

**Sentencing Council meeting:** 19 October 2018  
**Paper number:** SC(18)OCT04 – Arson & Criminal  
Damage  
**Lead Council member:** Rebecca Crane and Sarah Munro  
**Lead officials:** Mandy Banks  
0207 071 5785

## 1 ISSUE

1.1 This is the first meeting to consider the responses to the guideline following consultation earlier this year. The reaction to the draft guidelines was positive, in total 26 consultation responses were received. This is a smaller number than generally received, however this was not unexpected as the guidelines are uncontroversial and the public order consultation was also ongoing during some of the period. Responses were received from the main stakeholders that usually submit responses (The Law Society, Magistrates Association (MA), Prison Reform Trust (PRT) and so on). A list of the organisations that responded is attached at **Annex A**.

1.2 A consultation event on the guidelines was held with the Arson Prevention Forum, (which includes representatives from Police, Fire services, the Insurance Industry, Local Authorities, Charities etc), and the criminal damage (under £5000 guideline) was tested at events with magistrates. In addition the ‘aggravated’ criminal damage/arson with intent to endanger life or reckless as to whether life was endangered guideline was tested with 12 Crown Court Judges. Further details on the road testing can be found at **Annex B**.

1.3 This meeting will focus on the ‘simple’ arson and ‘aggravated’ criminal damage/arson guidelines. Subsequent meetings will consider the criminal damage both under and over £5000 offences, racially or religiously aggravated offence, threats to destroy/damage property, and sentence levels across all the offences. There are four meetings scheduled to discuss the guidelines, with sign off of the definitive guidelines at the April meeting.

## 2 RECOMMENDATION

That the Council:

- Considers the suggested amendments to the 'simple' arson offence
- Considers the suggested amendments to the 'aggravated' criminal damage/arson offence

## 3 CONSIDERATION

*Arson guideline- Annex C*

3.1 Generally, this draft guideline was received positively, with some suggestions made for amendments and clarification on the proposals. Starting with culpability, (page 2 of **Annex C**) the main comment from consultation respondents (CPS, MA, Law Society) was that the wording of factors between culpability A and B was too similar, (specifically the last 2 factors within each category), and that references to 'recklessness' should be removed from high culpability, category A and placed in category B. The Law Society stated that they believed '*...there is risk of sentence inflation and potentially, double counting and injustice, by elevating recklessness on a par with intent in assessing culpability...*' These respondents noted that the structure for culpability for the 'aggravated' arson/criminal damage offence, (**Annex D**) separated out intent into culpability A, and recklessness into culpability B, and asked whether there could be more consistency between the two guidelines.

3.2 However, as the Council may recall from the discussions in developing the draft guidelines, the reason why this structure was used for the aggravated offence, was because although one offence, cases involving intent are treated more seriously than those involving recklessness, and are sentenced accordingly. This structure allowed for those differences to be clearly reflected within one guideline. For simple arson, less distinction is drawn between recklessness and intent. The word 'recklessness' was added to the last factor in high culpability late in the development of the simple arson guideline, and on reconsideration, and given the comments by the Law Society, perhaps it should be removed from high culpability. The rest of the high culpability factors are those that make the offending more serious, so high degree of planning, acting in revenge, use of accelerant, and the risk of injury posed by an offender's actions, which generally all indicate intent by an offender. The relevant parts of legislation are attached at **Annex E** for reference.

3.3 It is recommended that some changes to culpability B are made to address the issue raised that the factors are too similar between A and B. During the development of the guideline the last two factors in category B '*intention to cause significant damage to property*' and '*recklessness or intention to create a significant risk of injury to persons*' were developed to try and provide more guidance to sentencers as to what kind of cases might fall into medium culpability (this is something sentencers often ask for- more factors within medium culpability). However, it seems that trying to provide additional guidance in this case has not been helpful, people commented that '*very serious damage to property*', and '*a high risk of injury*' in category A are too similar to '*significant damage to property*' and a '*significant risk of injury*' in category B, and that court time would be wasted in arguing the difference between the two.

3.4 As can be seen in track changes on page 2 of Annex C, these specific factors in culpability B have been struck through, and replaced with '*cases that fall between categories A and C because: factors are present in A and C which balance each other out and/or the offender's culpability falls between the factors described in A and C*'. It is suggested that this is the best way of assisting courts with assessing culpability, rather than trying to create specific factors which are not actually that helpful and could lead to debate about their meaning in the courts.

