

The sentencing of offences involving stalking in Scotland

Literature Review

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Executive Summary

- Stalking and associated behaviours are complex. They can cover a wide range of conduct of varying seriousness and raise questions in terms of meeting the needs of victims, managing risks, reducing reoffending, etc.
- In many cases the victims of stalking and associated behaviours are female and the perpetrators male. Often these offences occur within a context of domestic abuse or violence against women and girls more generally (VAWG).
- Internationally, the literature reveals a wide range of stalking behaviours (including by abusers) that may result in significant harm to victims. Indeed, even seemingly conciliatory behaviours such as messaging an ‘apology’ can surreptitiously be intended to place victims in a state of fear or distress and further coercion or control. In the literature (and perhaps to an increasing extent to the public) such surreptitious behaviours may be known as ‘love bombing.’
- Without context, acts associated with stalking can appear benign. However, the evidence base shows these behaviours can cause victims significant harm and this may even be the intent – reflecting higher culpability on the part of the offender. Thus, the VAWG context of many stalking offences can, depending on the case, have implications for both harm and culpability. Any prospective guidance would have to address this.
- A key utility of a guideline in this area might be in expressing disapproval of offending behaviour. By making it clear (to victims, the public, and offenders) that factors such as VAWG are considered in sentencing, a guideline could fulfil an important communicative aim.

1.0 The Legal Framework in Scotland

1.1 Stalking

1.1.1 The statutory offence of stalking

The offence of stalking, contained within section 39 of the Criminal Justice and Licensing (Scotland) Act 2010, is committed where a person engages in a course of conduct which causes fear or alarm.¹ For the purposes of the offence, “course of conduct” involves conduct on at least two occasions. Conduct can include following another person, contacting or attempting to contact another person, publishing material related to them, entering premises, loitering, interfering with property, giving another person something, watching or spying or acting in another way which would cause a reasonable person fear or alarm.² The *mens rea* of stalking is either the intention of causing fear or alarm or that the accused “ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause B to suffer fear or alarm”.³ It is a defence that the course of conduct in question was authorised by virtue of any enactment or rule of law; engaged in for the purpose of preventing or detecting crime, or reasonable.⁴

The offence of threatening or abusive behaviour,⁵ introduced at the same time under section 38 of the Criminal Justice and Licensing (Scotland) Act, is a relevant alternative charge to stalking. Given that a single incident can amount to an offence under section 38 of the Act, this may be helpful if there are problems establishing or evidencing a course of conduct for the purposes of section 39.

Shortly following the introduction of section 39 in 2012, the Appeal Court heard an appeal against conviction in circumstances where a no case to answer submission had been repelled by the Sheriff.⁶ The course of conduct evidenced amounted to:

...at least two text messages from the appellant were received by the complainer on 24 and 25 December 2012, one on her private mobile and one

¹ Section 39(2).

² Section 39(6).

³ Section 39(3) and 39(4).

⁴ Section 39(5).

⁵ Section 38.

⁶ *Behan v Procurator Fiscal, Hamilton* [2013] HCJAC 118.

on her business mobile (the number of which she had thought was unknown to the appellant). One text stated “Have a happy and good life I truly mean that”. Another stated “Have a good life. I hope you be happy. Bye xx”.

Representations for the appellant emphasised that the contents of the text messages were “benign”. However, the Appeal Court noted the relevance of the breakdown of the relationship which had involved an assault on the complainer and her child by the appellant, and subsequent bail conditions which prohibited him from contacting her, ending a month before the messages were sent. In refusing the appeal, the Court’s reasoning in relation to whether there was an intention to cause the complainer fear or alarm or whether he ought to have known that this behaviour would cause her fear or alarm was informed by the context of domestic abuse, albeit that was not the language used by the Court.

As will be discussed throughout the review, the most common context in which stalking occurs is domestic abuse. This is reflected in the reported cases, criminal proceedings statistics and research which will be presented below.

1.1.2 Evidencing a course of conduct

Stalking is unusual because it is dependent on a course of conduct being established rather than a single incident. This aspect of the offence has raised questions regarding the requirement of corroboration. In the case of *PF, Dunfermline v Ogilvie*, which involved charges of stalking against two complainers, the Court held that evidence of an allegation of a previous assault against one complainer, which had been included in a docket, did not form part of a course of conduct for the purposes of section 39, and so was inadmissible:

What is required by s 39(2) is that the course of conduct, not an extraneous incident, cause fear and alarm to the complainer.⁷

Case law on evidencing a course of conduct has developed further since the introduction of the Domestic Abuse (Scotland) Act 2018 which introduced the offence

⁷ 2020 S.L.T. (Sh Ct) 144 at para 46.

of 'abuse against partner or ex-partner', also a course of conduct offence. It would now appear to be settled that at least two individual incidents within a course of conduct offence must be corroborated, but that corroboration for each individual incident is not necessary.⁸

1.1.3 Stalking committed outside the UK

The Domestic Abuse Act 2021 inserted into the Criminal Justice and Licensing (Scotland) Act 2010, section 39A which provides the offence of stalking committed outside the United Kingdom. The offence provides that if:

- (1) (a) a person's course of conduct consists of or includes conduct in a country outside the United Kingdom,
- (b) the course of conduct would constitute the offence of stalking if it occurred in Scotland, and
- (c) the person is a United Kingdom national or is habitually resident in Scotland,

then the person commits that offence.

Section 39A also allows a person to be prosecuted and tried in any sheriff court district in Scotland even in a person's conduct consists entirely of conduct taking place in a country outside the UK.⁹

1.2 Harassment

1.2.1 The Protection from Harassment Act 1997

There is no offence of harassment under Scots law. The Protection from Harassment Act 1997 introduced the offence of harassment to England and Wales under section 1. Section 2 further provides that this offence is committed if:

⁸ *PF Livingstone v H(J)* 2021 S.L.T. (Sh Ct) 415; *A(C) v HM Advocate* 2023 J.C. 8.

⁹ Section 39A(2).

...the person whose course of conduct is in question ought to know that it amounts to [or involves] harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to [or involved] harassment of the other.

