total, 339 sentencing forms were returned, of which 82 per cent (278) related to common assault offences. Due to the low volume of forms returned, it has not been possible to undertake any detailed analysis on this data; however, the findings are available on request.

<sup>14</sup> The individual depth discussions typically lasted between 30 and 45 minutes and the group sessions for around an hour.

actual bodily harm (all interviewees) or assault on a police officer (magistrates and district judges only).<sup>15</sup> They were then asked to outline which offence category they would have placed the defendant into and why, and what harm and culpability factors would have influenced their decision. Participants' more general views on the guideline were also discussed and noted.<sup>16</sup>

## Overall findings

In the 12 months after the guideline came into force, there was a slight increase in the use of some less severe sentencing options, compared to the 12 months before; discharges increased from 10 per cent to 12 per cent and fines from 9 per cent to 12 per cent. On the other hand, community orders reduced (from 38 per cent to 36 per cent) as did suspended sentence orders (from 17 per cent to 15 per cent) while the use of immediate custody remained unchanged at 22 per cent. The adjusted average custodial sentence length also remained broadly unchanged at 2.7 years.

Looking at assault offences as a whole, the guideline has slightly decreased sentencing severity. This is likely to be as a result of the downward impact of the guideline on common assault, which makes up the largest group of assault offences.

## Offence specific findings

Despite the overall effect of the guideline being a slight decrease in sentencing severity, different outcomes were found when specific assault offences were analysed. The following outlines the key findings relating to individual assault offences,<sup>17</sup> followed by some general issues highlighted through the qualitative work with sentencers.

### **Causing grievous bodily harm with intent (GBH with intent)<sup>18</sup>**

Almost all sentences imposed for causing GBH with intent are immediate custody. It was found that adjusted average custodial sentence lengths (ACSLs) rose by 17 per cent between the 12 months before and 12 months after the definitive guidelines came into force (from 5.9 years to 6.9 years).<sup>19</sup> This was substantially in excess of the small increase anticipated by the resource assessment (a rise of 2 per cent and a requirement for between 20 and 60 additional prison places). In addition, the proportion of sentences greater than seven years increased. The increase in ACSLs occurred in June 2011, and coincided very closely with the guideline coming into force.

There was also an increase in severity of sentences in the month after the guideline came into force<sup>20</sup> (see figure 1). The "forecasted severity region" indicates the range of values the sentencing severity might have taken in the absence of the guideline, taking into account the general increase in sentencing severity since 2008. As can be seen, the actual increase in sentencing severity was in excess of that predicted in the resource assessment and may therefore indicate that the guideline is not being implemented in the way anticipated.

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<sup>15</sup> Short scenarios were used to reduce the burden on participants, however it is recognised that the details provided were restricted for this reason and that they will thus have some limitations as a research tool.

<sup>16</sup> More information on the methodology, including the scenarios used, and the findings, can be found at <http://www.sentencingcouncil.org.uk/analysis-and-research/>

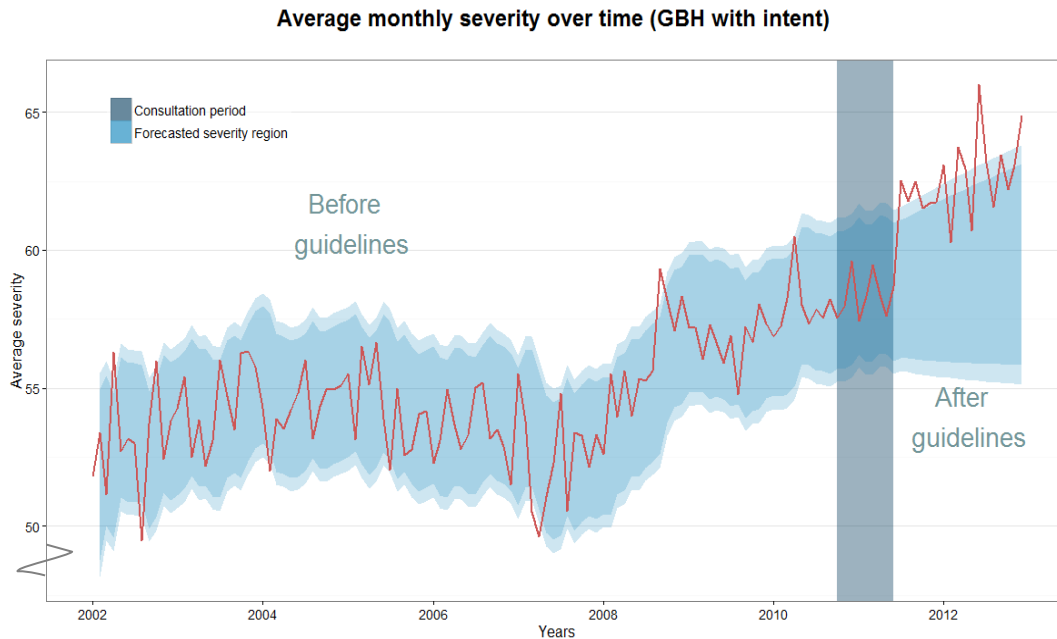
<sup>17</sup> It was not possible to undertake an evaluation of the impact and implementation of the assault with intent to resist arrest guideline. This was due to the small number of sentences for this offence.

<sup>18</sup> Causing grievous bodily harm with intent to do grievous bodily harm/Wounding with intent to do grievous bodily harm; Offences against the Person Act 1861 (section 18).

<sup>19</sup> During this period the use of IPPs for this offence declined by around 2.4 per cent. This could have caused some of the observed changes in sentence lengths. However, further investigation showed that a substantial difference in ACSLs persists even after including the minimum terms for IPPs in average sentence length calculation.

<sup>20</sup> There was no equivalent increase during the consultation period for the guideline.

Figure 1



A regression analysis of CCSS data was undertaken to examine why this might have occurred. This indicated that the factor in the new guideline which had the greatest effect on sentences was the step 1 factor “*injury which is serious in the context of the offence*”. The presence of this factor added around 29 per cent (1.7 years) to the average custodial sentence length.

In addition, it was found that there had been an increase in the use of the most serious offence category in the new guideline (from 17 per cent before the guideline to 33 per cent after), when compared to the old guideline. Furthermore, amongst the category 1 cases under the new guideline, the most frequent step 1 factor was “*injury which is serious in the context of the offence*”, which was present in 76 per cent of cases. Again, this suggests that this factor may be the reason for the increase in sentence levels for GBH with intent cases.

The data from the quantitative analysis was supplemented by the qualitative research which further indicated that application of the step 1 factors “*injury which is serious in the context of the offence*” and “*injury which is less serious in the context of the offence*” could be an issue.<sup>21</sup> Some participants felt that for higher end cases the factor relating to greater harm may lead to double counting and an inflation in sentences (because, for GBH with intent, a high level of harm is required in all instances for the defendant to have been charged with this offence in the first place). For others, it may be that the factor relating to lesser injury (within lesser harm) is not applied when it should be for the same reason:

*Under section 18, I'm not quite clear...how the injury can be less serious in the context of the offence where the alleged injury has to be a very serious bodily injury... (Crown Court judge)*

Crown Court judges also felt that sentences might have risen due to the increased starting points and ranges in the guideline. Although some thought this was appropriate, others felt the starting points were too high, particularly in relation to category 1:

<sup>21</sup> Sentencers reported being unclear about when they should apply the factor in general.



*I think the level of sentencing has gone up immensely because of the guidelines (Crown Court judge)*

*The starting point in category 1 is quite high at 12 years (Crown Court judge)*

Some judges admitted that they will often go outside the category range to reduce a sentence for GBH with intent.<sup>22</sup>

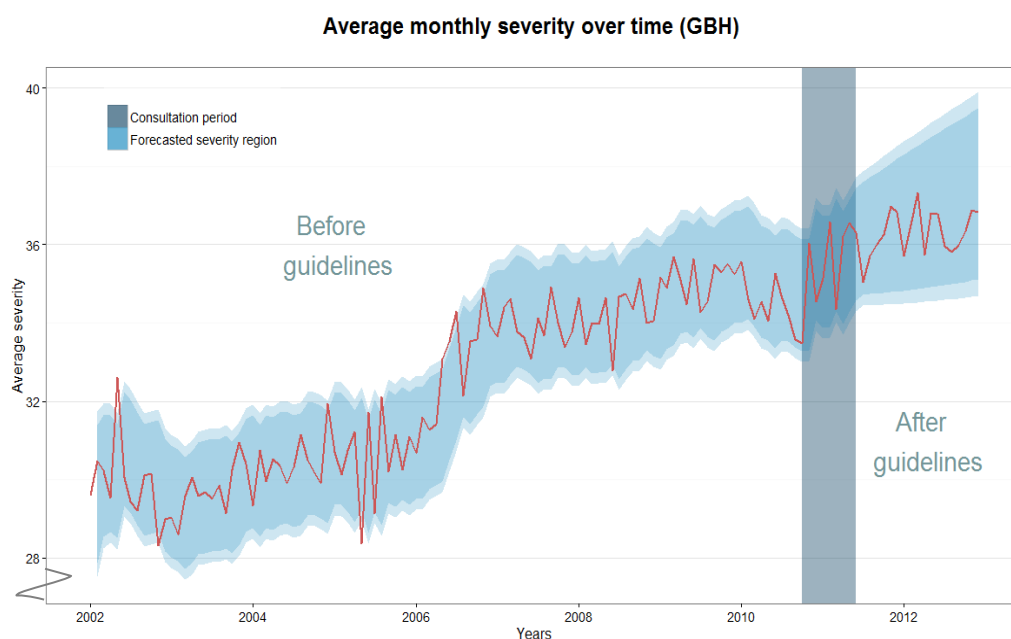
### **Grievous bodily harm (GBH):<sup>23</sup>**

There was a small increase in adjusted ACSLs, from 2.1 years in the 12 months before June 2011 to 2.3 years in the 12 months after June 2011. There was also a 2.7 per cent increase in the use of immediate custody, alongside a decrease in the use of community orders and suspended sentences.

Sentence severity also increased, but this was well within the bounds of historic fluctuations in sentencing levels (the “forecasted severity region”) as shown in figure 2. Therefore there is no strong statistical evidence that the guideline caused a change in sentencing practice for GBH. Analysis also indicated that the consultation period did not appear to have a statistically significant effect on sentencing.

This is broadly consistent with the minor changes to sentencing practice anticipated in the resource assessment which estimated increases in ACSLs of 3 per cent, (the result of rises in sentences at the most severe end of the sentencing scale) and a requirement for between 10 and 20 additional prison places.<sup>24</sup>

**Figure 2**



Further analysis using CCSS data to explore whether the factor “*injury which is serious in the context of the offence*” was influencing outcomes in a similar way to GBH with

<sup>22</sup> See Lock, K. (2015). *Assault Definitive Guideline: Findings from discussions with sentencers and practitioners*.

<sup>23</sup> Inflicting grievous bodily harm/unlawful wounding; Offences against the Person Act 1861 (section 20); Racially/religiously aggravated GBH/Unlawful wounding; Crime and Disorder Act 1998 (section 29).

<sup>24</sup> It should be noted, however, that the resource assessment also indicated overall, fewer custodial sentences and more community orders, which has not been observed.

intent showed it added 20 per cent (0.3 years) to the length of immediate custodial sentences.

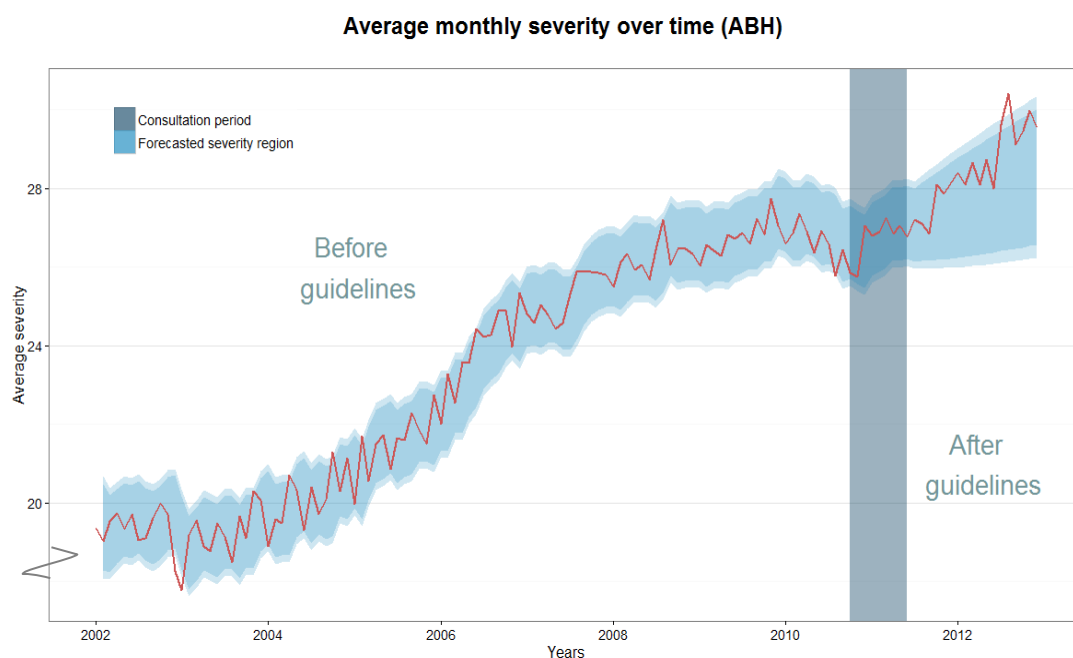
### **Actual Bodily Harm (ABH):<sup>25</sup>**

Analysis showed that there was a shift towards more serious disposal types being given – an increase in the use of custodial sentences (immediate and suspended) and a corresponding decrease in the use of community orders. The distribution of sentence lengths for immediate custody also changed, with relatively fewer shorter sentences (half a year or less) and an increase in the proportion in the range 0.5 to two years.

A regression analysis using CCSS data was carried out and showed that “*injury which is serious in the context of the offence*” was the most important factor for ABH and added 26 per cent (0.2 years) to the length of immediate custodial sentences.

These findings are in contrast to the prediction in the resource assessment which envisaged a drop in the severity of sentencing, due to the decrease in the sentencing range in the Sentencing Council guideline when compared to the previous guideline.<sup>26</sup> This equated to an estimate of between 400 and 900 fewer custodial sentences and 400 to 1,000 community orders becoming fines. The fact that the actual increase in sentence severity was almost entirely within the bounds of that expected if no guideline had come into force (see figure 3), indicates that there is no strong evidence that the guideline had an impact, despite the expectations that it would.

**Figure 3**



In contrast to the data showing no strong evidence that the guideline had an impact on sentence severity, the perceptions of the sentencers who were interviewed was that sentences had decreased, particularly for the lower level ABH offences. This view may reflect participants’ awareness that the sentencing range had decreased; many felt these were now too low and in interviews, several Crown Court judges said that they

<sup>25</sup> Assault occasioning actual bodily harm; Offences against the Person Act 1861 (section 47); Racially/religiously aggravated ABH; Crime and Disorder Act 1998 (section 29).

<sup>26</sup> The range was previously a community order to 4 years’ custody and is now a fine to 3 years’ custody.

often go outside the category range to increase a sentence for an actual bodily harm offence:

*Section 47...I will probably go outside the guidelines between 20 per cent and 25 per cent of the time because the ranges aren't appropriate in my opinion; they are too low (Crown Court judge)*

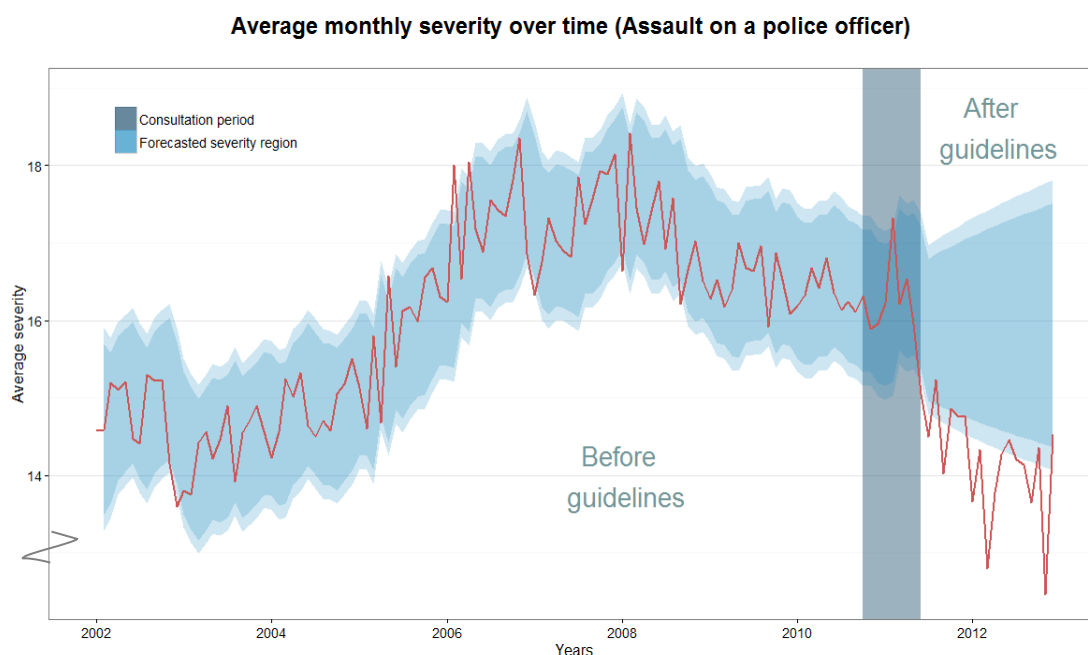
The factors of “injury which is serious in the context of the offence” and “injury which is less serious in the context of the offence” were also again cited<sup>27</sup> as factors that may be open to interpretation, due to the wide range of injuries that can be covered within this offence. This could therefore be a potential source of variation in the application of step 1 factors.