***Question 1: Does the Council agree to remove 'recklessness' from culpability A? And agree with the suggestions regarding the rewording of the factors in culpability B?***

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

3.6 It was also queried whether, given the aggravating factor of '*commission of offence whilst under the influence of alcohol or drugs*' and the fact that a high number

of people with mental disorders have drug/alcohol problems, that would be double counting, and these offenders would be doubly penalised. The Justice Committee noted that the wording was not the same as used in the definitive manslaughter guideline, and suggested that the wording here should reflect that of the manslaughter guideline. Out of four offences in the manslaughter guideline, qualifying wording for the mental disorder factor, as shown below, is only used in the diminished responsibility guideline:

*‘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.’*

3.7 It is recommended that the qualifying wording is removed from this guideline, and from all the offences within the guideline, leaving the culpability factor unqualified. This lesser culpability factor is used routinely across most other guidelines, without any form of qualifying wording, and it is suggested that it is unnecessary here. In due course the O/P mental health guideline will be published, which will be cross referred to in all offence guidelines, and will offer more guidance to courts on assessing culpability in these circumstances.

***Question 2: Does the Council agree to remove the qualifying wording from this factor in lesser culpability, and across all the offences in the guideline?***

3.8 In all the offences apart from criminal damage there was wording under the sentence table suggesting to sentencers that they consider asking for psychiatric reports, to assist in sentencing (this can be seen on page 4, struck through). This inclusion of this wording met with general approval by respondents, except for the PRT, who questioned the positioning of the text. They argue that sentencers need to be fully informed of any mental health disorder/learning disability whilst considering culpability at step 1, yet the wording appears at step 2, and is focused on sentencing disposals, so any wording should appear at step 1, right at the very start of the guideline. They recommend a tiered approach, so that a report is requested from L&D services, followed by a medical practitioner, and finally, if required and appropriate, a psychiatric report. New wording to reflect this suggestion has been developed, and can be seen above culpability at step 1 and reads:

*‘Courts should consider requesting a report from liaison and development services, or from a medical practitioner, or in appropriate cases, ordering a psychiatric report in*

order to both ascertain whether the offence is linked to an underlying mental disorder or learning disability (and so assist in the assessment of culpability) and whether any mental health disposal should be considered’.

**Question 3: Does the Council agree with the revised wording and placement of the text regarding requests for reports? If so, does the Council agree that this text should be used within the simple and aggravated arson, and threats to destroy guidelines?**

3.9 Respondents were supportive of the proposed structure for harm, and the harm factors. The only suggested amendment was from Historic England, who wanted a specific reference inserted into the second bullet point in category 1 harm of ‘cultural’ as they felt this would better capture heritage assets. This bullet point would then read ‘*serious consequential economic, cultural or social impact of offence*’. They also suggest that the same amendment should be made in harm the aggravated arson offence.

**Question 4: Does the Council agree with the suggestion regarding the factor in category 1 harm for both offences?**

3.10 The CBA suggest that given the proportion of offenders with mental health issues within these offences, there should be a reference inserted above the sentence table that prompts consideration of a community order with mental health treatment requirements as an alternative to a short or moderate custodial sentence. They pointed to the sexual offences guideline which has similar wording relating to community orders with a sex offender treatment programme as an alternative to a short/moderate sentence, in a number of serious offences, sexual assault for example. New wording to reflect this suggestion has been drafted, and is shown in the box below, and can be seen on page 3 of the Annex. As drugs and alcohol are also very common features within this type of offending, and offenders with mental health problems frequently also have drug/alcohol problems, a reference to community orders with drug rehabilitation or alcohol treatment requirements has also been added to this wording.

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

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

**Question 5: Does the Council agree to include the new wording regarding community orders with treatment requirements as alternatives to short/moderate sentences? If so, does the Council agree that this text should also be used within all the offences within this guideline?**

3.11 Very few comments were received regarding the proposed aggravating and mitigating factors. Two new aggravating factors were suggested, the Law Society and the National Fire Chief's Council suggested '*offence committed for financial gain*', (A5) to destroy commercial rivals, or for the insurance, for example, and '*offence committed to conceal other offences*', (A6) such as burglary. The Law Society and the CBA also suggested a new mitigating factor, '*Offender lit fire accidentally and/or tried to minimise its effect*' (M2). These suggestions can be seen on pages 4 and 5 of **Annex C**. As noted earlier in the paper, sentence levels across all offences will be reviewed at a later meeting.