Such behaviour does not amount to harassment if it: was pursued for the purpose of preventing or detecting crime; pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or was reasonable in the circumstances.

Section 8 of the Protection from Harassment Act 1997 provides for a civil action of harassment to be raised in Scotland by the person who may be the victim of the course of conduct in question.¹⁰

When the Protection from Harassment Bill was introduced, it was also discussed whether a specific offence of stalking was required in Scotland. There had previously been objection to this on the basis that the common law offence of breach of the peace suitably captured such wrongs.¹¹ The Protection of Freedoms Act 2012 later inserted the offence of stalking into the 1997 Act, applicable only to England and Wales.¹² It would not be until the introduction of the Criminal Justice and Licensing (Scotland) Act 2010, which came into force in December 2012, that such an offence was recognised in Scots law.

1.2.2 Using public order offences to charge harassment

Due to the fact that harassment is not an offence in Scots law, behaviour amounting to harassment is often charged under existing public order offences such as threatening or abusive behaviour or breach of the peace. One such example of this is *Ahmed v HM Advocate*.¹³ Here, the appellant had been indicted with 18 charges of threatening or abusive behaviour – arising from his conduct towards several female

¹⁰ Section 8(2).

¹¹ House of Commons Library., 1996. *Stalking, harassment and the Protection from Harassment Bill*. Research Paper 96/115. London: House of Commons. at p 26.

¹² Section 2A.

¹³ 2021 J.C. 19.

complainers. He had approached these women (who were strangers to him), asked their names, made comments about their appearance and requested further meetings. Two were in their school uniform at the time of these approaches. In relation to one, he is described as:

Standing in front of the complainer and stepping from side to side to attempt to block her path. His conduct then continued to contacting her on social media, although the complainer had not given him contact details or any reason to do so.¹⁴

The appellant gave evidence, accepting that he spoke to the complainers and acknowledging that they were strangers to him. He characterised some of the exchanges as “flirting”.¹⁵ It was accepted that a text message reading “good morning ya racist” did amount to abusive behaviour in contravention of section 38, but it was held that overall, “polite conversation” could not be construed as threatening merely because it was uninvited or unwelcomed and his appeal was allowed.

In *Ahmed*, the complainers variously “described themselves as overwhelmed uncomfortable, shaken up, intimidated, and stressed by the appellant’s actions”. The case illustrates the limitations of section 38 in dealing with behaviour which might be better understood as harassment.

Similar facts have been considered under section 39. For example, in *McBride v HM Advocate*, the appellant had been convicted of two charges of breach of the peace and two charges of stalking under section 39(1).¹⁶ His conduct had involved approaching women unknown to him and asking them if they were models, if they were prostitutes and if they would like to go out with him. He had also followed one of the complainers to work on approximately twenty occasions. The sentence imposed was two years’ imprisonment on each charge, to run concurrently, along with a supervised release order. The appeal against conviction, which was refused, held that there had been a misdirection by the sheriff, who had directed the jury that actual fear or alarm in respect of a breach of section 39(1) was not required, but that this was “not an issue which had loomed large at trial” since it was clear that the jury

¹⁴ Ibid, at para 44.

¹⁵ Ibid, at para 7.

¹⁶ 2016 S.C.L. 758.

had found the conduct had caused fear or alarm since this remained in the charge in return of their verdict.¹⁷

In his *Independent Review of Hate Crime Legislation* in Scotland, Lord Bracadale recommended a new statutory aggravation that would attach to existing offences in circumstances indicating a motive of gender hostility:

Where an offence is committed, and it is proved that the offence was motivated by hostility based on gender, or the offender demonstrates hostility towards the victim based on gender during, or immediately before or after, the commission of the offence, it would be recorded as aggravated by gender hostility. The court would be required to state the fact on conviction and take it into account sentencing.¹⁸

The increase in online abuse related to gender was recognised alongside a wider cultural shift which has occurred, one which has seen women have less tolerance for sexual harassment which might have been put up with in the past.¹⁹ Consultation responses on the issue demonstrated a strong support for a provision relating to gender or misogyny,²⁰ with a common view being that women are required to change their behaviour as a result of gender hostility crimes.²¹ However, this recommendation was not adopted.

1.2.3 Racially aggravated harassment

Although harassment is not a standalone offence under Scots law, section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 provides that a person commits the offence of racially aggravated harassment if he:

(a) pursues a racially-aggravated course of conduct which amounts to harassment of a person and—

¹⁷ Ibid, at para 10.

¹⁸ Scottish Government., 2018. *Independent Review of Hate Crime Legislation*. Edinburgh: Scottish Government. at Recommendation 9.

¹⁹ Ibid, at para 49, 34.

²⁰ Ibid, at para 4.13, 35.

²¹ Ibid, at para 4.18, 35.

- (i) is intended to amount to harassment of that person; or
- (ii) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person; or
- (b) acts in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress.

No public element is required for an offence under section 50A²² and it is not necessary that alarm or distress was caused.²³

The offence itself has been able to respond to one-off incidents between strangers where offensive language has been used, where such language was sufficient to infer malice and ill will by reference to colour and to presumed membership of a racial group.²⁴ It has been recognised that certain words in isolation may also refer to other features such as hairstyle and an explanation must be provided for concluding that the language used is a reference to racial origin.²⁵

Following Lord Bracadale's *Independent Review of Hate Crime Legislation*, the Hate Crime and Public Order (Scotland) Act 2021 was introduced in an attempt to consolidate and expand the law in this area. The Act is expected to be in force from 1st April 2024 and now contains the offence of racially aggravated harassment in section 3.

1.3 Domestic abuse

1.3.1 Domestic abuse aggravation

As said, there is a close relationship between stalking and domestic abuse, with most stalking arising from intimate partner relationships.

There are two routes to the criminalisation of domestic abuse in Scots law. The first is that any offence, including stalking, can be aggravated by abuse of a partner or

²² *King v Webster* 2012 S.L.T. 342.

²³ *Martin v Howdle* 2006 J.C. 35.

²⁴ *Procurator Fiscal, Glasgow v Callaghan* 2019 S.L.T. (Sh Ct) 249.