### **Assault on a police officer:**<sup>28</sup>

There was a shift towards less severe disposal types for assault on a police officer after the release of the guideline, with a smaller proportion of custodial sentences and community orders being imposed. The adjusted average custodial sentence length was 0.3 years in the 12 months prior to the guideline and just under 0.3 years in the 12 months afterwards.

Statistical analysis showed that this decrease in sentencing severity was unlikely to have occurred if the definitive guideline had not been released – as can be seen in figure 4, the actual decrease was considerably below that which might have been expected just taking into account historical changes in sentencing.

**Figure 4**



This impact is broadly consistent with that anticipated in the resource assessment – of between 200 and 600 fewer custodial sentences per year and a shift of some community orders to fines – and so indicates that the guideline is likely to have been implemented in the way anticipated by the Council.<sup>29</sup>

<sup>27</sup> Lock, K. (2015).

<sup>28</sup> Assault on a police constable in execution of his duty; Police Act 1996 (section 89).

<sup>29</sup> It would not be possible currently to explore the reasons for any changes quantitatively, as this offence is triable only summarily, and it has not been possible to collect data from the magistrates' courts.

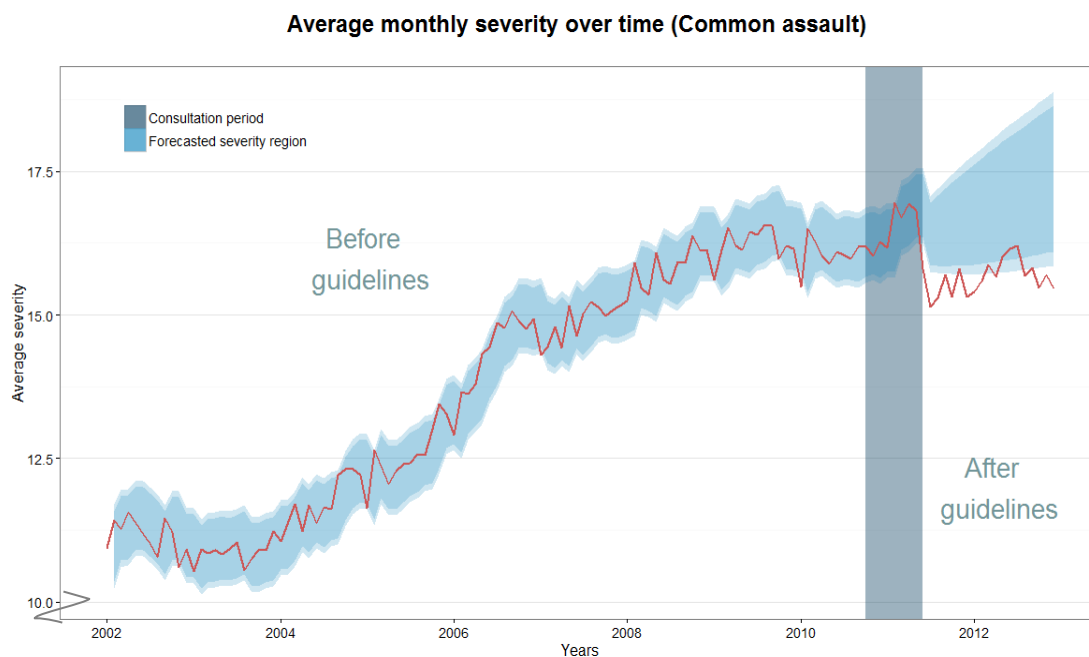
The pattern of changes in sentencing also aligns with the perceptions of the impact of the guideline raised in the interviews with sentencers. However, these perceived reductions in sentences were not always welcomed and the removal of spitting as a factor increasing offence seriousness in the Sentencing Council's guideline was seen by some to contribute to this reduction:<sup>30</sup>

*I think it must have reduced sentencing in terms of assault on a police officer because a spit in the face can't be identified as a sustained or repeated assault for greater harm. Yet in my view it is one of the most serious ways of assaulting (district judge)*

**Common assault:<sup>31</sup>**

For common assault, there was a shift away from suspended sentences and community orders, and towards fines and discharges. The use of immediate custody was broadly similar before and after the guideline came into force, as was the adjusted ACSL of 0.3 years. Figure 5 shows that sentence severity also decreased, despite the overall trend of a steady increase since 2004. Analysis suggests these changes were caused by the new guideline, with actual sentencing going outside the “forecasted severity region”.

**Figure 5**



This impact of the guideline in decreasing sentence severity is broadly consistent with the impact anticipated in the resource assessment – which included between 400 to 900 fewer community orders and additional fines and conditional discharges (between 1,200 and 2,900, and 400 and 900, respectively). However, while the resource assessment anticipated between 1,300 and 3,000 fewer custodial sentences,<sup>32</sup> analysis shows there was no change in the use of custodial sentences before and after the guideline came into force. It was also broadly in line with sentencers' perceptions that sentences have decreased for common assault, which was attributed to the

<sup>30</sup> The slight decrease in the sentencing range for this offence may also contribute to this.

<sup>31</sup> Common Assault; Criminal Justice Act 1988 (section 39); Racially/religiously aggravated common assault; Crime and Disorder Act 1998 (section 29).

<sup>32</sup> Overall it was anticipated that between 150 and 350 fewer prison places would be needed.

difficulty in establishing injury in cases of common assault, especially “*in the context of the offence*”:<sup>33</sup>

*It's often hard to get into category 1 because there really has to be some injury...and common assault doesn't usually involve injury (district judge)*

*We find that if you follow the guidelines properly that a lot of common assaults end up category 3...if there is no injury then you are automatically down a category (magistrate)*

## Other issues

Other issues relating to the guideline emerged in the interviews with sentencers and practitioners, which provide useful information relating to the drafting of the guideline and the way in which it might be interpreted.<sup>34</sup>

Overall, most participants felt that the three category approach in step 1<sup>35</sup> was sensible, intuitive and provided flexibility. This was welcomed and most were not in favour of any further categories. However, a very small minority of Crown Court judges and magistrates considered the offence categories to be overly restrictive and prescriptive, thus curbing judicial discretion. These participants suggested that a fourth category might allow them more flexibility in this regard.

Despite the general feeling that three categories were sufficient, a significant number of Crown Court and district judges also felt the guideline should be amended to accommodate cases of ‘neutral’ or ‘middling’ harm (where the injury is neither more nor less serious in the context of the offence).

*There's the argument that if a case isn't greater harm then it has to be lesser harm. However, there is a whole spectrum of injury between greater and lesser harm...how do you appropriately fit a case that has medium harm? (Crown Court judge)*

Again, most did not desire an extra category to accommodate this inclusion, the inference being that the wording of existing categories could be amended to cater for this.

The actual step 1 harm and culpability factors were generally considered appropriate by the majority of participants and there was no general call for further factors to be added; however, issues with the interpretation of some of the factors were raised and included:

- Significant difficulties with the harm factors “***injury that is serious in the context of the offence***” and “***injury which is less serious in the context of the offence***”; many Crown Court and district judges and magistrates admitted to not knowing exactly what it means or what types of injuries should take a case into greater or lesser harm:

*I don't understand what they mean by in the context of the offence. I honestly don't know what it means (magistrate)*

*Injury more or less serious in the context of the offence is inherently ambiguous...It's such a nebulous issue (magistrate)*

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<sup>33</sup> It is not possible currently to explore the reasons for any changes quantitatively, as common assault is triable only summarily, and it has not been possible to collect data from the magistrates' courts. Whilst section 29 offences are triable either way, volumes for this offence are low.

<sup>34</sup> See Lock, K. (2015).

<sup>35</sup> Category 1: Greater harm (serious injury must normally be present) **and** higher culpability; Category 2: Greater harm (serious injury must normally be present) **and** lower culpability; or lesser harm **and** higher culpability; Category 3: lesser harm **and** lower culpability. There had been four categories in the previous SGC guideline.

*I think that's probably the biggest issue with the guidelines...it's the one that causes the most amount of discussion at court (Crown Court judge)*

This was supported by the findings of the exercise using offence scenarios which indicated disagreements between participants regarding whether the injuries outlined in the scenarios were more or less serious in the context of the offence.

- The potential for differing interpretations of “**sustained or repeated assault on the same victim**” in greater harm:

*I genuinely have no idea what that means! Is that saying it's more than one punch or does it have to go on for 20 or 30 minutes? (Crown Court judge)*

*Some people will call two punches a sustained assault...to me the terms sustained or repeated assault means that it goes on for a long time; even three or four punches is not sustained to me (Defence lawyer)*

More explicit guidance was desired on what exactly is meant by both “sustained” and “repeated” to reduce the subjectivity with which it is applied.

- General satisfaction that a shod foot or head should be considered a **weapon equivalent** – though a small minority felt the latter is not (certainly no more than a fist would be). It was also said that the premeditated act of bringing a weapon to the scene of an offence should be considered more seriously than lashing out during the course of a fight.
- Concerns from some participants over the potential to double-count **victim vulnerability** as it is included in both greater harm (*‘victim is particularly vulnerable because of personal circumstances’*) and higher culpability (*‘deliberate targeting of a vulnerable victim’*) – albeit with a different emphasis.
- Difficulties reported from a small number of judges in interpreting **vulnerability**, particularly in a domestic violence context where it seems there are differing views as to which victims should be considered vulnerable and which should not.

*The guidelines are quite vague when it comes to victims who are vulnerable. I'm not entirely sure what a “victim who is particularly vulnerable” means. For example, is a woman in a domestic violence case who has fought back particularly vulnerable? (Crown Court judge)*
- The wish from many participants to see **domestic violence** – and its psychological effects – referenced more explicitly within the guideline. However, a minority disagreed and felt that domestic violence could be adequately covered by current (albeit mostly non-domestic violence specific) step one and two factors.<sup>36</sup>

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<sup>36</sup> ‘Deliberate targeting of vulnerable victim’, ‘location of the offence’, ‘gratuitous degradation of victim’, ‘ongoing effect upon the victim’; and ‘in domestic violence cases, victim forced to leave their home’.

- The potential to interpret the phrase “**a significant degree of premeditation**” in different ways; it was suggested that the word ‘pre-planning’ may be more suitable for situations when the defendant has planned the assault well in advance of perpetrating it.
- The wish from several participants to see ‘**spitting**’ reintroduced as an important consideration within the guideline (particularly in the context of Assault on a Police Officer). Most felt it should be a greater harm or higher culpability factor at step one.

*Spitting used to be an aggravating factor; it's gone and I don't know why. It's serious enough to justify a custodial sentence in my view, but it's absent (district judge)*

*It can be one of the most distressing things that victims experience...most say they would rather be punched. It needs to be highlighted (Prosecution lawyer)*

- Further consideration (raised by a small number only) of culpability factors such as “a greater degree of **provocation** than normally expected” – “how can being provoked ever justify GBH?” (Crown Court judge) and anything referencing a **group or gang** as the number making this up can be interpreted differently.

In terms of views on the impact of the assault definitive guideline, participants were generally positive, especially in relation to the consistency they felt it has brought to the sentencing process while still allowing a degree of judicial discretion and flexibility. It should, however, be noted that some responses to the scenario exercise<sup>37</sup> indicated that some variation in approach remains. This seemed to be due to the wording and differing interpretation of certain factors, for example, “injury that is more or less serious in the context of the offence”; “sustained or repeated assault”; and “use of weapon or weapon equivalent”, as outlined above.

Participants also felt that the guideline enabled more structured, logical sentencing; gave judges and magistrates confidence in their ‘instinct’; helped guide and build the confidence of inexperienced sentencers; helped mitigate against the potential for overly harsh or lenient sentences; and ensured better transparency in terms of explaining sentencing.

There was also a general view that the guideline allowed judges and magistrates to reach fair and proportionate outcomes, although as already highlighted some participants felt that some of the starting points and ranges were not appropriate. In addition, several Crown Court judges said that they often go outside the category range to reduce a GBH with intent sentence or increase one for ABH.

## Conclusion

This exercise has enabled an assessment of the impact and implementation of the Sentencing Council’s assault guideline. By estimating any changes to sentencing practice that are likely to have occurred without the guideline and then comparing this to what actually happened in practice after the guideline came into force in June 2011, it has been possible to ascertain if there has been any change to sentencing

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<sup>37</sup> Participants were presented with a scenario - either representing a case of grievous bodily harm with intent, actual bodily harm or assault on a police officer - and asked to outline which offence category they would have placed the defendant into and why.

outcomes.<sup>38</sup> This has then been compared to the impact estimated as part of producing the resource assessment for the guideline.

Where an impact has been observed but was anticipated, this indicates that the guideline is being implemented in the way anticipated by the Council. However, where an impact/scale of impact has been observed *but was not anticipated* (e.g. GBH with intent and ABH), this suggests there may be an issue with implementation. The further quantitative and qualitative data outlined in this document highlights potential reasons for this, which includes differing interpretation of some factors in the guideline and changing starting points and ranges. Where this leads to outcomes that some sentencers do not regard as appropriate, it may encourage some to go outside of the guideline range and not adhere to it.

This indicates the need to revisit the guideline and consider whether any changes are needed. Although those interviewed tended to view the guideline positively and highlighted a number of benefits it had brought about, some aspects are worthy of consideration, both to address some of the issues highlighted here and also to bring the guideline up-to-date with later guidelines produced by the Sentencing Council. Consequently, the Council has committed to reviewing the guideline again as part of its 2015-2018 work plan.

### **Acknowledgements**

The Sentencing Council would like to acknowledge Opinion Research Services for their work in undertaking data collection and where necessary, analysis and reporting. The quantitative analysis was undertaken by Meng Le Zhang and Robin Linacre and the resource assessment by Robin Linacre. Particular thanks go to all the sentencers and practitioners who took part in various aspects of this evaluation and who provided valuable insights into the impact and implementation of the guideline.

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<sup>38</sup> However, it is not statistically possible to attribute any changes observed to the guideline.



**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**18 May 2018**  
**SC(18)MAY05 – Mental Health**  
**Mandy Banks**  
**0207 071 5785**

## **1 ISSUE**

1.1 The Council previously agreed to include *Mental Health - Overarching Principles* as a guideline on the work plan. Background work on this project commenced some months ago, and this is the first meeting at which the Council are asked to consider the proposed guideline. At this meeting the focus will be principally upon deciding the scope of the guideline.

1.2 There are four Council meetings currently scheduled to consider the guideline, with sign off of the draft guideline to take place at the September meeting and a consultation to run from December 2018. However, at this very early stage in the project these are indicative dates only, and may be subject to change, depending on the scope of the project.

## **2 RECOMMENDATION**

2.1 At this meeting the Council are asked:

- To note the background information on this subject matter
- To note the current work in this area within the wider Criminal Justice system, which could have implications for the draft guideline
- To decide on the broad scope and structure of the guideline, principally whether to include learning disability and learning difficulty, autism and acquired brain injury, alongside mental health considerations

## **3 CONSIDERATION**

*Background information*

*Proportion of offenders with mental health issues and/or learning disabilities*

3.1 Available evidence suggests that people in the criminal justice system are far more likely to suffer from mental health problems than the general population, for example, when a survey screened prisoners on arrival at prison, 23% reported that they had had some prior contact with mental health services<sup>1</sup>. The National Institute for Health and Care Excellence

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<sup>1</sup> <https://www.nao.org.uk/wp-content/uploads/2017/06/Mental-health-in-prisons.pdf>.

(NICE) states that an estimated 39% of people detained in police custody and an estimated 29% of those serving community sentences have a mental health issue<sup>2</sup>. 7% of the prison population is thought to have a learning disability<sup>3</sup>, compared with 2% of the population. The exact number of people with autism in prisons is unknown, but the proportion is thought to be more than double that within in the general population, and this is likely to be an underestimate because many offenders are undiagnosed. Estimates also suggest that between 7-40% of offenders within the criminal justice system may have a learning difficulty such as ADHD.