**Question 6: Does the Council agree with the proposed aggravating and mitigating factors?**

*Criminal damage/arson with intent to endanger life or reckless as to whether life endangered - Annex D*

3.12 As noted in para 3.2, for this offence, culpability was separated into two fixed categories, culpability A for cases involving intent, and culpability B for recklessness cases, to reflect the fact that intent cases are treated more seriously by the courts and generally attract longer sentences. Other factors that might make the offence more serious, such as use of an accelerant, or less serious, such as a mental disorder, appear as aggravating or mitigating factors at step 2. Respondents were overwhelmingly supportive of this approach to culpability, so it is proposed that there are no changes to culpability.

**Question 7: Does the Council agree to retain the structure in culpability?**

3.13 As culpability is fixed for this offence, and there is quite a variation in types of harm for this offence, the proposed harm factors are quite expansive, with a number of medium harm category factors to try to assist courts assess harm effectively. As well as considering the *actual* harm caused, within harm for this offence there is also a factor to try and capture the risk posed by the offending (the second bullet point in each of the harm categories). This approach to harm was generally supported by respondents, except the CPS who questioned the use of both 'high' and 'very high'

within category 1, and 'significant' in category 2. They said these factors were too similar, would lead to uncertainty and make it difficult for courts to decide whether harm should fall into category 1 or 2. They proposed instead using the harm factors from 'simple' arson (page 3 **Annex C**) which just has category 2 as '*harm that falls between categories 1 and 3*'. The LCCSA also made similar comments.

3.14 As noted in the discussion around culpability factors in para 3.3, where possible, factors are included in medium levels of harm and culpability in response to requests by sentencers, who say that deciding what falls into the medium level can be difficult without specific factors. Sometimes however, the consequence of trying to do this can, as seen in the earlier culpability discussion, lead to confusion, with factors being too similar to one another. But for this offence, with its fixed culpability structure and variation in harm, there is a strong argument in retaining the specific medium harm factors, particularly as the majority of respondents didn't raise any objections to the proposals.

**Question 8: Does the Council agree to retain the structure and factors in harm?**

3.15 Several Judges during road testing mentioned the risk of double counting, stating that some of the aggravating factors, e.g multiple people endangered, may have already been considered when determining the harm category. They suggested putting a note in to remind sentencers not to double count. This has been done in other guidelines where considered necessary, so if the Council think it necessary in this text could be inserted to state: '*care should be taken to avoid double counting factors already taken into account in assessing the level of harm at step one*'. This can be seen on page 4 before the aggravating factors.

3.16 A suggestion was made during road testing of an additional mitigating factor: '*lack of premeditation*' (M3). It is recommended that this is included, as it was an oversight not to have included such a factor originally- as a counter balance to '*significant degree of planning or premeditation*' (A6) as an aggravating factor.

**Question 9: Does the Council feel it is necessary to warn against double counting? Does the Council wish to add the additional mitigating factor?**

3.17 For this offence, because of the particular structure of culpability, the factor '*offender's responsibility substantially reduced by mental disorder or learning disability*' appears as a mitigating factor (M2), in the arson guideline it appears as a lesser culpability factor. The LCCSA in particular noted this different placement between the 2 guidelines, and argue that this is unfair- that the same factor will carry less weight at step 2 within this guideline. This is a valid point, and so a way of

attaching more weight to it as mitigation (without moving it to culpability and altering the structure of culpability), would be to add some additional wording to so that it reads '*offender's responsibility substantially reduced by mental disorder or learning disability (if this factor provides strong mitigation it may be appropriate to go down a category)*'. The standard wording above the aggravating/mitigating factors states: '*identify whether any combination of these, or other relevant factors should result in an upward or downward adjustment from the starting point*'. So this wording doesn't preclude moving out of a category, but it also doesn't expressly say that you can.

***Question 10: Does the Council agree to the additional wording for this factor?***

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

4.1 A final resource impact assessment will be prepared and circulated amongst the Council for comment in due course.

***Question 11: Is the Council content that the risks have been adequately considered at this stage?***



**Arson and Criminal Damage consultation responses      Annex A**

1. CPS
2. Sophie (Member of the Public)
3. The Association of Youth Offending Team Managers
4. Criminal Bar Association
5. Merseyside Fire and Rescue Service
6. SEL Magistrates Bench
7. CLSA
8. Prison Reform Trust
9. The Magistrates Association
10. LCCSA
11. The Council of Circuit Judges
12. The National Fire Chief Council
13. Historic England
14. London Fire Brigade
15. The Heritage Alliance
16. Ben Payne
17. Ben Damazer
18. Ian Allott
19. Leics & Rutland Mags Bench
20. Julia Hurrell
21. Deborah Backhaus
22. South Derbys Mags bench
23. Council of District Judges
24. Professor Mark Walters
25. The Law Society
26. Justice Committee