²⁵ *Sennel v McGowan* 2011 S.C.C.R. 180. Here the accused shouted the word "Afro".

ex-partner under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. An offence is considered to be aggravated if:

(a) the person intends to cause the partner or ex-partner to suffer physical or psychological harm,

or

(b) in the case only of an offence committed against the partner or ex-partner, the person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm.²⁶

It is irrelevant for the purposes of proving the statutory aggravation whether or not the victim does in fact suffer physical or psychological harm.

Most stalking offences are aggravated by section 1 of the Abusive Behavior and Sexual Harm (Scotland) Act 2016 (abuse of a partner or ex-partner), as will be discussed below.²⁷

1.3.2 Distinct offence of abuse

The second route to criminalisation is through the Domestic Abuse (Scotland) Act 2018. Under section 1 of the Act, an offence is committed where:

(a) the person (“A”) engages in a course of behaviour which is abusive of A’s partner or ex-partner (“B”), and

(b) both of the further conditions are met.

(2) The further conditions are—

(a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,

²⁶ Section 1(2).

²⁷ Crown Office and Procurator Fiscal Service., 2023. *Domestic Abuse and Stalking Charges in Scotland, 2022-23*. Available at: < [https://www.copfs.gov.uk/publications/domestic-abuse-and-stalking-charges-in-scotland-2022-2023/html/#:~:text=In%202022%2D23%2C%2024%2C787%20charges,80%25%20in%202021%2D22.2.](https://www.copfs.gov.uk/publications/domestic-abuse-and-stalking-charges-in-scotland-2022-2023/html/#:~:text=In%202022%2D23%2C%2024%2C787%20charges,80%25%20in%202021%2D22.) > [Last accessed 3 March 2024].

(b) that either—

- (i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or
 - (ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.
- (3) In the further conditions, the references to psychological harm include fear, alarm and distress.

In respect of section 1 of the Act, corroboration is not required for each separate incident specified in the libel.²⁸

Section 2 of the Act provides further guidance on what constitutes abusive behaviour, noting that it includes (in particular) behaviour directed to the complainer that is violent, threatening or intimidating, or would have one or more of the relevant effects set out in section 2(3): making B dependent on, or subordinate to, A; isolating B from friends, relatives or other sources of support; controlling, regulating or monitoring B's day-to-day activities; depriving B of, or restricting B's, freedom of action; frightening, humiliating, degrading or punishing B.

The Domestic Abuse (Scotland) Act 2018 and Abusive Behaviour and Sexual Harm (Scotland) Act 2016 both adopt the same meaning of partner or ex-partner: spouses or civil partners, those living together as if spouses or civil partners, and those in an intimate personal relationship.²⁹ The existence of the relationship will be taken to be established unless challenged.³⁰

1.4 Communication Offences

A charge under section 127 of the Communications Act 2003, may also be used in circumstances where stalking and harassment-type behaviours have been undertaken by an accused person. Under section 127(1), which is UK-wide, the

²⁸ *Procurator Fiscal, Livingston v H(J)* [2021] WLUK 173.

²⁹ Section 11(2).

³⁰ Section 7(1).

offence of improper use of a public communications network may be committed where someone:

- (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
- (b) causes any such message or matter to be so sent.

Section 127(2) provides an offence consisting of causing annoyance, inconvenience or needless anxiety to another by sending, by means of a public electronic communications network, a message that he knows to be false; causes such a message to be sent; or persistently makes use of a public electronic communications network.

Under directions related to stalking, the Scottish Crime Report Standard provides the following example for when a charge of section 127 may be relevant:

Victim reports receiving several abusive text messages and telephone calls from the same suspect.

Record 1 Communications Act 2003, Section 127 (non-sexual). (While the number of calls received amounts to a course of conduct this is adequately covered by Communications Act 2003 and under normal circumstances should not be considered as a crime of Stalking unless other criminal elements contribute towards the course of conduct. However it should be noted that the crime of Stalking provides for behaviour which may cause a particular individual fear or alarm which might not cause the average member of the public fear or alarm. Should a course of conduct which causes fear or alarm include communications of a benign nature which would not meet the provisions of Communications Act 2003, Section 127 a crime of Stalking should be considered).³¹

³¹ Scottish Government., 2022. *Scottish Crime Reporting Standard: Annexes*, Annex 6, Example 8.

2.0 Sentencing Framework in Scotland

2.1 Statutory sentencing penalties

Under section 39(7) of the Criminal Justice and Licensing (Scotland) Act 2010, a person convicted of the offence of stalking is liable on summary conviction to imprisonment for a term not exceeding twelve months, or to a fine not exceeding the statutory maximum (or both). If convicted on indictment, they are liable to imprisonment for a term not exceeding five years, or to a fine (or both). This is identical to the statutory penalties available where there is a conviction for threatening or abusive behaviour.³²

Where there is a conviction under section 1 of the Domestic Abuse (Scotland) Act 2018, a person is liable to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both) when convicted under summary procedure,³³ and a term not exceeding 14 years' imprisonment or a fine (or both) where convicted under solemn procedure.³⁴

Where an offence has been aggravated by section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, the court must:

- (a) state on conviction that the offence is aggravated as described in subsection (1)(a),
- (b) record the conviction in a way that shows that the offence is so aggravated,
- (c) take the aggravation into account in determining the appropriate sentence, and
- (d) state—
 - (i) where the sentence imposed in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

³² Criminal Justice and Licensing (Scotland) Act 2010, section 38(4).

³³ Section 9(a).

³⁴ Section 9(b).

(ii) otherwise, the reasons for there being no such difference.³⁵

Where there is a conviction under section 1 of the Domestic Abuse (Scotland) Act 2018 or where a conviction is aggravated by section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, the court must consider whether imposition of a non-harassment order is appropriate and provide reasons if one is not going to be imposed.³⁶ Breach of such an order is a criminal offence in and of itself and the person will be liable to imprisonment for a term not exceeding five years or to a fine (or both) where convicted under indictment and to imprisonment for a period not exceeding six months or to a fine not exceeding the statutory maximum (or both) under summary conviction.³⁷

A person convicted of the offence of racially aggravated harassment is liable on summary conviction for a fine or imprisonment (up to 12 months) (or both) and on indictment for a term of imprisonment not exceeding seven years, or a fine (or both).³⁸

Last, where there is a conviction under section 127 of the Communications Act 2003, a person is liable to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 (or both).³⁹

2.2 Proceedings and convictions

Given the relationship between stalking and domestic abuse, annual statistics are provided by the Crown Office and Procurator Fiscal Service (COPFS) on both in a single publication. Proceedings for stalking charges for the period 2013-14 to 2022-23 are shown in Table 1 below:

³⁵ Section 1(5).