3.2 NICE states that around 60% of prisoners have personality disorders, compared to 5% of the general population, 11% of those serving community sentences have psychotic disorders compared to 1% of the general population, and 76% of female and 40% of male remand prisoners have a common mental health disorder<sup>4</sup>. The Prison Reform Trust state that self-inflicted deaths are 8.6 times more likely in prison than in the general population.

3.3 In addition, among adults with mental health problems serving community sentences, an estimated 72% also screened positive for either an alcohol or drug problem. Estimates of drug dependence within the prison population is 45%, in comparison to 5.2% within the general population (Public Health England 2016.)

3.4 Some organisations in this area believe that the reduction in the number of secure hospital beds in recent years and reductions in funding for mental health services generally has led to more people with mental health problems ending up within the criminal justice system than previously. Organisations have also expressed concern at what they see as the over use of custody for these offenders, believing that community orders and other options are underused. Organisations also refer to the 'criminalising of disability', referring to the high proportion of offenders with these conditions who have been victims of crime/abuse themselves, or whose conditions have led to the offending.

3.5 The prevalence of offenders with mental health issues coming before the courts has led to calls for a guideline for sentencing these offenders, most notably a recommendation in a report published in November by JUSTICE, entitled '*Mental health and fair trial*'<sup>5</sup>. There is little guidance for courts to use when sentencing offenders with mental health disorders/learning difficulties, which can be a difficult exercise. A lack of guidance could lead to inconsistencies in the way these offenders are sentenced, and there is an increasing public

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<sup>2</sup> <https://www.nice.org.uk/guidance/ng66/evidence/full-guideline-pdf-4419120205>.

<sup>3</sup> <http://www.prisonreformtrust.org.uk/Portals/0/Documents/FairAccesstoJustice.pdf>.

<sup>4</sup> NICE Guideline 66, p.17

<sup>5</sup> <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/11/JUSTICE-Mental-Health-and-Fair-Trial-Report-2.pdf>.

and media focus on mental health/learning difficulties generally (issues such as the abuse at the Winterbourne care home, and reports into the premature deaths of people with learning disabilities, and so on.)

#### *Mental disorder*

3.6 Guidelines have used the term 'mental disorder' as this is the term used in the Mental Health Act 1983 (M.H.A), which defines it as 'any disorder or disability of the mind' (s1(2). S1(3) states that drug or alcohol dependence is not a mental disorder of itself, but may co-exist with a condition that is a mental disorder. Mental illness can include conditions such as schizophrenia, for example, and conditions can fluctuate, with people experiencing periods of 'wellness'.

#### *Learning disability*

3.7 The M.H.A defines 'learning disability' as a '*state of arrested or incomplete development of the mind which includes significant impairment of intelligence and social functioning*' (s1(4). A learning disability is a lifelong condition and can vary from a mild disability in which an individual may only need support with certain activities, e.g form filling, to someone with a severe or profound learning disability who may need full time care and support with every aspect of their life.

#### *Learning difficulty*

3.8 A 'learning difficulty' can cover such conditions as dyslexia, or ADHD, and is different to a learning disability as it does not affect intellect. Dyslexia is thought to affect around 10% of the general population, and around 1.5% of the population have ADHD. Studies have shown<sup>6</sup> that people with ADHD were more likely to commit crime than adults without the condition (although of course the causes of crime are complex). Symptoms of ADHD can include impulsiveness, extreme impatience, inability to deal with stress, and so on, which can lead to difficulties with relationships, social interaction, employment and self-medication with drugs.

#### *Autism*

3.9 Around 700,000 people in the UK have a form of autism, which is a lifelong developmental disability that affects how people perceive the world and interact with others. Autism is a spectrum condition, all autistic people share certain difficulties, but being autistic will affect them in different ways. Some autistic people have learning disabilities, mental health problems or other issues. Like autism, Asperger syndrome is a lifelong developmental

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<sup>6</sup> <http://www.bbc.co.uk/news/health-20414822>.

disability. Some people with the syndrome may also have mental health problems, or specific learning *difficulties*, but do not have the learning disabilities that many autistic people have, as they tend to be of average or above average intelligence. As noted above in para 3.1, it is thought that people with autism are over represented within prisons. This could be due to aspects of the condition contributing to offending, such as social naivety (being befriended by criminals/becoming unwitting accomplices), difficulty particularly with change or unexpected events, misunderstanding of social cues, rigid adherence to rules or not understanding the implications of their behaviour.

#### *Acquired brain injury*

3.10 Acquired or traumatic brain injury (ABI) is an injury caused to the brain since birth, caused by falls, road accidents, tumour or strokes, for example. Survivors of severe brain injuries are likely to have complex long-term problems. These can include impaired reasoning, affecting their ability to understand rules. They can also have impaired insight into their own behaviours and that of others, they may have a loss of control over their behaviour and may behave inappropriately without being aware that there is anything wrong with their actions. This can include making inappropriate sexual advances. Other problems can be irritability, aggression, impulsivity, and egocentricity. A recent report<sup>7</sup> published in The Lancet Psychiatry claimed that up to 60% of the prison population have suffered some kind of head injury, ranging from mild to severe, compared to 0.56% of the general population (Headway, 2016).

3.11 As Dr Grounds noted in his presentation to Council last month, an important point to make in relation to offenders with mental disorder is that diagnoses may not be single. Co-morbidity, a person having a combination of different mental disorders is common.

3.12 It is recommended that the draft guideline includes learning disability, learning difficulty, autism spectrum disorder (ASD) and ABI alongside guidance for offenders with mental disorders. There is already a factor in most guidelines, either at step one or two that refers to mental disorder and learning disability. So, as sentencers are used to considering how these two issues affect offenders, it would be inconsistent not to include guidance on learning disability within this guideline. Also, given the high proportion of prisoners thought to have ABI, ASD or a learning difficulty, and the impact of this condition on cognitive processes, it is argued that these should also be within scope.

***Question 1: Does the Council agree to include learning disability, learning difficulty, ASD and ABI within the scope of the guideline?***

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<sup>7</sup> <https://www.telegraph.co.uk/science/2018/02/26/60-per-cent-prisoners-have-head-injuries-experts-warn-brain/>.

### *Current related work in this area- review of the Mental Health Act (MHA)*

3.13 Last year the Government announced an independent review of the MHA, to look at how the legislation is used and how practices can improve, following concerns with rising rates of detention, particularly amongst BAME groups, and concerns that some processes relating to the act are out of step with a modern health system. An interim report was published on the 1 May 2018. This report<sup>8</sup> states that they are considering a range of options for reforming the MHA, from large-scale changes to more specific amendments, combined with system and practice changes. They state that *'we are mindful of the current short term issues that limit ambitious legislative proposals, but that will not prevent us looking further into the future'*.

3.14 Going forward they state they will consider further the potential to reduce inappropriate use of custody for people with mental illness, how to make it easier for courts to use section 35 (remand to hospital for report on a defendant's medical condition) when appropriate, and sentencing options for courts and the circumstances in which they are used. The report specifically refers to recent case law and sentencing 'guides' relating to s.45A, (the 'hybrid order' which directs an offender to hospital for treatment alongside a term of imprisonment) which may increase the use of the order, further commenting that there is a lack of consensus as to in what circumstances s.45A is appropriate to use. The interim report also mentions considering the interface between the MHA and the Mental Capacity Act, that changes are required to Community Treatment Orders, and that the whole area of the overlap between the criminal justice system and mental health is in need of an overhaul. A final report with recommendations for change is expected to be published in Autumn 2018.

### *Community sentence treatment requirements protocol*

3.15 The MOJ, in partnership with a number of other Government departments is currently working to develop a protocol for community sentence treatment requirements. The protocol aims to set out what action is required by health and justice staff to ensure pathways into timely and appropriate treatment are in place, and that greater use is made of treatment requirements as part of community sentences. The protocol includes a new minimum of standard of service, a new maximum waiting time for court ordered treatment which is in line with waiting times for the general population, and a new single point of contact within local services. It aims to give a consistent approach, providing better and quicker access to mental health and substance misuse treatment.

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<sup>8</sup> <https://www.gov.uk/government/publications/independent-review-of-the-mental-health-act-interim-report>.

3.16 This follows concerns about the low use of treatment requirements. A study of adult offenders starting community orders in 2009/10 showed that 35% reported having a formal diagnosis of a mental health condition, however, in 2016 only 0.5% of commenced requirements as part of a community order or suspended sentence were Mental Health Treatment Requirements (MHTRs). Numbers were also similarly low for Alcohol Treatment Requirements (4%) and Drug Rehabilitation Requirements (5%). As noted above in para 3.4, there is concern amongst stakeholders in this area that community orders are underused. A contributing issue could of course be a lack of availability/provision for these treatment requirements within different areas around the country.

3.17 The protocol is being tested in a number of areas, the data from which will be evaluated ahead of any possible further rollout. An interim report for the data collected so far is expected to be published in July, with the final report in October.

#### *Liaison and diversion services*

3.18 Liaison and diversion services place clinical staff at police stations and courts to provide assessments and referrals to treatment and support. Health information can then be shared so that charging and sentencing decisions can be tailored to meet needs. There is currently around 83% coverage of these services throughout the UK.

#### ***Proposed approach to be taken with the guideline***

##### *Proposed structure of the guideline*

3.19 As the guideline is to provide overarching principles, and is not offence specific, it is proposed that it will be structured in a narrative format, in the same way as the recent *Overarching Principles: Domestic Abuse* and *Overarching Principles: Children and Young People* definitive guidelines.

#### ***Question 2: Does the Council agree that a narrative format is the most suitable structure for this guideline?***

##### *Proposed scope of the guideline*

3.20 It is proposed that the guideline will apply to children and young people as well as adults. There are only very brief references to considering mental health or learning disabilities when sentencing in the *Overarching Principles: Children and Young People* definitive guideline. Therefore it is proposed that the guideline would apply to under 18s, but that courts would be instructed to also refer to the *Overarching Principles: Children and Young People* guideline if sentencing someone under 18.

**Question 3: Does the Council agree that the guideline should apply to under 18s as well as adults?**

3.21 At this early stage of thinking, it is proposed that the guideline will cover three broad areas, as set out below.

1) *Factual information*

3.22 This will cover factual information that will be of use to the court, such as available mental health disposals, and links to other relevant information, such as the appropriate Criminal Procedure Rules/Criminal Practice Directions. It may be helpful to courts to include a flowchart as to which mental health disposals are available in which courts, and for what age of offender, for example.

2) *Guidance on assessing culpability*

3.23 It is proposed that this section will give guidance to assist courts to decide what extent, if any, an offender's condition reduces their culpability. The Council will recall that a factor relating to mental disorder (and the impact of abusing drugs or alcohol or failing to follow medical advice) has been discussed recently within the manslaughter and seriousness guidelines. Work will build on the consideration already given to these issues, and the comments made by Dr. Grounds last month regarding assessing the level of impairment caused by a condition. This section will arguably be the most difficult part of the guideline to develop. In previous guidelines factors have variably been dealt with at step one, at culpability, or at step two, as mitigation. Accordingly it may be necessary to consider how the guidance might need to reflect the different ways these factors are considered throughout guidelines. All of these issues may require a completely fresh approach, perhaps something like a new 'step back' consideration. It is also proposed to look at other related issues, such as 'remorse', a standard mitigating factor, which may require additional guidance for consideration for these types of offenders.

3) *Guidance on how different disposals may affect offenders with certain conditions*

3.24 It is proposed that the draft guideline should give guidance on the additional considerations when considering different disposals, for example an offender who has autism may find custody a greater struggle compared to other offenders, or an offender who has learning disabilities may not be able to participate effectively on certain courses as part of a Community Order. The guideline may also need to reflect the growing movement to deliver parity of esteem between physical and mental health, and relevant international obligations, such as the *UN Convention on the rights of persons with disabilities* (2006), which was ratified by the UK in 2009. However, there may be conflicts between the Convention's emphasis on

equality before the law and non-discrimination, and the purposes of sentencing, the protection of the public, and the punishment of offenders, and so on.

***Question 4: Does the Council agree with the three proposed broad areas for development within the draft guideline?***

***Question 5: Are there any other areas or issues not mentioned that the Council think should be included within the draft guideline?***

#### **4 IMPACT/RISK**

4.1 We expect development of a draft guideline to be welcomed by many external bodies. As noted in the paper, organisations such as JUSTICE in their recent report recommended that the Council produce a guideline on mental health and vulnerability. Organisations such as the National Autistic Society strongly feel that any guideline should include guidance on sentencing offenders with ASD, and the Council will be aware of the media attention given to cases such as Lauri Love and Gary McKinnon, who both had ASD. There could be criticism of the guideline therefore if it did not include guidance for sentencing offenders with ASD.

4.2 In terms of the impact of the guideline, the CPD data, which is the courts data usually used to develop guidelines, does not include information about whether the offender had a mental health disorder or learning difficulty. The A&R team will explore what other data is available in this area, including looking at the CCSS, to see if it contains any data to help assess the numbers involved/what the impact of the guideline might be. It is also planned to do a Rapid Evidence Assessment of the available literature in this area to support development of the guideline. We will undertake the usual assessment of the resources required for the provision of prison places and probation services as a result of the guideline. In addition, we are developing contacts in the relevant bodies (NHS England, Department of Health and the Ministry of Justice) to explore the information available from these agencies to help us consider any implications any of the guideline on them.

***Question 5: is the Council content that the impact/risks have been sufficiently considered at this stage?***



**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council members:**  
**Lead official:**

**18 May 2018**  
**SC(18)MAY06 - Seriousness**  
**Maura McGowan**  
**Ruth Pope**  
**0207 071 5781**

## **1 ISSUE**

1.1 At the April 2018 meeting the Council agreed to consult on a draft general guideline for use where there is no offence specific guideline as the first phase of the project to replace the SGC Seriousness guideline. The consultation will run from June 2018.

1.2 Concerns were raised about the scope of the second phase of the project which is to provide expanded explanations of factors in the digital versions of offence-specific guidelines. Rebecca Crane has very helpfully set out her concerns relating to the project and this paper will seek the Council's views on the points she raises.

1.3 At the January 2018 meeting the Council considered expanded explanations to be made available for factors in the digital version of the assault, burglary, sex, robbery, drugs, fraud, environmental offences, possession of offensive weapon/ bladed article and theft guidelines. Guidelines that are yet to be considered include health and safety, dangerous dogs, intimidatory offences, manslaughter and child cruelty.

1.4 At this meeting the Council will be asked to reconsider the rationale and scope of the second phase of the project; detailed consideration of the content will be undertaken at the June meeting, with a further meeting scheduled for sign off of the consultation draft in October, once feedback has been received from the consultation on the general guideline.

## **2 RECOMMENDATION**

2.1 That the Council considers the concerns raised in relation to the guidelines to replace the SGC Seriousness guideline and agrees the scope and direction of the project.

## **3 CONSIDERATION**

### *Principles of sentencing aimed at the public*

3.1 At the outset of the discussions on replacing the SGC Seriousness guideline the Council expressed the view that a 'principles of sentencing' document should be produced aimed at the public. It was proposed at the September meeting that this should be

incorporated into the work being done to update the Council's website to provide accessible information to the public on sentencing. Work is ongoing on this project. The Council will be updated on progress at a future meeting.

3.2 As is the case with all SC guidelines, both phases of the project to replace the Seriousness guideline would aim to contribute to greater clarity and transparency in sentencing. While the guidelines are designed primarily as a practical tool for use by sentencers and criminal justice professionals they may still be a useful source of information for the public but are not designed to be a standalone 'principles of sentencing' document.

**Question 1: Is the Council content that information for the public on the principles of sentencing is not part of the project to replace the SGC Seriousness guideline but is part of the work to revise the website being undertaken by the Communications team?**

*Addressing issues raised in the Review*

3.3 At the July 2017 meeting the Council considered the ways in which the replacement for the SGC Seriousness guideline could address some of the issues raised in Professor Bottoms' Review.

3.4 Providing guidance on the five purposes of sentencing: there was some question as to the usefulness/ necessity of this. It was agreed that offence specific guidelines already identify the relevant purposes in the factors and sentence levels. The draft General guideline contains a reference to the five purposes of sentencing.

3.5 Referring in guidelines to the effectiveness of sentencing: the Council agreed that there was not enough evidence to address effectiveness in guidelines.

3.6 Providing more guidance on aggravating and mitigating factors: the Council agreed that this could be useful and this is integral to the both phases of the project to replace the 'seriousness' guideline.

3.7 Restructuring the lists of aggravating and mitigating factors for example by including a balancing mitigating factor for every aggravating factor and separating offence related and personal mitigation: the Council concluded that the factors could not be balanced as there were not always relevant opposite factors. The Council did not consider that attempting to separate offence and offender mitigation would be helpful as there was not always a clear distinction and existing guidelines do not do so.