Blank page

## **Annex B**

### **Criminal Damage/Arson with Intent to Endanger Life or Reckless as to Whether Life Endangered: Road testing with Crown Court judges**

#### **Introduction**

Twelve interviews were conducted with Crown Court judges to test the *Criminal Damage/Arson with Intent to Endanger Life or Reckless as to Whether Life Endangered* draft guideline. These interviews were conducted either by telephone or face to face with judges across England and Wales. Each judge considered two scenarios (as summarised below)<sup>1</sup>, sentencing the scenarios as if they were in court today (without the draft guideline) and then sentencing using the draft guideline. The research has provided valuable information on how the guideline might work in practice to support development of the Arson and Criminal Damage Guideline. However, there are limitations to the work<sup>2</sup>, and as a result the research findings presented below should be regarded as **indicative** only and not conclusive.

<b>Scenario</b>	<b>Summary of scenario</b>
1 – arson with intent	P took off her jumper, set light to it, and pushed it through the letter box. She and the friend, who had left the scene and then returned, both then walked away. Children were in the house, P was aware of this.
1A – arson with intent	P was caught on CCTV setting alight rubbish he had piled against the fire exit of a crowded pub, using matches. This was the second time he had set fire to the same pub, he had previously done so in 2004. The fire was spotted in its early stages by a member of pub staff who put the fire out using a fire extinguisher.
2 - reckless	W, aged 30 had been drinking all day. On his way home in the afternoon he passed by a house in which a number of students lived. He took out a bag of rubbish from a wheelie bin, placed it outside the door of the property, and set it alight with matches he had in his pocket. He then left. The fire did not really take hold partly as the material in the bag was not particularly flammable, and partly as one of the students came and put the fire out.
2A – reckless	H, aged 28 shared a caravan with another man, they both lived and worked on a poultry farm. The pair had been drinking in a group earlier in the day, and had a disagreement about some beer that had gone missing. The victim was asleep in bed in the caravan in the early hours when H set fire to his empty bed, using an aerosol and a lighter. The victim awoke to thick black smoke and flames, and had to escape the caravan through a small window, dressed only in his boxer shorts, dropping to gravel below. A neighbour saw the flames and called the emergency services, but the fire had spread to two other caravans.

<sup>1</sup> The scenarios consisted of shortened versions of two reckless cases and two intent cases at varying levels of seriousness. Each scenario was sentenced by six judges.

<sup>2</sup> Limitations include: this is a small sample which is not necessarily representative; the guidelines were out for consultation at the time of the research which means judges may have seen the guideline before this exercise (biasing the 'pre-guideline' sentence); and the scenarios only include limited detail of the actual case, which makes comparison with the sentence given by the judge in the actual case difficult.

## Key Points

- Most judges see arson with intent to endanger life/reckless as to whether life is endangered cases a few times a year, and reported that these frequently involve an offender with mental health difficulties. 'Reckless' offences are reported as more common than 'with intent'. Criminal damage with intent or reckless as to whether life is endangered is rarely seen in the Crown Court.
- The guideline road tested well and judges found it clear and easy to use. For the most part, scenarios were sentenced consistently across judges, and the hypothetical sentences judges gave under the new draft guideline were largely consistent with the sentence they gave 'as if it came before them today'. There was no indication that the guideline would raise sentencing levels.
- Three small issues were raised, which the Council may wish to consider:
  - When sentencing one of the 'reckless' scenarios, several judges observed that the starting point under culpability B felt a little low, insufficiently reflecting the dangerousness of an offence where a life has been endangered by something as unpredictable as a fire. Moreover, in another 'reckless' scenario, a few judges gave a lower sentence under the new draft guideline than their current sentence. This may suggest an appetite for slightly increasing the starting point sentences for culpability B ('reckless' offences).
  - Although judges were generally happy with the aggravating and mitigating section, several felt that a number of aggravating factors (e.g. multiple people endangered) would be considered when determining the harm category and a flag to remind judges not to double count would be beneficial. Council may wish to add a line on double counting into the aggravating and mitigating factors section of the guideline.
  - Currently there is no aggravating factor that increases the seriousness of an offence in which victims are not able to get away from the fire easily, for example because the main exits are blocked. Several judges felt that if fire exits or main exits are blocked, this is an important aggravating factor.