³⁶ Criminal Procedure (Scotland) Act 1995 section 234AZA(4).

³⁷ Ibid, section 243A(4).

³⁸ Hate Crime and Public Order (Scotland) Act, section 3(6).

³⁹ 127(3).

Table 1: Stalking charges by year reported⁴⁰

Year	Total charges	Charges with domestic abuse aggravator	Charges without a domestic abuse aggravator	Percentage of charges with a domestic abuse aggravator
2013-14	912	623	289	68%
2014-15	1,456	975	481	67%
2015-16	1,657	1,114	543	67%
2016-17	1,510	1,044	466	69%
2017-18	1,558	1,120	438	72%
2018-19	1,415	1,015	400	72%
2019-20	1,160	751	409	65%
2020-21	1,125	630	495	56%
2021-22	1,067	606	461	57%
2022-23	921	485	436	53%

The reduction in the number of stalking charges post 2019 is explained by COPFS's policy, following the introduction of the Domestic Abuse (Scotland) Act 2018 in April 2019, to charge stalking under section 1 of the Domestic Abuse (Scotland) Act 2018 where it forms a course of conduct of domestic abuse.⁴¹ This clarification, provided in the annual report, also explains the declining number of charges with a domestic abuse identifier.

Upon request to COPFS, the additional data shown in Table 2 below was provided:

⁴⁰ Crown Office and Procurator Fiscal Service., 2023. *Domestic Abuse and Stalking Charges in Scotland, 2022-23*. at Table 8. Available at: <[https://www.copfs.gov.uk/publications/domestic-abuse-and-stalking-charges-in-scotland-2022-2023/html/#:~:text=In%202022%2D23%2C%2024%2C787%20charges,80%25%20in%202021%2D22](https://www.copfs.gov.uk/publications/domestic-abuse-and-stalking-charges-in-scotland-2022-2023/html/#:~:text=In%202022%2D23%2C%2024%2C787%20charges,80%25%20in%202021%2D22.)> [Last accessed 3 March 2024].

⁴¹ Ibid.

Table 2: Stalking charges reported to COPFS by sex & age of accused 2022-23

Age	Number of female accused	Number of male accused
17 and under	3	8
17-20 years	1	20
21-30 years	32	157
31-40 years	34	244
41-50 years	39	151
51-60 years	22	136
61-70 years	13	33
Over 70 years	4	18
Not recorded	2	4
Total	150	771

In terms of the statistics provided by the Scottish Government in their annual publication *Criminal Proceedings in Scotland*, stalking is combined with other charges into the category of ‘other non-sexual violence’, meaning there are no specific figures published on conviction rates or specific penalties issued for the offence. Upon request, the Scottish Government’s Justice Analytical Services were able to provide the following specific information:

Table 3: Number of people convicted under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010 (where main crime), by result, 2012-13 to 2021-22⁴²

	201 2-13	201 3-14	201 4-15	201 5-16	201 6-17	201 7-18	201 8-19	201 9-20	202 0-21	202 1-22
Custody	19	33	47	97	85	63	66	60	23	28
Community sentence	40	78	165	254	281	299	227	229	76	143
Monetary	28	50	92	140	147	141	127	108	67	112
Other	38	49	97	147	168	154	111	99	53	58
Total	125	210	401	638	681	657	531	496	219	341

As part of this research, a request was made to the Scottish Courts and Tribunal Service (SCTS) for additional data related to non-harassment orders issued in relation to stalking convictions. The following information was provided in response to that request:

⁴² In relation to this data, the Scottish Government advise that the period 2020-21 and 2021-22 was impacted by the pandemic and should be treated with caution.

Table 4: Criminal non-harassment orders issued by the Scottish Courts and Tribunal Service

Financial Year	Glasgow & Strathkelvin	Grampian Highland & Islands	Lothian & Borders	North Strathclyde	South Strathclyde, Dumfries & Galloway	Tayside Central & Fife	High Court	National
2009-10	24	1	5	4	6	7	0	47
2010-11	15	10	6	7	4	8	0	50
2011-12	42	17	15	16	3	8	0	101
2012-13	72	18	40	23	8	22	0	183
2013-14	113	24	130	44	46	26	0	383
2014-15	186	56	172	87	92	47	0	640
2015-16	199	75	300	133	134	93	4	938
2016-17	199	92	260	166	207	100	8	1032
2017-18	288	138	324	197	222	127	3	1299
2018-19	289	160	325	172	226	131	3	1306
2019-20	332	247	350	317	347	340	15	1948
2020-21	324	315	288	298	423	421	12	2081
2021-22	564	392	588	528	744	663	36	3515
2022-23	611	471	679	530	940	753	74	4058
2023-24 YTD ¹	589	343	632	509	835	627	119	3654
TOTALS	3847	2359	4114	3031	4237	3373	274	21235

Table 5: The number of accused persons who have received a Non- Harassment Order in respect of Section 39 of the Criminal Justice and Licensing (Scotland) Act 2010 between 1st April 2017 - 30th September 2023, split by Sheriffdom⁴³

Sheriffdom	Financial Year						
	2017 -18	2018 -19	2019 -20	2020 -21	2021 -22	2022 -23	2023-24 YTD ⁶
Glasgow & Strathkelvin	75	69	49	18	50	43	21
Grampian, Highlands & Islands	69	74	60	22	34	47	18
Lothian & Borders	87	73	43	29	52	67	26
North Strathclyde	52	39	58	22	45	37	15
South Strathclyde, Dumfries & Galloway	57	68	70	37	60	72	28
Tayside, Central & Fife	68	61	69	40	58	75	21
National	408	384	349	168	299	341	129

⁴³ These cases were identified by SCTC using the following charge codes: CJLA1000390101 and CJLA1000390100. Where an accused has multiple non-harassment orders recorded in the same case in different financial years, they have been counted only once in the financial year with the most recent sentence date for that accused. Where there are multiple accused in the same case, all non-harassment orders will be counted. Where a single accused has multiple cases in which a non-harassment order has been issued, these will all be counted.