3.8 Providing more guidance on the relevance of previous convictions: the Council agreed to do this and include this guidance in the general and offence-specific guidelines.

**Question 2: Is the Council satisfied that the decisions made at the July 2017 meeting remain the right ones and that the two phases of the 'Seriousness' project should address those issues that the Council wished to take forward?**

*Developing a 'dictionary' of terms for use in guidelines*

3.9 Consideration of factors across guidelines has highlighted differences in the wording of factors and there is concern that these differences could be confusing and potentially lead to inconsistency. Work has been done by the social research team to collate all of the factors used across guidelines and to compare how they are used. This work has shown a good deal of consistency in the terms used especially in more recent guidelines. In the development of future guidelines reference can be made to this 'dictionary' to ensure consistency.

**Question 3: Does the Council wish to refer to past guidelines and to use consistent language across future guidelines where appropriate?**

*Requiring sentencers to refer to too many guidelines or too much supplementary information*

3.10 The Lord Chief Justice has expressed concern about sentencers being required to refer to too many guidelines and therefore over complicating the sentencing exercise. It is undoubtedly the case that in any one sentencing exercise there may be several guidelines that are relevant. For example in sentencing someone for two offences of common assault, in addition to the Assault guideline the sentencer may be required to refer to the Imposition, Domestic Abuse, Totality and Guilty Plea guidelines. The Bottoms' Review (at paragraphs 35 and 54) notes that while sentencers will always use and refer to the relevant offence-specific guideline there is a tendency to take the other guidelines as read and perhaps to overlook them.

3.11 The Council has been urged (for example by Transform Justice) to produce more overarching guidelines rather than offence-specific ones. The Council is already committed to doing so; at this meeting the Council is considering a mental health overarching principles guideline for the first time. The Review recommends that the Council should give 'careful thought' to how it can ensure that these overarching guidelines are regularly referred to.

3.12 Members will recall the demonstration of the digital version of the guidelines at the April meeting. By the end of 2018 all guidelines will be provided in a digital format which will facilitate easy access to the overarching guidelines from within offence-specific guidelines.

3.13 The concern that is specific to the idea of providing expanded explanations in offence-specific guidelines is that a sentencer who fails (or appears to fail) to refer to the detail could be criticised on appeal, thus making it essential that all sentencers refer to the detail in every case, thus over-complicating the guidelines and the sentencing process.

3.14 The proposed expanded explanations will contain information to encourage best practice. In developing the explanations the Council has sought to bring certain considerations to the fore (an example would be age and immaturity). In some cases the explanations are based on Court of Appeal judgments (for example abuse of trust), which courts should be

following in any event. What the explanations can provide is a single accessible source of relevant guidance. The guidance is generally worded in such a way as to allow the sentencer wide discretion.

3.15 If the Council is concerned about explanations tying the hands of sentencers or leading to an increase in appeals this could be addressed by wording in the expanded explanations that make it clear the information is of general application and may not be applicable in all cases. If, despite this, there were to be a short term increase in appeals this could be dealt with in due course by the Court of Appeal stating that a failure by a court to refer in detail to the explanations in a guideline does not in itself render a sentence manifestly excessive (or unduly lenient).

3.16 Alternatively, the Council may feel that some explanations (for example the text on previous convictions and other 'standard' factors) should be an integral part of the guideline to be followed unless it would be contrary to the interests of justice to do so, but that others should be caveated as not applicable in all cases.

3.17 The concern about overburdening sentencers with information can be tested in research with sentencers and would be also be the subject of a question in the consultation.

#### *Problems with different explanations of factors in different guidelines*

3.18 There is a related concern that if the explanations of factors vary across guidelines sentencers will always need to click on them to check what is said in the context of each guideline. The Council has expressed a preference for consistency in explanations. The decisions made at the January Council meeting regarding explanations for existing guidelines were to use the standard explanations in most cases and to find explanations of general application for those factors not covered by standard explanations.

3.19 There were proposals to tailor explanations slightly so as to remove any irrelevant or confusing content in the context of a particular offence. It may be that any clarity gained by tailoring the explanations is outweighed by the complication of having similar but different explanations.

3.20 Using standard explanations wherever possible will also be simpler from the practical point of view in creating the digital guidelines.

3.21 The Council may conclude that for some factors in offence specific guidelines (particularly those factors that are tailored specifically for individual guidelines) no expanded explanation is necessary or helpful.

3.22 An alternative approach would be not to link from individual factors but to link to the general guideline or to a single document (or perhaps one document for aggravating factors and one for mitigating factors) which lists the various factors and their general explanations. This would have the merit of making it clear that there was only one set of explanations which once sentencers were familiar with, they would not need to refer to again; and if the document(s) were 'advisory' rather than having guideline status, sentencers would not be criticised for not following the guidance. The only links from individual factors would be to definitive guidelines (such as Domestic Abuse). Additionally, this would be a simpler option to develop and to maintain.

3.23 The disadvantage of this approach is that it would be less easy for sentencers to find the relevant information and make it less likely that they (and other court users) would take notice of it thus diluting the ability of the project to deliver the potential benefits.

**Question 4: Does the Council wish to provide explanations for factors in offence-specific guidelines?**

**Question 5: If so should this be as a link to one (or two) documents or links from individual factors in guidelines?**

**Question 6: If links to individual factors, should some of the factors have bespoke explanations (subject to detailed consideration at the June meeting)?**

**Question 7: What status should the explanations have – discretionary guidance or guideline status? Should the status vary depending on the factor?**

#### *Next Steps*

3.24 At the June 2018 Council meeting detailed proposals will be presented on the explanations to be provided in offence specific guidelines taking into account the decisions made at this meeting. Further work will be carried out over the summer and a draft for consultation will be brought to the October 2018 meeting to be signed off. By then the Council will have the benefit of feedback from the consultation on the General guideline.

**Question 8: Does the Council agree to take the work forward as proposed?**

## **4 IMPACT AND RISKS**

4.1 The aim of providing expanded explanations is to encourage best practice and therefore no significant impact on sentence levels is anticipated. However, as the project is wide in scope there is the potential for a significant impact. Road testing and the consultation process will highlight any issues that are likely to have unintended consequences.

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**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**18 May 2018**  
**SC(18)MAY07 – Business Plan**  
**Steve Wade**  
**020 – 7071 5779**

## **1 ISSUE**

1.1 To sign off the business plan for 2018-19 and agree the order of priorities for our forthcoming guidelines

## **2 RECOMMENDATION**

2.1 That the Council agrees:

- to the ordering of priorities as outlined in Annex D of the proposed Business Plan
- to publish the Business Plan subject to final proof-checking and designing

## **3 CONSIDERATION**

### *Background information*

3.1 Business plans are generally published early in the new Financial Year, setting out the organisation's priorities for the forthcoming year. The annual report then outlines to what extent the objectives set out in the business plan have been met and other significant achievements or activities that have happened within the year.

3.2 Over the last few years the publication of the two documents has moved slightly out of sync with the standard reporting cycle (annual reports moving to October or November and the business plan to September). This year we are seeking to realign our timetables with that cycle and wish to publish our business plan in May and annual report in July in line with the rest of the business areas within MoJ.

3.3 Much of the content of the business plan is standard content – for example the lists of members, the budgetary information, the setting out of our guideline development cycle. The two areas that form the main points of substance are the Chairman's foreword and the listing of, and ordering of, priorities.

3.4 It should be pointed out that, at the time of drafting we still have yet to receive our financial settlement for the year but it may be necessary to reconsider the workplan if our settlement is significantly lower than our current expectation.

***Question 1: Is the Council content to retain this basic structure and approach?***

## *Discussion*

3.5 The focus of today's discussion is primarily on the ordering of our priorities. The content of the report has been shared with the Governance sub-committee and this version will reflect any comments received. Information, including the list of members should be correct as of 1 May 2018. Subject to any amendments that may be necessary as a result of the discussion on priorities below, comments are invited from the Council on the content of the report.

### ***Question 2: Is the Council content with the content of the report as drafted (subject to any amendments as a result of the discussion on priorities)?***

3.6 Annex D sets out our proposed order of priorities for the guidelines for the coming 2 years. Members will note that some of the dates within Table 1 differ from those in Annex D but these will be updated to reflect the ordering of priorities in Annex D following today's discussion. The ordering of priorities in Annex DT is based on the following considerations:

- previous discussions at Council on priorities for the coming year;
- the need to consider the impact on analytical resource across guidelines and ensure a balance between new guidelines that are greater or lesser resource-intensive;
- the need to deliver against the Council's 2020 ambition to have revised all its predecessor body's guidelines, and to have produced guidelines for all the highest volume offences by its 10<sup>th</sup> anniversary; and
- emerging issues that have arisen since the last Council discussion on priorities.

3.7 Previously the Council had indicated that its next priorities were to begin work on the revision of our assault guideline and a new overarching guideline on Mental Health. Both of these guidelines are now in progress and have their first consideration at this meeting.

3.8 After this, Council had indicated that it wished to revisit the Burglary guideline as its next priority, followed by firearms, and then immigration and modern slavery (as two separate guidelines but to be done simultaneously given the potential cross-over in some areas). However, we propose two main changes to this approach.

3.9 First, we propose moving revision of our drugs guideline up the agenda. On our previous business plan, we had not envisaged looking at drugs again until post 2020. However, when Council considered the drugs evaluation in October 2017 it agreed that it would need to be revisited subject to other priorities. Since that point, the Council is aware of a number of emerging issues within drug offending (so called 'cuckooing' and associated with this, so called 'county lines', where a group establishes a network to supply drugs between an



urban hub and a county location, often exploiting vulnerable young people who act as couriers; and the emergence of new drugs – Fentanyl as an example – that are not adequately covered by existing guidelines). We therefore suggest picking up revision of the Drugs guideline as our next priority.

3.10 Second, we propose pushing Burglary back. Early indications from revising Assault suggest that the analytical input for such a revision is substantial – and far in excess of that required for a new guideline or indeed, for drugs. Picking up burglary straight after Assault would place too great a pressure on the Analysis and Research team. We therefore suggest starting burglary later once the bulk of the analytical work on Assault has been completed.

3.11 These changes will still enable us to remain on track to have met our 2020 goals with the possible exception of Motoring offences, which remains due to start at some point in late 2019 / early 2020 dependant on a clear indication from Government on its intentions for legislating in this area.

***Question 4: Is the Council content with the proposed re-ordering of priorities as per Annex D?***

***Question 5: Subject to any amendments as a result of the above discussion and a final proofread and fact-check of the document, is the Council content for us to publish the workplan towards the end of May?***

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# Sentencing Council

## **Business Plan** **Financial year 2018/19**

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# Sentencing Council

## Chairman's introduction



I am pleased to introduce the Sentencing Council's sixth annual business plan, which sets out our aims, objectives and priorities for the financial year 2018/19.

This year the Council will launch six definitive guidelines: Breach Offences, Intimidatory Offences (including stalking, as well as the new offences of controlling or coercive behaviour and disclosing private sexual images), Manslaughter, Child Cruelty, **Seriousness [DN: to reflect actual title once decided]** and Public Order Offences.

During the course of the year we are also continuing work to prepare, and consult upon, four further proposed guidelines. Two of these will be new guidelines: Arson and Criminal Damage and an overarching guideline on Mental Health. Two will be revisiting guidelines that the Council has previously produced: Assault (within which it is proposed to include attempted murder) and Burglary.

Consultation is a vital aspect of the Council's work. For guidelines to succeed they must be informed by the knowledge and expertise of those people who have legal or practical experience in the area we are examining, and by the views of those with an interest in our work or in the operation of the wider criminal justice system. We are always grateful to the people and organisations who give their valuable time to contribute to our consultations.

In addition to publishing guidelines, the Council is required to monitor and evaluate their operation and effect. During this year we will be publishing evaluations of several guidelines including the offences of robbery, drugs, theft, sexual offences, and fraud. The work to revisit our Assault and Burglary guidelines will be informed by the results of our assessment of their impact and implementation, which have previously been published.

We have also been working this year to take forward a number of themes arising from a review of how best the Council can exercise its statutory functions. The review was conducted by Sir Anthony Bottoms, Emeritus Professor at the Institute of Criminology, University of Cambridge, at the Council's request. I am extremely grateful for the work

undertaken by Professor Bottoms and his colleague, Dr Jo Parsons, which you can find at [XXXXXX \[DN: add weblink\]](#)

Professor Bottoms' review outlines areas in which the Council has been successful since its inception in 2010, but there are also recommendations that are designed to help the Council take forward its work and agree its future priorities as it approaches its tenth anniversary. We have published a response to the Review alongside the full document in which we outline which areas we plan to take forward.

The purpose of publishing our business plan is to make sure that everyone who has an interest in our work is kept informed of developments. The Council's priorities can, and do, change throughout the year and from one year to the next. For example, we are statutorily bound to consider requests from the Lord Chancellor<sup>1</sup> and the Court of Appeal to review the sentencing of particular offences. We may also need to consider amending our work plan if we are required to undertake work on new or particularly complex areas of sentencing. This may have an impact on our budget, where things are either brought forward or pushed back to accommodate new requests.

We will continue to review the plan during the year and publish updates, as appropriate, on our website.

The Council's website continues to support sentencers and criminal justice professionals by making the sentencing guidelines and supporting information accessible to them, as well as to the public, victims, witnesses, offenders, researchers and journalists. In 2017/18 we conducted a comprehensive review of the website and considered the ways in which it could more effectively meet the needs of the Sentencing Council and our many stakeholders. In particular, we considered to what extent the website helps the Council in improving public confidence in sentencing. We expect to develop the website in line with the recommendations of this review during the year.

This year we will also continue our programme of digital development with the digitisation of sentencing guidelines for the Crown Court. We expect to test the digital guidelines with users in late spring, with a view to launching in the summer. Development of the online guidelines has been informed by initial research with an advisory group of Crown Court judges, as well as the extensive consultation we did last year to support our redevelopment of the Magistrates' Court Sentencing Guidelines. We are most grateful to everyone who has helped us in this work.

In the last year we made good progress against the goals set out in our 2017/18 business plan. We published the Bladed Articles and Offensive Weapons guideline; a new guideline on Domestic Abuse; and we consulted on, and published, a guideline covering Terrorism offences. In addition, we consulted on Child Cruelty offences and completed consultations on Intimidatory and Domestic Abuse offences. We also worked with magistrates in a sample of courts to collect the data needed to support future evaluations of guidelines. I am very grateful to them for their support with this.

We have also made progress in our work to raise the Council's profile and build relationships across the criminal justice system, with Council members and staff from the Office of the Sentencing Council giving more than 30 speeches or presentations during the year. Our audiences included magistrates, judges, police, academics, NGOs, solicitors and barristers.

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<sup>1</sup> s.124 Coroners and Justice Act 2009

Since our last business plan five new members have joined the Council. I would like to take this opportunity to welcome District Judge Rebecca Crane, Rob Butler JP, HHJ Rosa Dean and Dr Alpa Parmar. I would like to acknowledge the contribution of District Judge Richard Williams, Jill Gramann JP and Dr Julian Roberts who have left the Council since the last Business Plan.

As is traditional, I would also like to pay tribute to the staff of the Office of the Sentencing Council. I have said before that they are the Council's most valuable resource and I am remain very proud of the high quality work that the team produces. In monetary terms our budget is very limited and it is testament to the staff's ability and dedication that the Council continues to have the success that it does.

A handwritten signature in black ink that reads "Colman Treacy". The signature is written in a cursive style. Below the signature is a long, thin, slightly curved horizontal line.

Colman Treacy

May 2018

## Background and membership

The Sentencing Council is an independent, non-departmental public body (NDPB) of the Ministry of Justice (MoJ). It was set up by Part 4 of the Coroners and Justice Act 2009 (“the Act”) to promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary. Its primary role is to issue guidelines, which the courts must follow unless it is in the interests of justice not to do so. The Council meets 10 times a year; minutes are published on its website.

### Appointments to the Council

The Lord Chief Justice, the Right Honourable Lord Burnett of Maldon is President of the Council. In this role he oversees Council business and appoints judicial members.

The Lord Chancellor and Secretary of State for Justice appoints non-judicial members.

All appointments are for a period of three years, with the possibility of extending up to a maximum of 10 years. Membership of the Council as of 1 May 2018 is as follows:

### Members

The Council comprises eight judicial and six non-judicial members.

#### ***Chair: The Right Honourable Lord Justice Treacy***

Colman Treacy was appointed to the Court of Appeal in 2012. He has been Chairman of the Sentencing Council since November 2013 and a member of the Council since April 2010.

#### ***Vice-Chair: The Right Honourable Lady Justice Hallett DBE***

Heather Hallett was appointed to the Court of Appeal in 2005 and has been Vice President of the Court of Appeal Criminal Division since 2013. She was appointed to the Sentencing Council on 27 November 2013.