## Sentence Levels, Consistency, Starting Points and Ranges

- In all four scenarios, the vast majority of judges categorised the culpability consistently and as expected by policy. This shows that judges understand that the culpability section is determined by the charging of the offence. Categorisation of harm was fairly consistent across judges and concurred with the expectations of policy, with one exception: in one scenario (the most serious 'intent' case – 1A), there was some tendency to categorise risk of harm at a lower level than expected.
- The road testing suggests that the draft guideline is unlikely to increase sentencing for criminal damage/arson with intent to endanger life or reckless as to whether life endangered offence. Across multiple scenarios and multiple judges, there were only two instances where judges gave a higher sentence (by one year) using the draft guideline than the sentence they would give under current practice.
- For criminal damage/arson with intent (those offences going into culpability A) most sentences stayed the same when judges sentenced as they would 'as if it came before them today' and then using the new guideline.
- For reckless criminal damage/arson offences (those offences going into culpability B) whilst most sentences stayed the same, some sentences were lower using the draft guideline (between 1.5 to 5 years' decrease). Some of the judges who gave lower sentences using the draft guideline for scenario 2 (culpability B, category 3 – students' house) felt that these sentences were too low. The road testing identified two main reasons why these sentences were perceived as low:
  - Firstly, these judges felt that regardless of whether it had been reckless, a life had been endangered and the sentence needed to reflect this. All of these judges gave a sentence of below two years on this scenario with the draft guideline and some judges did not deem this appropriate: *"This is too low for a case that recklessly puts lives in danger, this does not feel right"*.
  - Secondly, some judges felt that due to the unpredictable nature of fire there is always a high risk of harm as the offender does not know the extent of the damage that the fire will cause. Again, they felt this needed to be reflected in the sentence: *"Fire is unpredictable. So, if you set any fire however minor in circumstances where you are guilty of recklessness as to whether life is*

*endangered, if you come into contact with it, then there's a significant risk of serious harm”.*

- At the higher harm level in culpability B (scenario 2A, caravan) the guideline took some judges to an appreciably lighter sentence than they had reached without the guideline, inferring that sentence levels at the higher harm levels may be a little light as well.

### **Views on Culpability**

- Most judges were happy with the culpability step, words such as *clear*, *simple* and *sensible* were used to describe the structure. Judges were particularly keen on the simplicity of the culpability section and some judges suggested that there would not be another way of structuring it appropriately.
- For a couple of judges at first, they felt that the culpability section did not allow for a determination of seriousness (further than just distinguishing between reckless and intent offences). They felt that the factors included in the aggravating factors section which were used to potentially increase the seriousness of the offence were too important to be just aggravating factors and should be included in the culpability section of the guideline. This was no longer an issue when they realised that the seriousness of the case would largely be decided in the harm section.

### **Views on Harm**

- There was a general recognition of difficulty when assessing risk due to the unpredictable nature of fire, and the offender not knowing the level of harm they could end up causing. That being said, the scenarios found that judges were generally comfortable with placing the offender in harm categories and were able to use the facts in the scenario to justify this placement.
- Several judges suggested that the ‘serious consequential economic or social impact of offence caused’ and ‘value of damage caused’ factors need more context to clarify their meaning and to ensure that ‘value of damage caused’ is known by judges to be relative to the individual/company.
- A few other observations were made:
  - One judge queried why the word ‘very’ is included in category 1 (very serious physical and psychological harm caused and very high value of damage caused) when it is not referred to in category 2.
  - One judge felt that ‘some’ risk was not covered in the three categories (very serious, significant, no or minimal)

- One judge felt that category 3 was an oxymoron because if there is an endangerment of life then it will not get into category 3 as low risk.

## Views on Aggravating and Mitigating Factors

Judges were generally happy with the aggravating and mitigating section. There were the following observations:

- A few judges mentioned that previous convictions for arson were more relevant than other offences, even a historical conviction. One judge suggested making it clearer in the guideline that previous convictions for arson are of particular relevance, regardless of the time passed.
- Some of the judges considered 'victim is particularly vulnerable' to be applicable for a victim sleeping. One judge suggested that referring to a sleeping victim as 'vulnerable' could cause some issues in court but as it is an important factor this could be added to the list separately.
- When judges were asked to consider important factors in each scenario without the draft guideline a few judges referred to the ability of the victim to get away from the fire if the key entry/exit to the premises was obstructed and how this would aggravate the sentence, *"Outside the door so main point of exit or entrance potentially blocked"*.
- Several judges highlighted the risk of double counting with this guideline. Judges felt that a number of aggravating factors (e.g. multiple people endangered) would be considered when determining the harm category and a flag to remind judges not to double count would be beneficial *"I just think that it needs a note of caution, some factors which would determine the risk of serious harm may be factors which are aggravating features, be careful not to use them twice"*. Council may wish to add a line on double counting into the aggravating and mitigating section of the guideline.
- Other suggestions for aggravating and mitigating factors were<sup>3</sup>: lack of premeditation (mitigating), offender calls emergency services (mitigating), committed in the context of public order (aggravating), children being present (aggravating), danger to firefighters specifically (aggravating) and financial gain (aggravating).