Table 6: The number of accused persons with a Non-Harassment Order breach charge recorded between 1st April 2017 - 30th September 2023, split by Sheriffdom⁴⁴

Sheriffdom	Financial Year						
	2017 -18	2018 -19	2019 -20	2020 -21	2021 -22	2022 -23	2023-24 YTD ⁶
Glasgow & Strathkelvin	35	38	58	70	87	107	54
Grampian, Highlands & Islands	10	23	29	65	72	112	35
Lothian & Borders	62	70	76	78	106	87	52
North Strathclyde	25	40	48	76	87	97	62
South Strathclyde, Dumfries & Galloway	31	34	40	52	105	146	90
Tayside, Central & Fife	12	26	25	55	100	124	55
National	175	231	276	396	557	673	348

Although additional information regarding breaches has been provided via FOI by the Scottish Government,⁴⁵ SCTS advised that it could not be provided for the purposes of this project due to the way that such information is currently recorded and retrieved (that is to say, manually, using individual case identifiers).

⁴⁴ The figures in Table 5 only include non-harassment order breaches where a new complaint was registered due to the breach and cases were identified by SCTS using the following charge codes: CPSA199502340A00; CPSA19950234A401; CPSA19950234A402; CPSA19950234A403; CPSA19950234A404; CPSA19950234A405. Where an accused has multiple breaches of a non-harassment order in the same case, these breaches will be counted once. Where there are multiple accused with breaches of non-harassment orders in the same case, they will all be counted. Where an accused person has multiple cases in which a non-harassment order breach charge code is recorded, all cases will be counted.

⁴⁵ McPherson, R., 2022. Unintended consequences of non-harassment orders: child contact decision-making. *Journal of Social Welfare and Family Law*, 44(4): 495-511.

2.3 Sentencing statements and sentencing appeals

2.3.1 Sentencing statements

Although stalking is itself a course of conduct, it will often form part of a broader course of abusive conduct. A number of examples of current sentencing practice can be found in published sentencing statements. For example, in the recent case of *HM Advocate v Clark*, a 15-year extended sentence was imposed following convictions for a series of sexual offences, including rape and coercion.⁴⁶

Specifically, the convictions returned by the jury were:

two charges of stalking, in contravention of the Criminal Justice (Scotland) Act 2010 section 39(1); two charges of engaging in a course of conduct which was abusive of a partner or ex-partner, in contravention of the Domestic Abuse (Scotland) Act 2018 section 1; two charges of sexual assault, in contravention of the Sexual Offences (Scotland) Act 2009 section 3; one charge of sexual assault by penetration, in contravention of the 2009 Act section 2; one charge of attempted sexual coercion, in contravention of the 2009 Act section 4 and another, separate charge of sexual coercion, also in contravention of section 4 of that Act; one composite charge libelling sexual coercion in terms of section 4 of the 2009 Act and also libelling the coercion of a person to be present during a sexual activity in terms of the 2009 Act section 5; and, finally, two charges of rape, in contravention of the Sexual Offences (Scotland) Act 2009 section 1.

The custodial period of the sentence was ten years with a further five on licence in the community. Indefinite non-harassment orders were also imposed in respect of two of the women and the offender was made subject to notification requirements in relation to the convictions for sexual offences. It was noted in sentencing that the offender presented a high risk to women.

⁴⁶ 2023, unreported. Sentencing statement. Available on request from the Scottish Judiciary.

Similarly, in *HM Advocate v McKay*,⁴⁷ the offender was convicted of twenty charges towards three complainers over a 24-year period. A charge of stalking also related to behaviour towards a fourth complainer over a four-year period. Here, an Order for Lifelong Restriction was imposed with a minimum period of six years' imprisonment, alongside indefinite non-harassment orders in relation to all four complainers.

*HM Advocate v Ramsay*⁴⁸ demonstrates a case where stalking was charged under section 1 of the Domestic Abuse (Scotland) Act 2018. Ramsay was convicted of 16 charges of partner abuse against nine women. An extended sentence of 16 years consisting of a custodial term of 13 years and an extension period of three years was imposed and in sentencing, Lord Richardson made the following comments:

it is clear to me, that you subjected each of these women to abuse: – you frightened them; you threatened them; you stalked them; you subjected them, to a really extraordinary and intolerable degree, to repeated and unwanted communication.

At worst, you physically assaulted 3 of the women and you raped 4 of them.

These women appear to have little in common beyond having had the misfortune to have encountered you.

However, the common thread running through your conduct to all of these women is that you were not prepared to take “no” for an answer – from these women - whether in relation to being in communication with you; being in a relationship with you; or having sexual relations with you.

2.3.2 Sentencing appeals

Due to the size of the jurisdiction and the relatively short period of time that the offence has been in force, there are only a small number of appeal judgments related to section 39, with an even smaller number related to sentencing. These are discussed below.

⁴⁷ 2023, unreported. Sentencing statement. Available on request from the Scottish Judiciary.

⁴⁸ 2022, unreported. Sentencing statement. Available on request from the Scottish Judiciary.

In *McLean v HM Advocate*, a custodial sentence of 30 months was quashed and substituted with one of two years, discounted to 18 months.⁴⁹ The appellant had been convicted under section 38(1) and section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010 by way of repeatedly contacting his ex-partner whilst in custody for assaulting her to her severe injury. In doing so, he was also in breach of a non-harassment order in place at the time. It was held that a custodial sentence was appropriate due to the conviction for assault to severe injury but that the contact in charge 1 was “conciliatory”; he had not entered the property in charge 2, and in charge 4 there was no physical contact or injury and that his words were use in “anger”. The imposition of a further non-harassment order was considered justified having regard to the longstanding history of “tension” between McLean and the complainer.