#### ***Simon Byrne QPM***

Simon Byrne has been Chief Constable with Cheshire Constabulary since June 2014. In 2015 he became the National Police Chiefs Council (NPCC) lead for the National Police Air Service. He was appointed to the Sentencing Council on 1 September 2016.

#### ***Mark Castle***

Mark Castle is Chief Executive of Victim Support. He was appointed to the Sentencing Council on 17 July 2015.

#### ***Rosina Cottage QC***

Rosina Cottage has been a barrister since 1988, practicing in criminal law, and is a Tenant at the Chambers of Max Hill QC, Red Lion Chambers. She was appointed Queen’s Counsel in 2011 and appointed Crown Court Recorder in 2012. She was appointed to the Sentencing Council on 18 July 2016.

#### ***District Judge (Magistrates’ Court) Rebecca Crane***

Rebecca Crane has been a District Judge since 2011 and is currently based in Birmingham. She was appointed to the Sentencing Council on 1 April 2017.



### ***The Honourable Mr Justice Goose***

Julian Goose is the Resident Judge and Honorary Recorder of Sheffield. In October 2017, he was appointed to the High Court, assigned to the Queen's Bench Division. He was appointed to the Sentencing Council on 26 June 2014.

### ***Martin Graham***

Martin Graham was Chief Executive of the Norfolk and Suffolk Community Rehabilitation Company until April 2016. He was appointed to the Sentencing Council on 1 June 2015.

### ***Rob Butler JP***

Rob Butler has sat as a magistrate since 2007, as a presiding justice in the adult court since 2012, and joined the youth panel in 2010. He was appointed to the Sentencing Council on 6 April 2018.

### ***Her Honour Judge Rosa Dean***

Rosa Dean was called to the bar in 1993, she was appointed as a district judge (Magistrates' Courts) in 2006, a recorder in 2009 and a Circuit Judge in 2011. She was appointed to the Sentencing Council on 6 April 2018

### ***The Right Honourable Lord Justice Holroyde***

Tim Holroyde was appointed as a High Court Judge in January 2009 and was a Presiding Judge on the Northern Circuit until December 2015. In October 2017 he was appointed as a Lord Justice of Appeal. He was appointed to the Sentencing Council on 6 April 2015.

### ***The Honourable Mrs Justice McGowan***

Maura McGowan was called to the Bar by the Middle Temple in 1980 and took Silk in 2001. She was appointed an Assistant Recorder in 1997 and as a Recorder in 2000. She was appointed as a High Court Judge in 2014. She was appointed to the Sentencing Council on 2 January 2017.

### ***Her Honour Judge Sarah Munro QC***

Sarah Munro was appointed as a Circuit Judge based at Portsmouth Crown Court in 2011 In July 2017 she was appointed as a Senior Circuit Judge at the Central Criminal Court.

She was appointed to the Sentencing Council on 6 April 2013.

### ***Dr Alpa Parmar***

Alpa Parmar is a departmental lecturer in criminology, in the Faculty of Law at Oxford University. She was appointed to the Sentencing Council on the 6 April 2018

### ***Alison Saunders***

Alison Saunders is the Director of Public Prosecutions and head of the Crown Prosecution Service. She was appointed to the Sentencing Council on 1 November 2013.

## **Sub-groups**

The Council has sub-groups to provide oversight in three areas: analysis and research, confidence and communications and governance. The sub-groups' roles are mandated by the Council and all key decisions are made by the full membership. The sub-groups are internal rather than public-facing.

# Objectives

## Statement of Purpose

The Sentencing Council for England and Wales promotes a clear, fair and consistent approach to sentencing through the publication of sentencing guidelines, which provide clear structure and processes for judges and magistrates, and victims, witnesses, offenders and the public.

## Objectives

The Council's objectives are informed by its statutory duties under the Act.

We will:

- 1. Prepare sentencing guidelines that meet their stated aims, with particular regard to the likely impact on prison, probation and youth justice services, the need to consider the impact on victims and to promote consistency and public confidence**

This will be met by: developing evidence-based guidelines, fully considering the policy, legal and resource implications; publishing consultations which clearly set out the rationale for the approach and likely resource implications; taking into account responses and research to make improvements before publication of definitive guidelines; and engaging with stakeholders, practitioners, the media and others to explain the implications of guidelines.

- 2. Monitor and evaluate the operation and effect of our guidelines and draw conclusions**

This will be met by: putting in place bespoke, targeted evaluations and assessments of the impact and/or implementation of guidelines and collecting the necessary monitoring data; and by using evaluation evidence to review and if necessary, amend guidelines.

- 3. Promote awareness of sentencing and sentencing practice**

This will be met by: making effective use of consultation events, proactive engagement of the media, and maximising the Council's digital capability and online presence to promote awareness and to improve and strengthen engagement with stakeholders; and by publishing relevant material, in particular evaluations of guidelines and an annual report of the Council's activities.

- 4. Deliver efficiencies, while ensuring that the Council continues to be supported by high-performing and engaged staff**

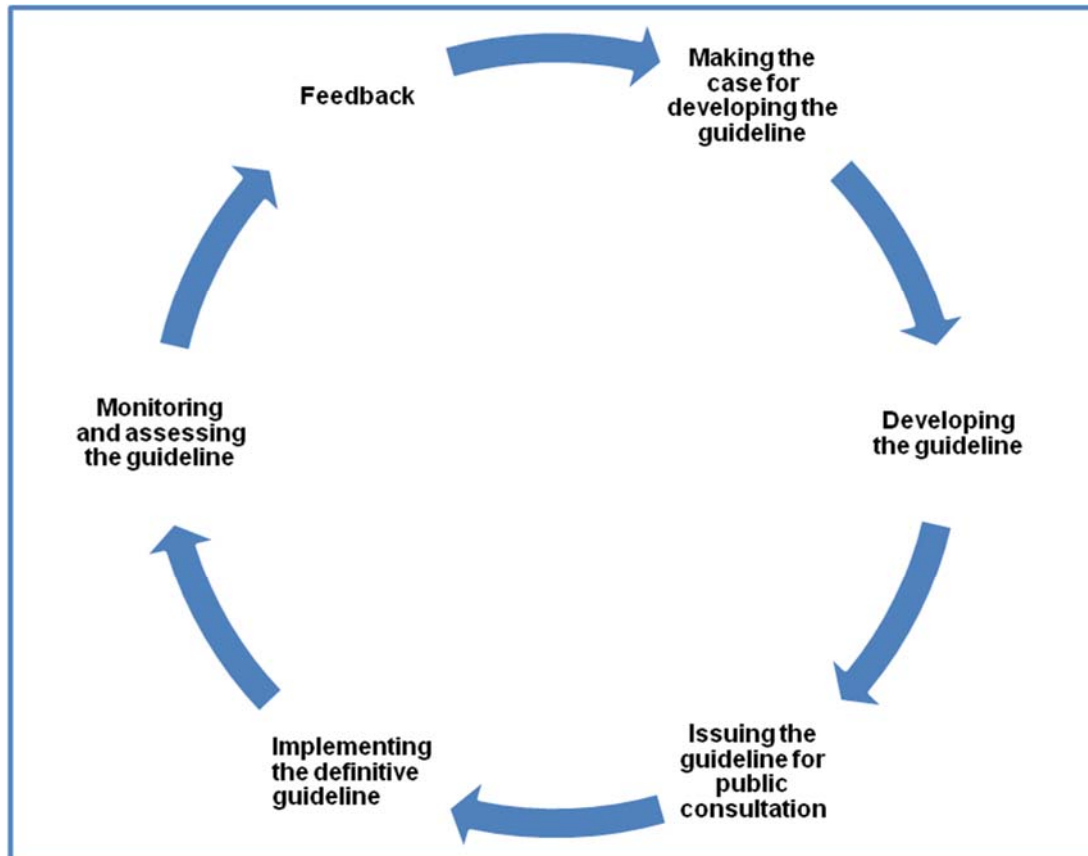
This will be met by: delivering our objectives within the budget we are allocated, while ensuring that the Office has a motivated and collaborative team who feel valued and challenged and has the necessary capability and autonomy to deliver clear, tangible and outcome-focused objectives, and work together to identify and implement more efficient ways of working and ensure value for money.

The activities for 2018/19 that will deliver these objectives are outlined in **Table 1**.

## Delivering the Sentencing Council's objectives

The Council approaches the delivery of its objectives by adopting a guideline development cycle. This is based on the policy cycle set out by HM Treasury in the *Green Book on Appraisal and Evaluation in Central Government (2003)* and allows a culture of continuous improvement to be embedded within the development process.

Following this cycle, there are several key stages within the development of a sentencing guideline:



### ***Making the case for developing the guideline***

Annex A outlines the Council's rationale for prioritising which guidelines to produce, after which options for the actual guideline are considered. This may include conducting research, assessing options for the scope and remit of a guideline, its objectives, or whether there is in fact a need for the guideline. If the guideline has been requested by the Lord Chancellor, Lord Chief Justice, Court of Appeal or external bodies or stakeholders, this would also be considered.

### ***Developing the guideline***

Once the Council has decided that a guideline will be produced and has agreed the objectives, work is undertaken to produce a draft guideline that will be issued for consultation. This involves a variety of different activities including consideration of relevant case law and existing sentencing guidelines or guidance; analysis of current sentencing practice; research and analysis to assess any practical, behavioural or resource implications of draft guideline proposals; stakeholder mapping and engagement and analysis of media reports. The guideline proceeds through a number of iterations of drafting in order to ensure

that different options are fully considered. A monitoring and evaluation strategy is also drawn up to ensure that the guideline can be assessed and evaluated after implementation.

### ***Issuing the guideline for public consultation***

A draft guideline is issued for public consultation, alongside the analysis and research that supported its development and an assessment of its resource implications and any equality impact. The media and stakeholders are briefed about the main issues and the purpose of the consultation, in order to bring it to the attention of a wide audience and encourage responses. Events are held with stakeholders to ensure that those with particular interest in the guideline are aware of the consultation and able to provide their input.

Further work is then undertaken after the consultation to revise the guideline to take account of the responses received; and to review and if necessary test changes to the guideline.

### ***Publishing and implementing the definitive guideline***

The guideline is published. Updated data on sentencing practice and a new resource assessment to reflect the final guideline are published at the same time. The guideline is distributed to stakeholders and events may be held. The media are also briefed, and a range of channels, including social media, are used to ensure that the public is informed and that all key parties are aware of and able to access the guideline.

The Council works with the Judicial College to help facilitate training for sentencers on using the guideline. There will generally be an implementation period of approximately three months before the guideline comes into effect to allow for awareness-raising and any training to take place.

### ***Monitoring and assessing the guideline***

Annex B outlines the Council's approach to monitoring and evaluating its guidelines. This adopts a targeted, bespoke and proportionate approach to assessing each guideline's impact and implementation, based on the likely impact of unanticipated consequences having a significant effect on correctional resources, whether the Council intended to change sentencing practice, and whether any informal evidence suggests the guideline may not have had its intended effect. It also takes into account the data and resources available. A variety of different methods of data collection may therefore be utilised, as necessary.

### ***Feedback***

The outcomes of the monitoring and evaluation, along with any stakeholder or media feedback will then be assessed and considered by the Council. On the basis of this, the guideline cycle moves back into the phase of **making the case for developing the guideline**, this time addressing the need to review the guideline and make improvements. If this is found to be necessary, the cycle begins again. The timescale for this process will vary, depending on a number of factors including the extent of monitoring and evaluation and the urgency for taking any action.

### ***Timing and prioritisation***

The Business Plan sets out an indicative timeline for preparation and publication of guidelines based on the Council's current priorities and its three-year rolling work programme. The plan will be subject to bi-annual review and updates will be published, as appropriate, on the Sentencing Council website.

**Table 1: The main activities to deliver our objectives and planned timescales are as follows:**

<b>Work area</b>	<b>Objectives addressed</b>	<b>Key planned deliverables</b>	<b>Target (end of quarter)</b>
<b>SECTION 1: GUIDELINES</b>			
<b>Assault including Attempt murder</b>	1, 2, 3	Publication of consultation, resource assessment and statistical bulletin	March 2019
<b>Arson and criminal damage</b>	1, 2, 3	Consideration of consultation responses and preparation of definitive guideline	March 2019
<b>Bladed article/ offensive weapon possession</b>	1, 3	Guideline in force	June 2018
<b>Breach Offences</b>	1, 2, 3	Publication of definitive guideline, consultation response, and resource assessment	June 2018
<b>Burglary</b>	1, 2, 3	Publication of consultation, resource assessment and statistical bulletin	March 2019
<b>Child cruelty</b>	1, 2, 3	Publication of definitive guideline, consultation response and updated resource assessment	December 2018
		Guideline in force	March 2019
<b>Domestic abuse</b>	1, 3	Guideline in force	June 2018
<b>Drugs</b>	2, 3	Publication of findings from guideline assessment	June 2018
<b>Fraud</b>	2, 3	Publication of findings from guideline assessment	June 2018
<b>Firearms offences</b>	1, 2, 3	Publication of consultation, resource assessment and statistical bulletin	March 2019
<b>Intimidatory offences</b>	1, 2, 3	Publication of definitive guideline, consultation response and updated resource assessment	September 2018

		Guideline in force	December 2018
<b>Manslaughter</b>	1, 2, 3	Publication of definitive guideline, consultation response and updated resource assessment	September 2018
		Guideline in force	December 2018
<b>Mental Health</b>	1, 2, 3	Publication of consultation and resource assessment	March 2019
<b>Public Order</b>	1, 2, 3	Publication of consultation, resource assessment and statistical bulletin	June 2018
		Publication of definitive guideline, consultation response and updated resource assessment	March 2019
<b>Robbery</b>	2,3	Publication of findings from guideline assessment	September 2018
<b>Seriousness - [DN - To be renamed and will need to split out to reflect Council's decision to do in two parts.]</b>	1, 2, 3	Publication of consultation, resource assessment and statistical bulletin	June 2018
		Publication of definitive guideline, consultation response and updated resource assessment	March 2019
<b>Sexual Offences</b>	2,3	Publication of findings from guideline assessment	September 2018
<b>Theft</b>	2,3	Publication of findings from guideline assessment	December 2018
<b>Terrorism</b>	1, 3	Guideline in force	June 2018
<b>SECTION 2: CROSS-CUTTING WORK</b>			
<b>Digitisation of guidelines</b>	3	Maintain, support and promote online and offline sentencing guidelines for magistrates (MCSG)	Ongoing
	3	Test, deliver, promote and refine online and offline sentencing guidelines for Crown Court judges	June 2018

	3	Redevelop the Sentencing Council website	March 2019
<b>Annual Report</b>	3	Publish Annual Report	June 2018
<b>Business Plan</b>	3	Review progress and publish update	December 2018 (tbc)
<b>References received from Lord Chancellor or Court of Appeal under section 124</b>	1, 2, 3	Respond as required	Reactive only
<b>External representation</b>	1, 3	Council members and office staff speak at a minimum of 20 external events targeting the judiciary, criminal justice practitioners, academics and special interest groups	Ongoing
	3	Promote sentencing guidelines and the Council using all channels, including via proactive and positive engagement with the media, to engage with Government, its Arm's Length Bodies, the Judicial College and organisations with an interest in criminal justice and sentencing.	Ongoing
	3	Promote public confidence in sentencing by tailoring and targeting our external communications, developing relationships with key advocates such as the police service and developing the public-facing content of our website.	Ongoing
	3	Provide assistance to foreign jurisdictions via visits, advice and support work	Ongoing
<b>SECTION 3: EFFICIENCY AND OUR PEOPLE</b>			
<b>Efficiency</b>	4	Assess need for publication of hard copy documents on case by case basis, publishing online unless not appropriate.	