---

<sup>3</sup> These were mentioned by one judge only.

## **Other points**

- Judges were supportive of the 'in exceptional cases within category 1A' text that sits above the starting point table.
- Judges were also supportive of the mental health disposal step, stating that it was very helpful and relevant for the offence. Some judges queried the details in this step (especially around ordering of the different disposals) and this is being looked at again by policy.
- Of the judges that expressed an opinion it was generally felt that there would not be any issues by having arson and criminal damage in the same guideline.



## **Arson (criminal damage by fire)**

### **Criminal Damage Act 1971, s.1**

**This is a serious specified offence for the purposes of section 224 of the Criminal Justice Act 2003.**

#### **Triable either way**

Maximum when tried summarily: Level 5 fine and/or 6 months' custody

Maximum when tried on indictment: Life

Offence range: Discharge – 8 years' custody

---

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline**

**Courts should consider requesting a report from liaison and development services, or from a medical practitioner, or in appropriate cases, ordering a psychiatric report in order to both ascertain whether the offence is linked to an underlying mental disorder or learning disability (and so assist in the assessment of culpability) and whether any mental health disposal should be considered**

## STEP ONE

### Determining the offence category

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

The level of **culpability** is determined by weighing up all the factors of the case. **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:

- High degree of planning or premeditation
- Revenge attack
- Use of accelerant
- Intention to cause very serious damage to property
- ~~Recklessness or~~ Intention to create a high risk of injury to persons

#### B - Medium culpability:

- ~~All other~~ Cases that fall between categories A and C because:
- Factors are present in A and C which balance each other out and/or
- The offender's culpability falls between the factors described in A and C
- ~~Intention to cause significant damage to property~~
- ~~Recklessness or intention to create a significant risk of injury to persons~~
- 

#### C - Lesser culpability:

- Little or no planning; offence committed on impulse
- Offender's responsibility substantially reduced by mental disorder\* or learning disability
- Involved through coercion, intimidation or exploitation

~~\* Reduced weight may be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice~~

## Harm

**The level of harm is assessed by weighing up all the factors of the case.**

<p><b>Category 1</b></p> <ul style="list-style-type: none"> <li>• Serious physical and/or psychological harm caused</li> <li>• Serious consequential economic, <u>cultural</u> or social impact of offence</li> <li>• High value of damage caused</li> </ul>
<p><b>Category 2</b></p> <ul style="list-style-type: none"> <li>• Harm that falls between categories 1 and 3</li> </ul>
<p><b>Category 3</b></p> <ul style="list-style-type: none"> <li>• No or minimal physical and/or psychological harm caused</li> <li>• Low value of damage caused</li> </ul>
<p><b>STEP TWO</b>  <b>Starting point and category range</b></p> <p>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.</p>

**In exceptional cases within category 1A, sentences of above 8 years may be appropriate.**

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

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

Harm	Culpability		
	A	B	C
<p><b>Category 1</b></p>	<p><b>Starting point</b> 4 years' custody</p> <p><b>Category range</b> 2 to 8 years' custody</p>	<p><b>Starting point</b> 1 year 6 months' custody</p> <p><b>Category range</b> 9 months to 3 years' custody</p>	<p><b>Starting point</b> 9 months' custody</p> <p><b>Category range</b> 6 months – 1 year 6 months' custody</p>
<p><b>Category 2</b></p>	<p><b>Starting point</b> 2 years' custody</p> <p><b>Category range</b> 1 to 4 years'</p>	<p><b>Starting point</b> 9 months' custody</p> <p><b>Category range</b> 6 months- 1 year 6</p>	<p><b>Starting point</b> High level Community order</p> <p><b>Category range</b> Medium level</p>

	custody	months' custody	Community order-9 months' custody
<b>Category 3</b>	<b>Starting point</b> 1 years' custody  <b>Category range</b> 6 months - 2 years' custody	<b>Starting point</b> High level Community order  <b>Category range</b> Medium level Community order-9 months' custody	<b>Starting point</b> Low level Community order  <b>Category range</b> Discharge- High level Community order

~~Sentencers should consider whether to ask for psychiatric reports in order to assist in the appropriate sentencing (hospital orders, or mental health treatment requirements) of certain offenders to whom this may be relevant. Where a mental health disposal is indicated refer to Step 3 of the Criminal Damage/ Arson with intent to endanger life or reckless as to whether life endangered guideline.~~

The court should then consider any adjustment for any aggravating or mitigating factors. Below is 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 starting point.