Murray v HM Advocate involved an appeal against sentence for engaging in an unspecified course of conduct against an ex-partner which caused her fear and alarm.⁵⁰ The original sentence of 21 months’ imprisonment was quashed and substituted for a community payback order for a period of two years with a supervision requirement and requirement to perform 200 hours’ unpaid work in the community. It was commented that whilst “the appellant had undoubtedly engaged in unpleasant and offensive behaviour” there were no incidents of physical violence towards the complainer; that his age (21) must be taken into account alongside the fact that he did not have a history of criminal conduct, and that he had already served a period of over four months’ imprisonment.

Miller v HM Advocate considered section 39 in the context of the doctrine of art and part liability.⁵¹ Here the appellants were the ex-partner and daughter of the complainer. From an initial 14 charges libelled, including assaults and stalking against the complainer, they were convicted of three charges. The first appellant, Kevin Miller, was sentenced to six months’ imprisonment for assault and 12- and 16-months’ imprisonment for two charges of stalking, all to be served consecutively. A non-harassment order was also imposed since the complainer was his ex-partner

⁴⁹ [2015] HCJAC 46.

⁵⁰ [2018] HCJAC 27. It is not entirely obvious why this case proceeded on the basis of art and part liability since there was evidence relating to the conduct of each appellant individually.

⁵¹ 2022 J.C. 33.

and the offence was aggravated by section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. The second appellant, Lauren Miller, was ordered to undertake 280 hours of unpaid work in the community within nine months. Both appealed against conviction and sentence. The stalking convictions were quashed. It was held that the Crown had not done enough to establish the common criminal purpose required for art and part liability and that it was unclear on what basis the necessary intent or knowledge had been established. They noted:

...it is not itself a contravention of sec 39(1) of the 2010 Act for a husband or a daughter to contact an estranged wife or mother to proffer apologies, or to seek to persuade her to return home. Such conduct could only constitute a contravention of sec 39 of the Act if in fact it had the necessary effect, and the necessary intention or knowledge on the part of the accused.⁵²

Given that the context of the charges included contacting the complainer at a women's refuge, and in the case of Kevin Miller, contacting her in contravention of an interdict which prohibited such contact, this case serves as an important reminder to those prosecuting and directing juries to clearly establish the *mens rea* which on the basis of the evidence led, and, art and part liability if utilised in this context. As Lord Turnbull directed in the full judgement:

The appeal highlights the difficulties which can ensue when the parties to a case fail properly to isolate and identify the essential legal components of such a charge and when the Crown fail to set out a coherent and logical analysis of the basis upon which they invite the jury to be satisfied that the accused persons engaged in conduct which was criminal and did so whilst acting in concert.

It would also appear from the facts of the case that aggravations under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 can apply to non-partners in cases where the doctrine of art and part liability is used as a route to achieve a conviction.

⁵² Ibid, para 45.

2.4 Scottish sentencing guidelines

At the time of writing, the High Court of Justiciary has approved four sentencing guidelines developed by the Scottish Sentencing Council. Three of these approved guidelines are of potential relevance to the sentencing of offences involving stalking: the Principles and Purposes of Sentencing Guideline; the Sentencing Process Guideline; the Sentencing Young People Guideline.⁵³ Approved guidelines are intended to be read alongside one another.

The principles and purposes of sentencing guideline requires all sentences to be fair and proportionate. This core principle requires that:

- all relevant factors of a case must be considered including the seriousness of the offence, the impact on the victim and others affected by the case, and the circumstances of the offender;
- sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case;
- reasons for sentencing decisions must be stated as clearly and openly as circumstances permit;
- sentencing decisions must be made lawfully and sentencers must have regard to any sentencing guidelines which are applicable;
- people should be treated equally, without discrimination; and
- sentencing decisions should treat similar cases in a similar way, assisting consistency and predictability

⁵³ Scottish Sentencing Council., 2018. *Principles and Purposes of Sentencing: Sentencing Guideline*. Available at: < <https://www.scottishsentencingcouncil.org.uk/media/j1jo1tw2/guideline-principles-and-purposes-of-sentencing.pdf> > [Last accessed 24 March 2024]; Scottish Sentencing Council., 2021. *The Sentencing Process: Sentencing Guideline*. Available at: < <https://www.scottishsentencingcouncil.org.uk/media/jtbhlsre/the-sentencing-process-guideline-d.pdf> > [Last accessed 24 March 2024]; Scottish Sentencing Council., 2022. *Sentencing Young People: Sentencing Guideline*. Available at: < <https://www.scottishsentencingcouncil.org.uk/media/4d3piwmw/sentencing-young-people-guideline-for-publication.pdf> > [Last accessed 24 March 2024]. The fourth guideline published at the time of the writing, relates to sentencing cases of death by driving.

The sentence selected should be best achieve the purposes of sentencing relevant to the case and might include: protection of the public, punishment, rehabilitation of offenders, allowing the offender the opportunity to make amends and expressing disapproval of the offending behaviour.

The sentencing process guideline sets out a series of steps that should be considered by the sentencer. In arriving at the headline sentence, the sentencer should assess the seriousness of the offence, select the sentencing range, and identify relevant aggravating and mitigating factors. Aggravations will include statutory aggravations such as abuse of a partner or ex-partner, as contained within section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.⁵⁴ Annex B provides examples of aggravating factors which include the vulnerable of the victim, abuse of trust by the offender and previous convictions, especially where they suggest a pattern of offending. Annex C provides examples of possible mitigatory factors, and these include remorse and the effect that any sentence may have on their own family.

The guideline advises that consideration should then be given to a guilty plea (as per section 196 of the Criminal Procedure (Scotland) Act 1995) and any time already spent in custody. There should also be a consideration of any ancillary orders. An example of an ancillary order relevant to the sentencing of stalking cases would be a non-harassment order. Thereafter, the sentence should be imposed, and reasons given.