		<p>Ensure value for money in the procurement of goods and services, making savings where possible, in particular from printing costs and complying with departmental finance, procurement and contract management rules.</p> <p>Learn from lessons of each project, making improvements to future guidelines as a result; and improving efficiency on the basis of experience of what works.</p>	Ongoing; review quarterly
<b>Capability</b>	4	<p>Enable the Council to operate digitally, through development and support of secure online members' area, digital Council papers and online collaboration tools.</p> <p>Ensure all staff undertake at least five days of targeted learning and development to develop skills, capability and career.</p> <p>Hold lunchtime seminars for staff to share knowledge and expertise about the work of the Council, the criminal justice system and Whitehall/ Government.</p>	
<b>Engagement</b>	4	<p>Implement an action plan arising from the findings of the people survey, based on priorities identified by staff.</p>	

<b>TIMELINE OF PUBLICATIONS AND GUIDELINE EFFECTIVE DATES 2018/2019</b>		
April	Terrorism	Definitive guideline in force
April	Drugs	Publication of evaluation report
April	Research to Advise on how the Sentencing Council can best Exercise its Statutory Functions	Publication of report
May	Public Order	Launch of consultation
May	Breach	Publication of definitive guideline
May	Domestic Abuse	Definitive guideline in force
May	Fraud	Publication of evaluation report
June	Seriousness	Launch of consultation
July	Intimidatory offences	Publication of definitive guideline
August	Sexual offences	Publication of evaluation report
September	Manslaughter	Publication of definitive guideline
September	Robbery	Publication of evaluation report
October	Child Cruelty	Publication of definitive guideline
December	Manslaughter	Definitive guideline in force
	Mental Health	Launch of consultation
	Theft	Publication of evaluation report
January	Assault (including attempted murder)	Launch of consultation
	Burglary	Launch of consultation
	Child Cruelty	Definitive guideline in force
March	Public order	Publication of definitive guideline
	Seriousness [DN - Reword plus split into two]	Publication of definitive guideline

## Resources

### Staff headcount (as at 1 April 2018)

Area of activity	FTE <sup>2</sup>
Head of Office and support	2
Policy	3.9
Analysis and research	7.3
Legal	1
Communications	3
<b>Total</b>	<b>17.2</b>

### Budget

Summary of budget and resource allocation

	2017/18 (actual) <sup>3</sup> £000s	2018/19 (budget) £000s
<b>Total funding allocation</b>	1,455	---
<b>Staff costs</b>	1,116	---
<b>Non staff costs</b>	323	---
<b>Total expenditure</b>	1,439	---

<sup>2</sup> FTE: full-time equivalents

<sup>3</sup> The total expenditure has been rounded to the nearest £1,000 independently from the constituent parts, therefore summing the parts may not equal the rounded total.

## Annex A: Rationale for the prioritisation of guidelines

Under section 120 of the Coroners and Justice Act 2009 the Sentencing Council must prepare sentencing guidelines on:

- the discharge of a court's duty under section 144 of the Criminal Justice Act 2003 (c. 44) (reduction in sentences for guilty pleas);<sup>4</sup> and
- the application of any rule of law as to the totality of sentences.<sup>5</sup>

Section 120(4) provides that the Council may prepare sentencing guidelines about any other matter.

The overarching aim of the Council in publishing guidelines is to promote a clear, fair and consistent approach to sentencing. In agreeing its three-year rolling work plan, the Council will prioritise the publication of guidelines that will fulfil that aim.

The Sentencing Council will schedule guideline production on the basis of one or more of the following factors:

- The Lord Chancellor or Lord Chief Justice formally requests the review of sentencing for a particular offence, particular category of offence or particular category of offender and the production of a guideline;
- New legislation requires supporting sentencing guidelines;
- Guidelines issued by the Sentencing Guidelines Council require conversion into the Council's step by step approach to sentencing or current guidelines are out of date or incomplete;
- A substantial body of interested parties request a guideline to be issued for a particular area of sentencing;
- Sentencing data suggests that there may be inconsistency in sentencing for a particular offence, particular category of offence or particular category of offender;
- Evidence suggests that the guideline would have a significant effect on sentencing practice, for example, the potential range of available sentences is wide and/or the number of offences sentenced is significant; and
- The resource required to produce a guideline and other work pressures.

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<sup>4</sup> s.120 (3)(a)

<sup>5</sup> s.120 (3)(b)

## Annex B: Criteria for assessing/ evaluating guidelines

### Aim

To assess whether guidelines are having any impact on sentencing outcomes (type, length and severity) and/ or incurring any implementation issues. A two stage process of decision-making will be undertaken:

#### **Stage 1: Consider the need to assess the guideline**

This will take account of changes forecast in the resource assessment (impact assessment) or the sentencing process set out in the guideline (implementation assessment). It will take account of whether:

- The offence is high volume and any incorrect assumptions in the resource assessment may have a significant impact;
- The Council had a stated intention of changing sentencing practice;
- Informal evidence suggests the guideline is not having its intended impact (e.g. feedback from sentencers); and
- External bodies have an interest in the impact of the guideline.

If none of the above apply, the Council will be advised not to evaluate formally at this stage.

#### **Stage 2: Evaluation/ assessment**

##### **a) Initial evaluation**

If any of the above criteria apply, initial work will be undertaken using MoJ Court Proceedings Database<sup>6</sup> (CPD) sentencing data for the magistrates' and Crown Court, to determine the feasibility, need and scale of further work.

If initial analysis of sentencing volumes, outcomes and average custodial length indicate any marked and/ or unintended changes after the guideline was introduced, further work will be considered. If it does not, this information would be fed back and no further analytical work at this stage would be advised.

##### **b) Further evaluation**

If further work is deemed useful, feasibility of the work will be assessed. This would consider:

- Whether offence volumes are large enough to use MoJ data and to enable appropriate statistical analysis to be undertaken using a forecast of what would have happened if the guideline had not been introduced;
- What other information can be collated (qualitative information, media reports, stakeholder feedback, etc).

The best approach to evaluation would be assessed, considering, as appropriate:

- Statistical work involving time series analysis using the MoJ CPD;

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<sup>6</sup> The CPD is derived from the LIBRA case management system, which holds the magistrates' court records, and the Crown Court's CREST system which holds the trial and sentencing data.

- Analysis of sentencing factor information using Crown Court Sentencing Survey<sup>7</sup> and other court data (if available);
- Further bespoke quantitative or qualitative data collection and analysis to support the evaluation.

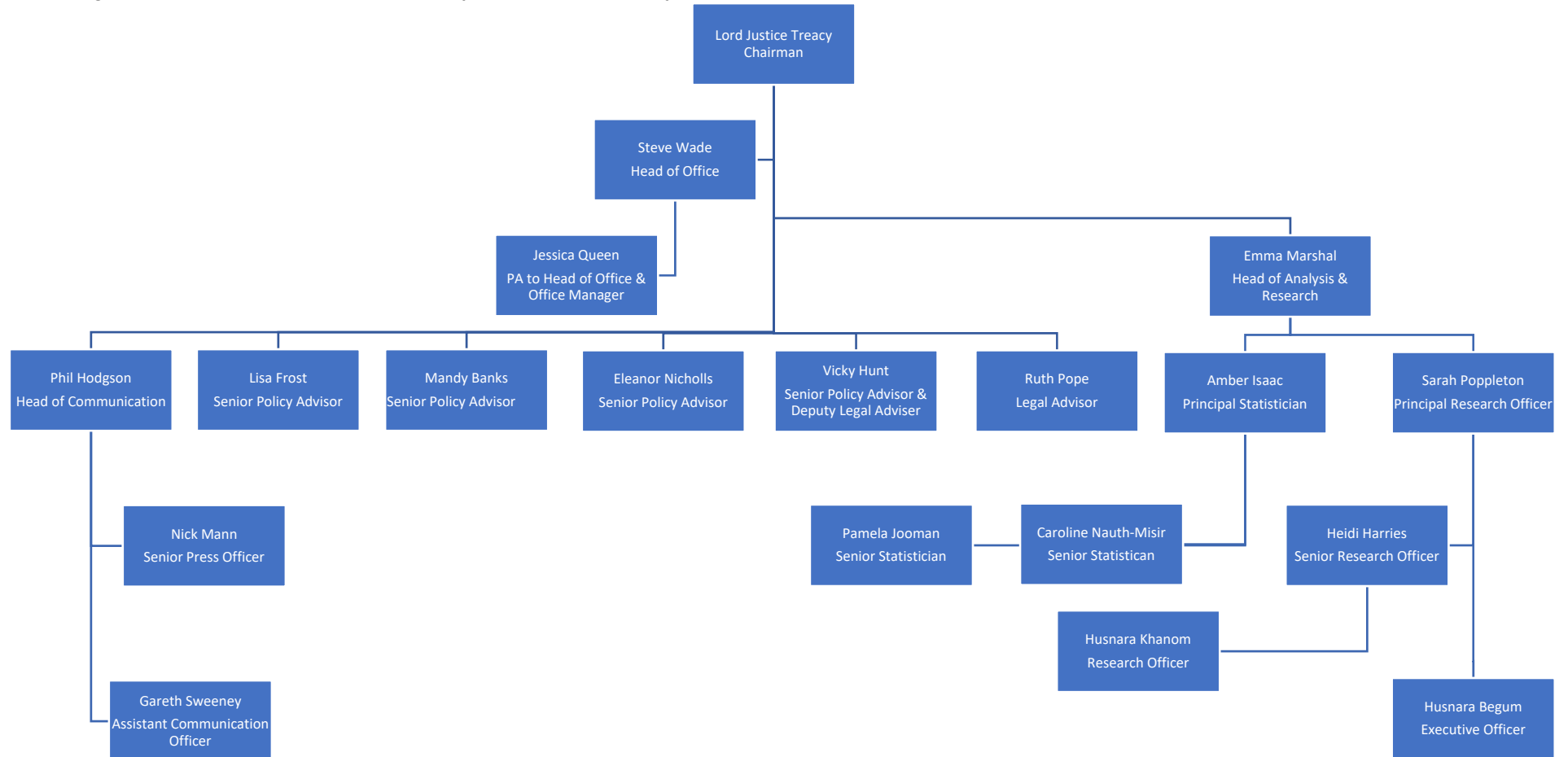
Where bespoke data collection is initiated, this should preferably involve a “before” and “after” sample, covering at least a three-month period before publication of a consultation guideline and at least three months after the guideline comes into force.

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<sup>7</sup> Between 1 October 2010 and 31 March 2015 the Council conducted a data collection exercise called the Crown Court Sentencing Survey. The paper-based survey was completed by the sentencing judge (or other sentencer) in the Crown Court. It collected information on the factors taken into account by the judge in working out the appropriate sentence for an offender and the final sentence given. It was designed to assist the Sentencing Council with fulfilling its duties under section 128 of the Coroners and Justice Act 2009.

## Annex C: The Office of the Sentencing Council as at 1 May 2018

The Sentencing Council is supported in its work by a multi-disciplinary team of civil servants, as shown below.



## Annex D: Sentencing Council Guideline Work Plan – 2018-2020<sup>1</sup>

<b>Guideline</b>	<b>Consultation period</b>	<b>Publish definitive guideline</b>	<b>Definitive guideline in force<sup>2</sup></b>
Breach	25 October 2016 – 25 January 2017	7 June 2018	October 2018 (tbc)
Intimidatory offences	30 March 2017 – 30 June 2017	5 July 2018	October 2018
Manslaughter (including SGC provocation guideline)	4 July 2017 – 10 October 2017	2 August 2018	January 2019
Child Cruelty	13 June 2017 – 13 September 2017	4 September 2018	January 2019
Arson and Criminal damage	27 March 2018 – 26 June 2018	March 2019	July 2019
Public order	9 May – 8 August 2018	March 2019	July 2019
Updating the SGC Seriousness guideline – generic guideline	June 2018 - Sept 2018	March 2019	July 2019
Updating the SGC Seriousness guideline - additional info for offence specific guidelines	December 2018 – March 2019	November 2019	January 2020
Revision of SC assault and SGC attempt murder guidelines	January 2019 - April 2019	February 2020	May 2020
Overarching guideline on mental health	December 2018 – March 2019	December 2019	February 2020
Drugs – revision of SC guideline	March 2019 – June 2019	March 2020	June 2020
Firearms offences	April 2019 – July 2019	April 2020	July 2020



<b>Guideline</b>	<b>Consultation period</b>	<b>Publish definitive guideline</b>	<b>Definitive guideline in force<sup>2</sup></b>
Immigration/ modern slavery	June 2019 – October 2019	Spring 2020	2020
Burglary revision of SC guideline	Autumn 2019	Autumn 2020	2020
Motoring offences <sup>3</sup>	2019 – 2020	2020	2020

In addition, the Council will aim to update any remaining either way offences from the Magistrates' Court Sentencing Guidelines, not covered by any guideline above by 2020.

<sup>1</sup> The dates shown in this work plan are indicative and may be subject to change

<sup>2</sup> Currently in most instances we allow a three month implementation period between publication and the definitive guideline coming into force

<sup>3</sup> Timetable provisional dependent on outcome of Government review

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**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**18 May 2018**  
**SC(18)MAY08 - Manslaughter**  
**Tim Holroyde**  
**Ruth Pope**  
**0207 071 5781**

## **1 ISSUE**

1.1 This is the final consideration of the manslaughter guidelines prior to publication of the definitive guideline. The Council will be asked to review all of the changes made post consultation and to consider sentence levels.

1.2 The plan had been to publish in early September, but to enable effective training on the guideline at the Serious Crime seminar on 6 September it will be necessary to publish in early August.

## **2 RECOMMENDATION**

2.1 The Council is asked to consider and agree the amendments to each of the guidelines:

- **Annex A** Unlawful act
- **Annex B** Gross Negligence
- **Annex C** Loss of Control
- **Annex D** Diminished Responsibility

2.2 The Council is asked to specify the intended effect of each guideline on sentence levels and to agree in broad outline the content of the resource assessment.

## **3 CONSIDERATION**

### *Unlawful Act - factors*

3.1 The guideline at Annex A includes amendments agreed at the December 2017 Council meeting. Additions are shown in red and underlined. Deletions have been omitted for the sake of clarity. For ease of reference aggravating and mitigating factors are numbered; the numbering will **not** be included in the definitive guideline.

3.2 An analysis of 2016 cases suggests that few (if any) cases are likely to be assessed as culpability D, although culpability D factors were important in balancing culpability B factors.

**Question 1: Is the Council content with the factors in Annex A?**

### *Gross Negligence - factors*

3.3 The guideline at Annex B includes amendments agreed at the January 2018 Council meeting which were 'road tested' with 11 judges. Additional proposed changes resulting from that research and from further representations on behalf of medical professionals are shown underlined in red or struck through.

3.4 The version of the guideline agreed at the January meeting (and in subsequent email exchanges) was generally well received by the judges who tested it for us. The five judges who resentenced their own cases using the guideline were happy with the sentence they arrived at. Two of the cases were work based deaths and, as expected, the guideline produced higher sentences than those passed originally. In one case the actual sentence of 4 years would have been increased to 8 years. The judge concerned confirmed that he felt the higher sentence was appropriate.

3.5 The culpability B factor which was the subject of most discussion by the Council was:

The offence was particularly serious because the offender showed a blatant disregard for a very high risk of death resulting from the negligent conduct

3.6 This factor was designed to capture cases such as motor manslaughter or cases involving firearms which are not covered by other high culpability factors. One judge who resentenced a case involving a shotgun raised a point that Council members had anticipated: when does 'blatant' become 'extreme' thus elevating it to culpability A? The judge felt that he had to stretch a point to get the case into culpability A which is where he felt it belonged.

3.7 Judges who applied the guideline to a case of extremely dangerous driving, almost all arrived at sentences lower than the 12 years passed in the case that the scenario was based on. Sentences ranged from 5 years to 12 years and averaged 8.5 years. Most judges categorised it as culpability B (using the above factor), but one placed it in C and one (somewhat reluctantly) in A.

3.8 The culpability D factor 'The negligent conduct was a lapse in the offender's otherwise satisfactory standard of care' was applied as expected in a medical case (although the judge did suggest clarifying whether it meant towards the victim or more generally) but unexpectedly by one judge to the driving scenario (hence the categorisation of culpability C).

3.9 One judge commented:

My problem with the guidelines is that this offence can arise in a multiplicity of different circumstances. If those are not listed specifically under culpability the sentence could be too low. Hence here, D drove dangerously for a period, he was "after" the V, neither factor can be seen in the sections of culpability.

3.10 The Council has been aware of this difficulty throughout the development of this guideline and has left considerable discretion to judges, a fact that many judges have

recognised and welcomed. It is submitted that the guideline as currently drafted strikes the right balance between providing guidance and affording discretion for this very diverse offence. A judge commented:

I have to say I liked it – principally because it forced me to exercise judgment (within a framework) and was not overly prescriptive. That approach is crucial in manslaughter cases whereby the categorisation of the manslaughter is relatively easy, but the factual matrices are wide and diverse.

3.11 A number of organisations representing doctors and other medical professionals responded to the consultation and suggested factors to take account of the particular mitigating circumstances that might apply in this setting. The Council previously agreed versions of the mitigating factors numbered 5 and 6 in Annex B. Tim and Ruth met with a delegation of doctors and lawyers to discuss the guideline and the extent to which their concerns would be met by the revisions to the guideline. In the light of that meeting additional factors are proposed (numbered 4, 7 and 8). These could apply in some medical cases but also to others (such as other emergency workers) who are operating in particularly complex, stressful or pressurised environments where mistakes are more likely to result in death.

**Question 2: Is the Council content with the factors in Annex B?**

*Loss of control - factors*

3.12 No substantive amendments are proposed for the factors in the loss of control guideline at Annex C which was agreed at the March Council meeting.

**Question 3: Is the Council content with the factors in Annex C?**

*Diminished responsibility - factors*

3.13 This guideline (at Annex D) was agreed at the April Council meeting. Changes were made to step one and step four. A minor addition is proposed at step four.