#### **Factors increasing seriousness**

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

- A1. 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
- A2. Offence committed whilst on bail
- A3. 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:**

- A4. Commission of offence whilst under the influence of alcohol or drugs
- A5. Offence committed for financial gain
- A6. Offence committed to conceal other offences
- A7. Victim is particularly vulnerable
- A8. Fire set in or near a public amenity
- A9. Damage caused to heritage assets
- A10. Significant impact on emergency services or resources

- A11. Established evidence of community/wider impact
- A12. Failure to comply with current court orders
- A13. Offence committed on licence or post sentence supervision
- A14. Offences taken into consideration

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

- M1. No previous convictions **or** no relevant/recent convictions
- M2. Offender lit fire accidentally and/or tried to minimise its effect
- M3. Remorse
- M4. Good character and/or exemplary conduct
- M5. Serious medical condition requiring urgent, intensive or long-term treatment
- M6. Age and/or lack of maturity where it affects the responsibility of the offender
- M7. Sole or primary carer for dependent relatives
- M8. Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

#### **STEP THREE**

##### **Consider any factors which indicate a reduction, such as 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 15 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (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 must consider whether to make a compensation order and/or other ancillary orders.

***Compensation order***

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

**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.

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

**Criminal Damage Act 1971, s.1(2)**

**This is a serious specified offence for the purposes of section 224 of the Criminal Justice Act 2003.**

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

Offence range: High level Community order- 12 years' custody

---

**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline**

**Courts should consider requesting a report from liaison and development services, or from a medical practitioner, or in appropriate cases, ordering a psychiatric report in order to both ascertain whether the offence is linked to an underlying mental disorder or learning disability (and so assist in the assessment of culpability) and whether any mental health disposal should be considered.**

#### **STEP ONE**

##### **Determining the offence category**

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

**Within this offence, culpability is fixed, culpability A is for intent, culpability B is for recklessness.**

##### **Culpability A:**

- Offender intended to endanger life

##### **Culpability B:**

- Offender was reckless as to whether life was endangered

#### **Harm**

The level of harm is assessed by weighing up all the factors of the case.

##### **Category 1**

- Very serious physical and/or psychological harm caused
- High risk of very serious physical and/or psychological harm
- Serious consequential economic, cultural or social impact of offence caused
- Very high value of damage caused

##### **Category 2**

- Significant physical and/or psychological harm caused
- Significant risk of serious physical and/ or psychological harm
- Significant value of damage caused
- All other harm that falls between categories 1 and 3

##### **Category 3**

- No or minimal physical and/or psychological harm caused
- Low risk of serious physical and/or psychological harm
- Low value of damage caused



**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.

**In exceptional cases within category 1A, sentences of above 12 years may be appropriate.**

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

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

Harm	Culpability	
	A	B
<b>Category 1</b>	<b>Starting point</b> 8 years' custody  <b>Category range</b> 5 years to 12 years' custody	<b>Starting point</b> 6 years' custody  <b>Category range</b> 4 years to 10 years' custody
<b>Category 2</b>	<b>Starting point</b> 6 years' custody  <b>Category range</b> 4 to 8 years' custody	<b>Starting point</b> 4 years' custody  <b>Category range</b> 2 to 6 years' custody
<b>Category 3</b>	<b>Starting point</b> 2 years' custody  <b>Category range</b> 6 months custody to 3 years' custody	<b>Starting point</b> 1 years' custody  <b>Category range</b> High level Community order- 2 years 6 months' custody

**~~In appropriate cases, the court should order a psychiatric report in order to ascertain whether the offence is linked to an underlying mental disorder and, if it is, whether any mental health disposal should be considered (see Step Three.)~~**

The court should then consider any adjustment for any aggravating or mitigating factors. Below is 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 starting point.

Care should be taken to avoid double counting factors already taken into account in assessing the level of harm at step one

### **Factors increasing seriousness**

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

- A1. 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
- A2. Offence committed whilst on bail
- A3. 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:**

- A4. Commission of offence whilst under the influence of alcohol or drugs.
- A5. Revenge attack
- A6. Significant degree of planning or premeditation
- A7. Use of accelerant
- A8. Fire set in or near a public amenity
- A9. Victim is particularly vulnerable
- A10. Damage caused to heritage assets
- A11. Multiple people endangered
- A12. Significant impact on emergency services or resources
- A13. Established evidence of community/wider impact
- A14. Failure to comply with current court orders
- A15. Offence committed on licence or post sentence supervision
- A16. Offences taken into consideration