Against the background of an understanding that a young person has lower levels of maturity and greater opportunity for rehabilitation and change, the young persons guideline directly links maturity to culpability and places rehabilitation as the primary purpose of sentencing. For the purposes of the guideline, a young person is considered to be under the age of 25 at the age of their plea of guilty or when a finding of guilt against them is made. The guideline has been the subject of discussion in the appeal of *HM Advocate v LB*. In this case, the Crown appealed against sentences imposed for three accused convicted of rape and related offences against domestic partners. LB had pled guilty to a series of offences against three former partners over a five-year period. A custodial sentence of 45 months was

⁵⁴ Statutory aggravations are also provided in Annex A of the Guideline.

imposed alongside a sexual offences prevention order. The trial judge considered that LB was “the paradigm example of the individual to whom the Scottish Sentencing Council (‘SSC’) guideline on the sentencing of young people applied”.⁵⁵ The court noted in the appeal, which was allowed, that even before the introduction of the Guideline, cases involving sentences of five years or less tended to involve young accused.⁵⁶

3.0 Sentencing Framework in England and Wales

Whilst Scotland has its own legal system, it shares many similarities in terms of legal structures and sentencing options with England and Wales. This section sets out the statutory framework for stalking and harassment offences in England and Wales; discusses the Sentencing Council for England and Wales’ (SCEW) definitive guideline for sentencing stalking and harassment offences; provides a qualitative summary of relevant and illustrative case law; and considers the quantitative data available on victims and police recorded figures these offences.

3.1 The legal framework

Whereas Scotland has one primary standalone offence of stalking, in England and Wales there are several discrete stalking- and harassment-related offences contained across a number of Acts of Parliament. Additionally, it may be possible to charge conduct amounting to one of these specific stalking/harassment offences as the offence of controlling or coercive behaviour in an intimate or family relationship.⁵⁷

SCEW has produced sentencing guidelines for most of these separate offences. These guidelines are discussed below at Section 3.2. However, it is important to take cognisance of the major differences in the Scottish and English and Welsh offences.

⁵⁵ 2023 J.C. 97, para 17.

⁵⁶ *Ibid*, para 120.

⁵⁷ Serious Crime Act 2015, section 76. Note that Crown Prosecution Service practice appears to be to charge conduct as coercive or controlling behaviour instead of certain (summary level) harassment or stalking offences due to the powers available at sentence: Crown Prosecution Service., 2018. *Stalking or harassment*. Available at: < <https://www.cps.gov.uk/legal-guidance/stalking-or-harassment> > [Last accessed 3 March 2024].

It may be that these differences render it difficult or inappropriate to place too much reliance on, or to be overly inspired by, the SCEW guidelines/sentencing practice in England and Wales.⁵⁸ Conversely, it is perhaps worth noting that while a benefit of the Scottish single-offence approach may be the promotion of simplicity in the law, a benefit of the legislative framework in England and Wales (insofar as sentencing considerations go) may be that the discrete offences provide some pre-existing gradation of, *inter alia*, the defendant's culpability, and that these gradations may be equally applicable to the Scottish context, both in terms of 'fair-labelling' and the sentence attached to a specific offence.

3.1.1 Protection from Harassment Act 1997

The Protection from Harassment Act 1997 (as amended)⁵⁹ (hereinafter 'the 1997 Act') contains four stalking- and harassment-related offences. These are: harassment (section 2); stalking (section 2A)⁶⁰; putting people in fear of violence (section 4);⁶¹ and stalking involving fear of violence or serious alarm or distress (section 4A). All four offences require the defendant to have engaged in a course of conduct, which is defined as:

- (a) in the case of conduct in relation to a single person...conduct on at least two occasions in relation to that person, or
- (b) in the case of conduct in relation to two or more persons...conduct on at least one occasion in relation to each of those persons.⁶²

⁵⁸ For further discussion on comparisons between the jurisdictions in the context of sentencing, see: Gormley, J., Roberts, J.V., Pina-Sánchez, J., Tata, C., and Veiga, A., 2022. *The Methodological Challenges of Comparative Sentencing Research*. Edinburgh: Scottish Sentencing Council.

⁵⁹ Serious Organised Crime and Police Act 2005; Protection of Freedoms Act 2012. The latter (2012) Act inserted sections 2A and 4A into the 1997 Act.

⁶⁰ Stalking was introduced as a distinct offence because it was considered that those experiencing it had a lack of confidence in the justice system. For discussion see: Justice Unions' Parliamentary Group, 2012., *Independent Parliamentary Inquiry into Stalking Law Reform: Main Findings and Recommendations*. See also: House of Commons Library., 2018. *The Protection from Harassment Act 1997*. Available at: <<https://commonslibrary.parliament.uk/research-briefings/sn06261/#:~:text=The%20campaign%20led%20to%20an,of%20a%20package%20of%20reforms>> [Last accessed 3 March 2024].

⁶¹ Note SCEW Definitive Guideline calls this offence 'Harassment (putting people in fear of violence)', i.e. another form of harassment.

⁶² Protection from Harassment Act 1997, section 7(3).

The offences of harassment and stalking under sections 2 and 2A (respectively) are triable only summarily. As such, they carry a maximum sentence of six months' imprisonment and/or a fine not exceeding level 5 on the standard scale.⁶³ The SCEW Definitive Guideline set out sentencing ranges for these (and other) offences, and are discussed below. The Guideline now clarify the maximum and minimum sentences and appropriate sentence ranges, with the starting point being 12 weeks' imprisonment.⁶⁴

The offence of harassment can be committed against one, or against two or more, persons. Where the offence is committed against one person, the *actus reus* of the offence is "a course of conduct which amounts to harassment"; section 7(1) further states that "References to harassing a person include alarming the person or causing the person distress". The *mens rea* of the offence is where the defendant:

knows or ought to know' their actions amount to harassment.⁶⁵ Where the offence is committed against two or more persons, there is an additional requirement that the defendant 'intends to persuade any person ... not to do something that he is entitled or required to do, or ... to do something that he is not under any obligation to do'.⁶⁶

The Crown Prosecution Service (CPS) Guidance on Stalking or Harassment notes that this:

...covers collective harassment, whether directed towards members of the same family, neighbourhood, protected characteristics, trade or profession, organisation, or institution.⁶⁷

By contrast, the offence of stalking is committed where, first, the offence of harassment against one person is made out and, furthermore, "the course of conduct amounts to stalking".⁶⁸ Conduct may amount to stalking either by acts or omissions,

⁶³ References to level 5 fines are now to be read as "an unlimited fine" for offences committed after 12 March 2015 as per the Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 85(1).