**Question 4: Is the Council content with the factors in Annex D?**

*Comparing the step two factors*

3.14 Annex E sets out the factors used at step two across all four guidelines. Minor amendments have been proposed to the individual guidelines to ensure consistency.

**Question 5: Does the Council wish to make any further changes to the aggravating and mitigating factors?**

*Sentence levels*

3.15 The research with sentencers carried out during the consultation period suggested that the manslaughter guidelines would result in an increase in sentence levels compared with 2014 sentencing practice. Sentence data from MoJ suggested that manslaughter sentences

had increased since 2014. Transcripts of sentencing remarks from 2016 were ordered so that the trends could be analysed across the different manslaughter offences.

3.16 The sentence levels for each of the guidelines are discussed in more detail below; no changes are proposed.

*Unlawful act*

<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>
<b>Starting Point</b> 18 years' custody <b>Category Range</b> 11 - 24 years' custody	<b>Starting Point</b> 12 years' custody <b>Category Range</b> 8 - 16 years' custody	<b>Starting Point</b> 6 years' custody <b>Category Range</b> 3 - 9 years' custody	<b>Starting Point</b> 2 years' custody <b>Category Range</b> 1 - 4 years' custody

3.17 The analysis of 2016 cases shows that the average custodial sentence length for unlawful act manslaughter was around two years higher than in 2014. This is in line with the increase in sentences observed in the research.

3.18 Using the latest version of the unlawful act guideline to categorise the 2016 cases suggests that all but a few cases were sentenced within the range of the applicable guideline category.

3.19 Research with judges showed that they were applying the guideline flexibly and took note of the text above the culpability factors and the sentence table. It is therefore likely that judges will exercise discretion in the application of the guideline. While this is in line with the Council's intention, it makes it difficult accurately to predict the effect of the guideline on sentence levels.

*Gross negligence*

<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>
<b>Starting Point</b> 12 years' custody <b>Category Range</b> 10 - 18 years' custody	<b>Starting Point</b> 8 years' custody <b>Category Range</b> 6 - 12 years' custody	<b>Starting Point</b> 4 years' custody <b>Category Range</b> 3 - 7 years' custody	<b>Starting Point</b> 2 years' custody <b>Category Range</b> 1 - 4 years' custody

3.20 There was no significant difference in sentencing levels for gross negligence manslaughter between 2014 and 2016 with an average sentence of around five years. This is a low volume offence with only 12 cases in the 2016 sample, so trends are more difficult to

detect. The result of research with sentencers clearly shows that health and safety type offences (of which there were six in 2016) would receive significantly higher sentences under the guideline. This was anticipated by the Council and, in general, seems to be welcomed by judges. Sentences for other types of case in the 2016 sample would be likely to be similar using the guideline. As discussed above, recent changes to the guideline should avoid sentence inflation in medical negligence cases.

*Loss of Control*

<b>A</b>	<b>B</b>	<b>C</b>
<b>Starting Point</b> 14 years' custody	<b>Starting Point</b> 8 years' custody	<b>Starting Point</b> 5 years' custody
<b>Category Range</b> 10 - 20 years' custody	<b>Category Range</b> 5 – 12 years' custody	<b>Category Range</b> 3 - 6 years' custody

3.21 Loss of control cases are also low in volume and from an analysis of the transcripts it seems likely that sentences imposed using the guideline would not be higher on average than those imposed in 2016. However, evidence from research with judges shows that where a case is placed in high culpability, sentences are increased. This echoes the concern from some consultees that the 14 year starting point of culpability A, which compares to 12 years under the old provocation guideline would lead to higher sentences. The Council considered that 14 years was the appropriate starting point for a high culpability case of manslaughter by reason of loss of control. It is submitted that a lower starting point for a case that falls only just short of murder would seem disproportionate when compared with unlawful act or diminished responsibility sentence levels.

*Diminished responsibility*

<b>High</b>	<b>Medium</b>	<b>Lower</b>
<b>Starting Point</b> 24 years' custody	<b>Starting Point</b> 15 years' custody	<b>Starting Point</b> 7 years' custody
<b>Category Range</b> 15 - 40 years' custody	<b>Category Range</b> 10 - 25 years' custody	<b>Category Range</b> 3 - 12 years' custody

3.22 There were 22 diminished responsibility cases in the 2016 transcripts. Only four received determinate sentences ranging from 7 to 19 years, four received life sentences with notional determinate terms ranging from 30 to 45 years, six were sentenced to life with a s45A order with notional determinate terms ranging from 15 to 30 years and the remaining eight were made subject to s37 hospital orders with a s41 restriction.

3.23 Given the very high level of discretion afforded by the diminished responsibility guideline and the high proportion of these cases that receive mental health disposals it is not possible accurately to estimate the impact of the guideline (if any) on sentence levels.

**Question 6: Does the Council agree to retain the sentence levels in the draft guidelines?**

#### **4 IMPACT AND RISKS**

4.1 As can be seen from the discussion above, with the exception of some gross negligence manslaughter cases and loss of control cases, the guidelines are not expected to cause an increase in sentence lengths. However, because of the discretion and flexibility built into the guidelines, the current upward trend in sentencing for manslaughter cases may continue once the guideline is in force. Some of this may be due to the case mix (for example joint enterprise cases that were previously sentenced as murder now being sentenced as manslaughter or a possible increase in the use of knives), but much of it may be due a more general trend towards more punitive sentencing especially in cases involving death.

4.2 Sentencing data for 2017 will be published on 17 May 2018 and an oral update on the trends in manslaughter sentences will be provided at the Council meeting.

4.3 The resource assessment will reflect the anticipated increases resulting from the guideline and will also make clear that other factors may continue to exert an upward influence on sentence levels after the implementation of the guideline.

4.4 The final resource assessment will be circulated to Council members before publication in August.

**Question 7: Does the Council agree that the resource assessment should reflect the fact that sentence levels may continue to increase after the implementation of the guideline?**



# **UNLAWFUL ACT MANSLAUGHTER**

**Common law**

**Triable only on indictment  
Maximum: Life imprisonment**

**Offence range: 1 – 24 years' custody**

**This is a serious specified offence for the purposes of sections 224 and 225(2) (life sentences for serious offences) of the Criminal Justice Act 2003.**

**This is an offence listed in Part 1 of Schedule 15B for the purposes of section 224A (life sentence for a second listed offence) and section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.**

**The type of manslaughter (and thereby the appropriate guideline) should have been identified prior to sentence. If there is any dispute or uncertainty about the type of manslaughter that applies the judge should give clear reasons for the basis of sentence.**

**STEP ONE**

**Determining the offence category**

**CULPABILITY**

- The characteristics set out below are indications of the level of culpability that may attach to the offender’s conduct; the court should balance these characteristics to reach a fair assessment of the offender’s overall culpability in the context of the circumstances of the offence.
- The court should avoid an overly mechanistic application of these factors.

<p><b>A-</b> Very High Culpability</p>	<p>Very high culpability <b>may</b> be indicated by:</p> <ul style="list-style-type: none"> <li>• the extreme character of one or more culpability B factors and /or</li> <li>• a combination of culpability B factors</li> </ul>
<p><b>B-</b> Factors indicating high culpability</p>	<p>Death was caused in the course of an unlawful act which involved an intention <u>of the offender</u> to cause harm falling just short of GBH</p> <hr/> <p>Death was caused in the course of an unlawful act which carried a high risk of death or GBH which was or ought to have been obvious to the offender</p> <hr/> <p>Death was caused in the course of committing or escaping from a serious offence in which the offender played more than a minor role</p> <hr/> <p>Concealment, destruction, defilement or dismemberment of the body (where not separately charged).</p>
<p><b>C-</b> Factors indicating medium culpability</p>	<p>Cases falling between high and lower <b>including but not limited to</b></p> <ul style="list-style-type: none"> <li>• where death was caused in the course of an unlawful act which involved an intention <u>of the offender</u> to cause harm (or recklessness as to whether harm would be caused) that falls between high and lower culpability</li> <li>• where death was caused in the course of committing or escaping from a less serious offence but in which the offender played more than a minor role</li> </ul>
<p><b>D-</b> Factors indicating lower culpability</p>	<p>Death was caused in the course of an unlawful act</p> <ul style="list-style-type: none"> <li>• which was in defence of self or other(s) (where not amounting to a defence) OR</li> <li>• where there was no intention <u>of the offender</u> to cause any harm <b>and</b> no obvious risk of anything more than minor harm OR</li> <li>• in which the offender played a minor role</li> </ul> <hr/> <p>The offender’s responsibility was substantially reduced by mental disorder, learning disability or lack of maturity</p>

**HARM**

For all cases of manslaughter the harm caused will inevitably be of the utmost seriousness. The loss of life is taken into account in the sentencing levels at step two

**STEP TWO****Starting point and category range**

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

- **Where a case does not fall squarely within a category, adjustment from the starting point may be required before adjustment for aggravating or mitigating features.**

<b>Culpability</b>			
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>
<b>Starting Point</b> 18 years' custody	<b>Starting Point</b> 12 years' custody	<b>Starting Point</b> 6 years' custody	<b>Starting Point</b> 2 years' custody
<b>Category Range</b> 11 - 24 years' custody	<b>Category Range</b> 8 - 16 years' custody	<b>Category Range</b> 3 - 9 years' custody	<b>Category Range</b> 1 - 4 years' custody

Note: The table is for a single offence of manslaughter resulting in a single fatality. Where another offence or offences arise out of the same incident or facts concurrent sentences **reflecting the overall criminality** of offending will ordinarily be appropriate: please refer to the *Offences Taken into Consideration and Totality* guideline and step six of this guideline.

Below is a **non-exhaustive** list of additional elements providing the context of the offence and factors relating to the offender. Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.

**Care should be taken to avoid double counting factors already taken into account in assessing culpability**

**Factors increasing seriousness**

*Statutory aggravating factors:*

1. Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction  
(See step five for a consideration of dangerousness)
2. Offence committed whilst on bail
3. Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity

*Other aggravating factors:*

1. History of violence or abuse towards victim by offender
2. Involvement of others through coercion, intimidation or exploitation
3. Significant mental or physical suffering caused to the deceased
4. Victim particularly vulnerable due to age or disability
5. Victim was providing a public service or performing a public duty at the time of the offence
6. Commission of offence whilst under the influence of alcohol or drugs
7. Persistence of violence
8. Offence involved use of a weapon
9. Other(s) put at risk of harm by the offending
10. Leading role in group or gang
11. Death occurred in the context of an offence which was planned or premeditated.
12. Offence committed in the presence of children
13. Actions after the event (including but not limited to attempts to cover up/ conceal evidence)
14. Blame wrongly placed on other(s)
15. Abuse of a position of trust
16. Offence committed on licence or post sentence supervision or while subject to court order(s)

**Factors reducing seriousness or reflecting personal mitigation**

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. Attempts to assist the victim
4. History of significant violence or abuse towards the offender by the victim
5. Lack of premeditation
6. Good character and/or exemplary conduct
7. Serious medical conditions requiring urgent, intensive or long-term treatment
8. Mental disorder or learning disability
9. Age and/or lack of maturity
10. Sole or primary carer for dependent relatives

**STEP THREE**

**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR**

**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

**STEP FIVE**

**Dangerousness**

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 224A or section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

**STEP SIX**

**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Offences Taken into Consideration and Totality guideline.

**STEP SEVEN**

**Compensation and ancillary orders**

In all cases the court should consider whether to make compensation and/or other ancillary orders.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

**STEP EIGHT**

**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP NINE**

**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

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# **GROSS NEGLIGENCE MANSLAUGHTER**

**Common law**

**Triable only on indictment  
Maximum: Life imprisonment**

**Offence range: 1 – 18 years' custody**

**This is a serious specified offence for the purposes of sections 224 and 225(2) (life sentences for serious offences) of the Criminal Justice Act 2003.**

**This is an offence listed in Part 1 of Schedule 15B for the purposes of section 224A (life sentence for a second listed offence) and section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.**

**The type of manslaughter (and thereby the appropriate guideline) should have been identified prior to sentence. If there is any dispute or uncertainty about the type of manslaughter that applies the judge should give clear reasons for the basis of sentence.**

**STEP ONE**  
**Determining the offence category**

<b>CULPABILITY</b>	
<ul style="list-style-type: none"> <li>The characteristics set out below are indications of the level of culpability that may attach to the offender’s conduct; the court should balance these characteristics to reach a fair assessment of the offender’s overall culpability in the context of the circumstances of the offence.</li> <li>The court should avoid an overly mechanistic application of these factors particularly in cases to which they do not readily apply.</li> </ul>	
<b>A-</b> Very High Culpability	Very high culpability <b>may</b> be indicated by: <ul style="list-style-type: none"> <li>the extreme character of one or more culpability B factors and /or</li> <li>a combination of culpability B factors</li> </ul>
<b>B-</b> Factors indicating high culpability	The offender continued or repeated the negligent conduct in the face of the obvious suffering caused to the deceased by that conduct <hr/> The negligent conduct was in the context of other serious criminality <hr/> The offence was particularly serious because the offender showed a blatant disregard for a very high risk of death resulting from the negligent conduct <hr/> The negligent conduct was motivated by financial gain (or avoidance of cost) <hr/> The offender was in a leading role if acting with others in the offending <hr/> Concealment, destruction, defilement or dismemberment of the body (where not separately charged)
<b>C-</b> Factors indicating medium culpability	Cases falling between high and lower because <ul style="list-style-type: none"> <li>factors are present in high and lower which balance each other out <b>and/or</b></li> <li>the offender’s culpability falls between the factors as described in high and lower</li> </ul>
<b>D-</b> Factors indicating lower culpability	The negligent conduct was a lapse in the offender’s otherwise satisfactory standard of care <hr/> The offender was in a lesser or subordinate role if acting with others <u>in the offending</u> <hr/> The offender’s responsibility was substantially reduced by mental disorder, learning disability or lack of maturity

**HARM**

For all cases of manslaughter the harm caused will inevitably be of the utmost seriousness. The loss of life is taken into account in the sentencing levels at step two



**STEP TWO****Starting point and category range**

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

- **Where a case does not fall squarely within a category, adjustment from the starting point may be required before adjustment for aggravating or mitigating features.**

<b>Culpability</b>			
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>
<b>Starting Point</b> 12 years' custody	<b>Starting Point</b> 8 years' custody	<b>Starting Point</b> 4 years' custody	<b>Starting Point</b> 2 years' custody
<b>Category Range</b> 10 - 18 years' custody	<b>Category Range</b> 6 - 12 years' custody	<b>Category Range</b> 3 - 7 years' custody	<b>Category Range</b> 1 - 4 years' custody

**Where the offender's acts or omissions would also constitute another offence, the sentencer should have regard to any guideline relevant to the other offence to ensure that the sentence for manslaughter does not fall below what would be imposed under that guideline.**

Note: The table is for a single offence of manslaughter resulting in a single fatality. Where another offence or offences arise out of the same incident or facts concurrent sentences **reflecting the overall criminality** of offending will ordinarily be appropriate: please refer to the *Offences Taken into Consideration and Totality* guideline and step six of this guideline.

Below is a **non-exhaustive** list of additional elements providing the context of the offence and factors relating to the offender. Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.

**Care should be taken to avoid double counting factors already taken into account in assessing culpability**

**Factors increasing seriousness***Statutory aggravating factors*

1. Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction  
(See step five for a consideration of dangerousness)
2. Offence committed whilst on bail
3. Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity

*Other aggravating factors:*

1. History of violence or abuse towards victim by offender
2. Involvement of others through coercion, intimidation or exploitation
3. Significant mental or physical suffering caused to the deceased
4. Offender ignored previous warnings
5. Commission of offence whilst under the influence of alcohol or drugs
6. Offence involved use of a weapon
7. Other(s) put at risk of harm by the offending
- ~~Death occurred in the context of dishonesty or the pursuit of financial gain~~
8. Actions after the event (including but not limited to attempts cover up/ conceal evidence)
9. Investigation has been hindered and/or other(s) have suffered as a result of being falsely blamed by the offender
10. The duty of care arose from a close personal or familial relationship where the deceased was dependent on the offender
11. Offence committed on licence or post sentence supervision or while subject to court order(s)

**Factors reducing seriousness or reflecting personal mitigation**

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. Attempts to assist the victim
4. Self-reporting and/or co-operation with the investigation
- ~~The duty of care was a temporary one created by the particular circumstances~~
5. For reasons outside the offender's control, the offender lacked the necessary expertise, equipment, support or training which contributed to the negligent conduct
6. For reasons outside the offender's control, the offender was subject to stress or pressure (including from competing or complex demands) which related to and contributed to the negligent conduct
7. For reasons outside the offender's control the negligent conduct occurred in circumstances where there was reduced scope for exercising usual care and competence
8. The negligent conduct was compounded by the actions or omissions of others outside of the offender's control.
9. Good character and/or exemplary conduct
10. Serious medical conditions requiring urgent, intensive or long-term treatment
11. Mental disorder or learning disability
12. Age and/or lack of maturity
13. Sole or primary carer for dependent relatives

**STEP THREE**

**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR**

**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

**STEP FIVE**

**Dangerousness**

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 224A or section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

**STEP SIX**

**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Offences Taken into Consideration and Totality guideline.

**STEP SEVEN**

**Compensation and ancillary orders**

In all cases the court should consider whether to make compensation and/or other ancillary orders.