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

- M1. No previous convictions **or** no relevant/recent convictions
- M2. Offender's responsibility substantially reduced by mental disorder or learning disability (if this factor provides strong mitigation it may be appropriate to go down

a category)

- M3. Lack of premeditation
- M4. Involved through coercion, intimidation or exploitation
- M5. Remorse
- M6. Good character and/or exemplary conduct
- M7. Serious medical condition requiring urgent, intensive or long-term treatment
- M8. Age and/or lack of maturity where it affects the responsibility of the offender
- M9. Sole or primary carer for dependent relatives
- M10. Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

~~\*Reduced weight may be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice.~~

### **STEP THREE**

#### **Consideration of mental health disposals**

##### **Where custody is being considered:**

Where:

- (i) the evidence of medical practitioners suggests that the offender is currently suffering from a mental disorder,
- (ii) that the offending is wholly or in significant part attributable to that disorder,
- (iii) treatment is available, and
- (iv) 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 these matters in the following order:

##### **Section 45A hospital and limitation direction**

- a. Before a hospital order is made under s.37 MHA (with or without a restriction order under s41), 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 direction will cease to have effect at the end of a determinate sentence.
- b. If the mental disorder can appropriately be dealt with by a direction under s.45A(1), 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, before going further, whether: (1) the mental disorder is treatable, (2) once treated there is no evidence the offender would be dangerous, and (3) the offending is due to that mental disorder. If these conditions are met a hospital order under s.37/41 is likely to be the correct disposal.

### **Section 47 transfer to hospital**

- d. The court must also have regard to the question of whether other methods of dealing with the offender are available including consideration of whether the powers under s47 MHA for transfer from custody to hospital for treatment would, taking in to consideration all of the circumstances, be appropriate.
- There must always be sound reasons for departing from the usual course of imposing a custodial sentence and where a custodial sentence is not imposed, the judge must set out these reasons.

#### **Non-custodial option:**

If a non-custodial option is considered, and where an offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be appropriate. The offender should express a willingness to comply with the requirement.

### **STEP FOUR**

#### **Consider any factors which indicate a reduction, such as 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 FIVE**

#### **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 SIX**

#### **Dangerousness**

The court should consider whether having regard to the criteria contained in Chapter 15 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (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 SEVEN**

#### **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 EIGHT****Compensation and ancillary orders**

In all cases, the court must consider whether to make a compensation order and/or other ancillary orders.

***Compensation order***

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

**STEP NINE****Reasons**

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

**STEP TEN****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.

Blank page

## Annex E

### Criminal Damage Act 1971

#### Section 1

##### **Destroying or damaging property.**

(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

(2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—

(a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and

(b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;

shall be guilty of an offence.

(3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.

#### Section 2

##### **Threats to destroy or damage property.**

A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out,

(a) to destroy or damage any property belonging to that other or a third person; or

(b) to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or third person;

shall be guilty of an offence.

#### Section 3

##### **Possessing anything with intent to destroy or damage property.**

A person who has anything in his custody or under his control intending without lawful excuse to use it or cause or permit another to use it —

(a) to destroy or damage any property belonging to some other person; or

(b) to destroy or damage his own or the user's property in a way which he knows is likely to endanger the life of some other person;

shall be guilty of an offence.

#### Section 4

##### **Punishment of offences.**

(1) A person guilty of arson under section 1 above or of an offence under section 1(2) above (whether arson or not) shall on conviction on indictment be liable to imprisonment for life.

(2) A person guilty of any other offence under this Act shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.

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

Section 30 [Crime and Disorder Act 1998](#)

### **30.— [ Racially or religiously aggravated ] criminal damage.**

(1) A person is guilty of an offence under this section if he commits an offence under section 1(1) of the Criminal Damage Act 1971 (destroying or damaging property belonging to another) which is [ racially or religiously aggravated ] for the purposes of this section.

(2) A person guilty of an offence under this section shall be liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or to a fine, or to both.

(3) For the purposes of this section, section 28(1)(a) above shall have effect as if the person to whom the property belongs or is treated as belonging for the purposes of that Act were the victim of the offence

Under section 17 of the Magistrates' Courts Act 1980 the following are either way:  
Schedule 1 para 29:

Offences under the following provisions of the Criminal Damage Act 1971 —  
section 1(1) (destroying or damaging property);  
section 1(1) and (3) (arson);  
section 2 (threats to destroy or damage property);  
section 3 (possessing anything with intent to destroy or damage property).

Under sections 22, 33 and schedule 2 of the MCA 1980 offences of criminal damage where the value is £5000 or less are treated as summary only