In appropriate cases an offender may be disqualified from being a director of a company in accordance with section 2 of the Company Directors Disqualification Act 1986. The maximum period of disqualification is 15 years.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

**STEP EIGHT**

**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP NINE**

**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

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# **MANSLAUGHTER BY REASON OF LOSS OF CONTROL**

**Common law and Coroners and Justice Act 2009 (sections 54 and 55)**

**Triable only on indictment  
Maximum: Life imprisonment**

**Offence range: 3 – 20 years' custody**

**This is a serious specified offence for the purposes of sections 224 and 225(2) (life sentences for serious offences) of the Criminal Justice Act 2003.**

**This is an offence listed in Part 1 of Schedule 15B for the purposes of section 224A (life sentence for a second listed offence) and section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.**

**The type of manslaughter (and thereby the appropriate guideline) should have been identified prior to sentence. If there is any dispute or uncertainty about the type of manslaughter that applies the judge should give clear reasons for the basis of sentence.**

## STEP ONE - Determining the offence category

**CULPABILITY** demonstrated by one or more of the following:

- **The characteristics set out below are indications of the level of culpability that may attach to the offender's conduct; the court should balance these characteristics to reach a fair assessment of the offender's overall culpability in the context of the circumstances of the offence.**
- **The court should avoid an overly mechanistic application of these factors.**

### **A - High Culpability**

- Planning of criminal activity (including the carrying of a weapon) **before** the loss of control
- Offence committed in the context of other serious criminal activity
- Use of a firearm (whether or not taken to the scene)
- Loss of self-control in circumstances which only just met the criteria for a qualifying trigger
- Concealment, destruction, defilement or dismemberment of the body (where not separately charged)

### **B - Medium Culpability:**

Cases falling between high and lower because:

- factors are present in high and lower which balance each other out **and/or**
- The offender's culpability falls between the factors as described in high and lower

### **C - Lower Culpability**

- Qualifying trigger represented a very high degree of provocation

### **HARM**

For all cases of manslaughter the harm caused will inevitably be of the utmost seriousness. The loss of life is taken into account in the sentencing levels at step two

## STEP TWO: Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

- **Where a case does not fall squarely within a category, adjustment from the starting point may be required before adjustment for aggravating or mitigating features.**

Culpability		
A	B	C
<p><b>Starting Point</b> 14 years' custody</p> <p><b>Category Range</b> 10 - 20 years' custody</p>	<p><b>Starting Point</b> 8 years' custody</p> <p><b>Category Range</b> 5 – 12 years' custody</p>	<p><b>Starting Point</b> 5 years' custody</p> <p><b>Category Range</b> 3 - 6 years' custody</p>

Note: The table is for a single offence of manslaughter resulting in a single fatality. Where another offence or offences arise out of the same incident or facts concurrent sentences **reflecting the overall criminality** of offending will ordinarily be appropriate: please refer to the *Offences Taken into Consideration and Totality* guideline and step six of this guideline.

Below is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.

**Care should be taken to avoid double counting factors already taken into account in assessing culpability or in the finding of a qualifying trigger**

### Aggravating factors

#### *Statutory aggravating factors*

1. Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction  
(See step five for a consideration of dangerousness)
2. Offence committed whilst on bail
3. Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity

#### *Other aggravating factors:*

1. History of violence or abuse towards victim by offender
2. Involvement of other(s) through coercion, intimidation or exploitation
3. Significant mental or physical suffering caused to the deceased

4. Victim was providing a public service or performing a public duty at the time of the offence
5. Commission of offence whilst under the influence of alcohol or drugs
6. Persistence of violence
7. Offence involved use of a weapon
8. Other(s) put at risk of harm by the offending
9. Actions after the event (including but not limited to attempts to cover up/ conceal evidence)
10. Offence committed on licence or post sentence supervision or while subject to court order(s)

**Factors reducing seriousness or reflecting personal mitigation**

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. Intention to cause serious bodily harm rather than to kill
4. History of significant violence or abuse towards the offender by the victim
5. Violence initiated by the victim
6. Good character and/or exemplary conduct
7. Serious medical conditions requiring urgent, intensive or long-term treatment
8. Mental disorder or learning disability
9. Age and/or lack of maturity
10. Sole or primary carer for dependent relatives

**STEP THREE**

**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR**

**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

**STEP FIVE**

**Dangerousness**

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 224A or section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.



**STEP SIX**

**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Offences Taken into Consideration and Totality guideline.

**STEP SEVEN**

**Compensation and ancillary orders**

In all cases the court should consider whether to make compensation and/or other ancillary orders.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

**STEP EIGHT**

**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP NINE**

**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

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# **MANSLAUGHTER BY REASON OF DIMINISHED RESPONSIBILITY**

**Common law and Homicide Act 1957 (section 2)**

**Triable only on indictment  
Maximum: Life imprisonment**

**Offence range: 3 – 40 years' custody**

**This is a serious specified offence for the purposes of sections 224 and 225(2) (life sentences for serious offences) of the Criminal Justice Act 2003.**

**This is an offence listed in Part 1 of Schedule 15B for the purposes of section 224A (life sentence for a second listed offence) and section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.**

**The type of manslaughter (and thereby the appropriate guideline) should have been identified prior to sentence. If there is any dispute or uncertainty about the type of manslaughter that applies the judge should give clear reasons for the basis of sentence.**

## STEP ONE

### Assessing the degree of responsibility retained: high, medium or lower

- A conviction for manslaughter by reason of diminished responsibility necessarily means that the offender's ability to understand the nature of the conduct, form a rational judgment and/or exercise self-control was substantially impaired.
- The court should reach a determination as to the level of responsibility the offender **retained**:
  - High;
  - Medium; or
  - Lower
- The court should consider the extent to which the offender's responsibility was diminished by the mental disorder **at the time of the offence** with reference to the medical evidence and all the relevant information available to the court.
- The degree to which the offender's actions or omissions contributed to the seriousness of the mental disorder at the time of the offence may be a relevant consideration. For example:
  - where an offender exacerbates the mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to seek or follow medical advice this may increase responsibility. In considering the extent to which the offender's behaviour was voluntary, the extent to which a mental disorder has an impact on the offender's ability to exercise self-control or to engage with medical services will be relevant.
- The degree to which the mental disorder was undiagnosed and/or untreated may be a relevant consideration. For example:
  - where an offender has sought help but not received appropriate treatment this may reduce responsibility.

### **HARM**

For all cases of manslaughter the harm caused will inevitably be of the utmost seriousness. The loss of life is taken into account in the sentencing levels at step two

**STEP TWO****Starting point and category range**

Having determined the level of responsibility retained at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.		
Level of responsibility retained		
High	Medium	Lower
<b>Starting Point</b> 24 years' custody <b>Category Range</b> 15 - 40 years' custody	<b>Starting Point</b> 15 years' custody <b>Category Range</b> 10 - 25 years' custody	<b>Starting Point</b> 7 years' custody <b>Category Range</b> 3 - 12 years' custody

Note: The table is for a single offence of manslaughter resulting in a single fatality. Where another offence or offences arise out of the same incident or facts concurrent sentences **reflecting the overall criminality** of offending will ordinarily be appropriate: please refer to the *Offences Taken into Consideration and Totality* guideline and step eight of this guideline.

Below is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.

**Care should be taken to avoid double counting factors already taken into account in assessing the level of responsibility retained**

**Aggravating factors***Statutory aggravating factors*

1. Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction  
(See step three for a consideration of dangerousness)
2. Offence committed whilst on bail
3. Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity

*Other aggravating factors:*

1. History of violence or abuse towards victim by offender
2. Involvement of other(s) through coercion, intimidation or exploitation
3. Significant mental or physical suffering caused to the deceased

4. Victim particularly vulnerable due to age or disability
5. Victim was providing a public service or performing a public duty at the time of the offence
6. Commission of offence whilst under the influence of alcohol or drugs (the extent to which a mental disorder has an effect on offender's ability to make informed judgments or exercise self-control will be a relevant consideration in deciding how much weight to attach to this factor).
7. A significant degree of planning or premeditation
8. Offence involved use of a weapon
9. Other(s) put at risk of harm by the offending
10. Actions after the event (including but not limited to attempts to cover up/ conceal evidence)
11. Concealment, destruction, defilement or dismemberment of the body.
12. Blame wrongly placed on other(s)
13. Offence committed on licence or post sentence supervision or while subject to court order(s)

#### **Factors reducing seriousness or reflecting personal mitigation**

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. Intention to cause serious bodily harm rather than to kill
4. History of significant violence or abuse towards the offender by the victim
5. Lack of premeditation
6. The offender acted in self-defence or in fear of violence (where not amounting to a defence)
7. The offender made genuine and sustained attempts to seek help for the mental disorder
8. Belief by the offender that the killing was an act of mercy
9. Good character and/or exemplary conduct
10. Serious medical conditions requiring urgent, intensive or long-term treatment
11. Age and/or lack of maturity
12. Sole or primary carer for dependent relatives

### **STEP THREE**

#### **Consideration of dangerousness**

- The court should then go on to consider whether having regard to the criteria contained in Chapter 5 of part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a **life sentence** (section 224A or section 225) or an **extended sentence** (section 226A).
- When sentencing to a life sentence the notional determinate term (identified at step two above) should be used as the basis for setting the minimum term.

## STEP FOUR

### Consideration of mental health disposals

Where:

- (i) the evidence of medical practitioners suggests that the offender is currently suffering from a mental disorder,
- (ii) treatment is available, and
- (iii) the court considers that a hospital order (with or without a restriction) may be an appropriate way of dealing with the case,

the court should consider **all sentencing options** including a section 45A direction and consider the importance of a penal element in the sentence taking into account the level of responsibility assessed at step one.

#### Section 45A hospital and limitation direction

- a. Before a hospital order is made under s.37 MHA (with or without a restriction order under s.41), consider whether the mental disorder can appropriately be dealt with by custody with a hospital and limitation direction under s.45A MHA. In deciding whether a s.45A direction is appropriate the court should bear in mind that the limitation direction will cease to have effect at the end of a determinate sentence.
- b. If a penal element is appropriate and the mental disorder can appropriately be dealt with by a direction under s.45A MHA, then the judge should make such a direction. (Not available for a person under the age of 21 at the time of conviction).

#### Section 37 hospital order and s41 restriction order

- c. If a s.45A direction is not appropriate the court must then consider whether, (assuming the conditions in s.37(2) (a) are satisfied), the matters referred to in s. 37(2)(b) would make a hospital order (with or without a restriction order under s.41) the most suitable disposal. The court should explain why a penal element is not appropriate.

## STEP FIVE

### IN ALL CASES consider factors that may warrant an adjustment to the sentence

Cases of manslaughter by reason of diminished responsibility vary considerably on the facts of the offence and on the circumstances of the offender.

- The court should review whether the sentence as a whole meets the objectives of punishment, rehabilitation and protection of the public in a fair and proportionate way.
- Relevant factors will include the psychiatric evidence and the regime on release.
- An adjustment may require a departure from the sentence range identified at step two above.

**STEP SIX**

**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP SEVEN**

**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline. Note: the limitations on reductions for murder do not apply to manslaughter.

**STEP EIGHT**

**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Offences Taken into Consideration and Totality guideline.

**STEP NINE**

**Compensation and ancillary orders**

In all cases the court should consider whether to make compensation and/or other ancillary orders.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

**STEP TEN**

**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP ELEVEN**

**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.



## Aggravating factors

UA	GNM	LC	DR
1. History of violence or abuse towards victim by offender	1. History of violence or abuse towards victim by offender	1. History of violence or abuse towards victim by offender	1. History of violence or abuse towards victim by offender
2. Involvement of others through coercion, intimidation or exploitation	2. Involvement of others through coercion, intimidation or exploitation	2. Involvement of others through coercion, intimidation or exploitation	2. Involvement of others through coercion, intimidation or exploitation
3. Significant mental or physical suffering caused to the deceased	3. Significant mental or physical suffering caused to the deceased	3. Significant mental or physical suffering caused to the deceased	3. Significant mental or physical suffering caused to the deceased
4. Victim particularly vulnerable due to age or disability			4. Victim particularly vulnerable due to age or disability
	4. Offender ignored previous warnings		
5. Victim was providing a public service or performing a public duty at the time of the offence		4. Victim was providing a public service or performing a public duty at the time of the offence	5. Victim was providing a public service or performing a public duty at the time of the offence
6. Commission of offence whilst under the influence of alcohol or drugs	5. Commission of offence whilst under the influence of alcohol or drugs	5. Commission of offence whilst under the influence of alcohol or drugs	6. Commission of offence whilst under the influence of alcohol or drugs
7. Persistence of violence		6. Persistence of violence	
			7. A significant degree of planning or premeditation
8. Offence involved use of a weapon	6. Offence involved use of a weapon	7. Offence involved use of a weapon	8. Offence involved use of a weapon

9. Other(s) put at risk of harm by the offending	7. Other(s) put at risk of harm by the offending	8. Other(s) put at risk of harm by the offending	9. Other(s) put at risk of harm by the offending
10. Leading role in group or gang			
11. Death occurred in the context of an offence which was planned or premeditated			
12. Offence committed in the presence of children			
13. Actions after the event (including but not limited to attempts to cover up/ conceal evidence)	8. Actions after the event (including but not limited to attempts to cover up/ conceal evidence)	9. Actions after the event (including but not limited to attempts to cover up/ conceal evidence)	10. Actions after the event (including but not limited to attempts to cover up/ conceal evidence)
			11. Concealment, destruction, defilement or dismemberment of the body.
14. Blame wrongly placed on other(s)	9. Investigation has been hindered and/or other(s) have suffered as a result of being falsely blamed by the offender		12. Blame wrongly placed on other(s)
15. Abuse of a position of trust	10. The duty of care arose from a close personal or familial relationship where the deceased was dependent on the offender		

16. Offence committed on licence or post sentence supervision or while subject to court order(s)	11. Offence committed on licence or post sentence supervision or while subject to court order(s)	10. Offence committed on licence or post sentence supervision or while subject to court order(s)	13. Offence committed on licence or post sentence supervision or while subject to court order(s)
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## Mitigating factors

UA	GNM	LC	DR
1. No previous convictions <b>or</b> no relevant/recent convictions	1. No previous convictions <b>or</b> no relevant/recent convictions	1. No previous convictions <b>or</b> no relevant/recent convictions	1. No previous convictions <b>or</b> no relevant/recent convictions
2. Remorse	2. Remorse	2. Remorse	2. Remorse
3. Attempts to assist the victim	3. Attempts to assist the victim	3. Intention to cause serious bodily harm rather than to kill	3. Intention to cause serious bodily harm rather than to kill
4. History of significant violence or abuse towards the offender by the victim		4. History of significant violence or abuse towards the offender by the victim	4. History of significant violence or abuse towards the offender by the victim
5. Lack of premeditation			5. Lack of premeditation
		5. Violence initiated by the victim	6. The offender acted in self-defence or in fear of violence (where not amounting to a defence)
			7. The offender made genuine and sustained attempts to seek help for the mental disorder

			8. Belief by the offender that the killing was an act of mercy
	4. Self-reporting and/or co-operation with the investigation		
	5. For reasons outside the offender's control, the offender lacked the necessary expertise, equipment, support or training which contributed to the negligent conduct		
	6. For reasons outside the offender's control, the offender was subject to stress or pressure (including from competing or complex demands) which related to and contributed to the negligent conduct		
	7. For reasons outside the offender's control the negligent conduct occurred in circumstances where there was reduced scope for exercising usual care and competence		
	8. The negligent conduct was compounded by the actions or omissions of others		

	outside of the offender's control		
6. Good character and/or exemplary conduct	9. Good character and/or exemplary conduct	6. Good character and/or exemplary conduct	9. Good character and/or exemplary conduct
7. Serious medical conditions requiring urgent, intensive or long-term treatment	10. Serious medical conditions requiring urgent, intensive or long-term treatment	7. Serious medical conditions requiring urgent, intensive or long-term treatment	10. Serious medical conditions requiring urgent, intensive or long-term treatment
8. Mental disorder, learning disability	11. Mental disorder, learning disability	8. Mental disorder, learning disability	
9. Age and/or lack of maturity	12. Age and/or lack of maturity	9. Age and/or lack of maturity	11. Age and/or lack of maturity
10. Sole or primary carer for dependent relatives	13. Sole or primary carer for dependent relatives	10. Sole or primary carer for dependent relatives	12. Sole or primary carer for dependent relatives

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