⁶⁴ The legislation says that the maximum sentence for stalking is 51 weeks per section 2A(4). Section 2A(5) clarifies that: "In relation to an offence committed before the commencement of section 281(5) of the Criminal Justice Act 2003, the reference in subsection (4) to 51 weeks is to be read as a reference to six months.". Section 281(5) is not in force.

⁶⁵ Ibid, section 1(1).

⁶⁶ Ibid, section 1(1A)(c).

⁶⁷ Crown Prosecution Service., 2018. (n 57).

⁶⁸ Protection from Harassment Act 1997, section 2A(1).

and such conduct can include: following a person; contacting or attempting to contact a person by any means; publishing any statement or other material relating to, purporting to relate to, or purporting to originate from a person; monitoring the use by a person of the internet, email, or other electronic communication; loitering in any place (whether public or private); interfering with any property in possession of a person; and/or watching or spying on a person.⁶⁹ The CPS Guidance states that:

This is not an exhaustive list', and that "stalking" may be understood as a pattern of Fixated, Obsessive, Unwanted and Repeated (FOUR) behaviour which is intrusive.⁷⁰

The offences under the 1997 Act of putting people in fear of violence (section 4) and of stalking involving fear of violence or serious alarm or distress (section 4A) are triable either way. On summary conviction, the maximum sentence for both offences is one of six months' imprisonment and/or a fine not exceeding the statutory maximum.⁷¹ On conviction on indictment, the maximum sentence for both offences is one of ten years' imprisonment and/or a fine.⁷²

The *actus reus* of the offence of putting people in fear of violence is where the defendant's 'course of conduct causes another to fear, on at least two occasions, that violence will be used against him'.⁷³ The *mens rea* is where the defendant "knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions".⁷⁴ The applicable legal test with regards to the *mens rea* is "if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion".⁷⁵ A key difference between this offence and the offences of harassment and stalking under sections 2 and 2A (respectively) is the requirement of causing fear of violence (as opposed to causing alarm or distress). However, a jury can return a verdict of not guilty to the section 4 offence of putting people in fear of violence and instead find the defendant guilty of either section 2 harassment or section 2A stalking.⁷⁶ In these circumstances,

⁶⁹ Section 2A(3).

⁷⁰ Crown Prosecution Service., 2018. (n 57).

⁷¹ Sections 4(4)(b) and 4A(5)(b).

⁷² Sections 4(4)(a) and 4A(5)(a).

⁷³ Section 4(1).

⁷⁴ Ibid.

⁷⁵ Section 4(2).

⁷⁶ Section 4(5).

“The Crown Court has the same powers and duties...as a magistrates’ court would have”.⁷⁷

The *actus reus* of the offence of stalking involving fear of violence or serious alarm or distress is where the defendant’s course of conduct amounts to stalking (which is given the same definition as for the section 2A offence)⁷⁸ and either “causes another (B) to fear, on at least two occasions, that violence will be used against B”, or “causes B serious alarm or distress which has a substantial adverse effect on B’s usual day-to-day activities”.⁷⁹ The *mens rea* of the offence is where A “knows or ought to know” (judged according to a ‘reasonable person’ test) that B would be caused fear of violence, or such serious alarm or distress.⁸⁰ The CPS Guidance cites Home Office guidelines to provide examples of what may constitute a “substantial adverse effect on another’s usual day-to-day activities”. These include the victim: changing their routes to work, work patterns, or employment; arranging for friends or family to pick up children from school to avoid contact with the stalker; putting in place additional security measures in their home; moving home; suffering an impact to their physical or mental health, or a deterioration in work performance due to stress; and/or stopping or changing the way they socialise.⁸¹

3.1.2 Crime and Disorder Act 1998

The Crime and Disorder Act 1998 contains, in section 32, further stalking- and harassment-related offences. These offences are triable either way.

Section 32(1)(a) of the 1998 Act creates racially or religiously aggravated versions of the offences under sections 2 (harassment) or 2A (stalking) of the 1997 Act.⁸² The maximum penalties on conviction are increased compared to the ‘basic’ offences: it

⁷⁷ Section 4(6).

⁷⁸ Sections 2A(2).

⁷⁹ Section 4A(1).

⁸⁰ Section 4A(2)-(3).

⁸¹ Crown Prosecution Service., 2018. (n 57).

⁸² Section 32(1)(a).

is triable either way and the maximum custodial sentence on conviction is up to two years' imprisonment.⁸³

Section 32(1)(b) of the 1998 Act creates racially or religiously aggravated versions of the offences under sections 4 (putting people in fear of violence) or 4A (stalking involving fear of violence or serious alarm or distress) of the 1997 Act.⁸⁴ On conviction on indictment the maximum custodial sentence is up to 14 years' imprisonment.⁸⁵ The CPS Guidance notes that where a 1997 Act offence is not racially or religiously aggravated, but "involves hostility based upon sexual orientation, transgender identity or disability, then the sentence uplift provisions of section 66 Sentencing Act 2020 will apply".⁸⁶

3.1.3 Criminal Justice and Police Act 2001

The Criminal Justice and Police Act 2001, section 42A, creates an offence of harassment etc of a person in his home. This offence is triable only summarily and carries a maximum sentence of six months' imprisonment and/or a fine not exceeding level 4 on the standard scale.⁸⁷ The *actus reus* of the offence is (a) being present outside or in the vicinity of any premises used by any individual as a dwelling;⁸⁸ (b) the purpose of which (by presence or otherwise) is of representing to, or persuading, the resident or another individual, that he should not do something that he is entitled or required to do, or that he should do something that he is not under any obligation to do;⁸⁹ and (c) that the presence amounts to or is likely to result in the harassment of, or cause alarm or distress to, the resident.⁹⁰ The *mens rea* of the offence is an intention that the presence amounts to the harassment of, or to cause alarm or distress to, the resident; or where the defendant knows or ought to

⁸³ Section 32(3). As noted above, the 'basic' offences are triable only summarily, with a maximum fine of level 5 on the standard scale.

⁸⁴ Section 32(1)(b).

⁸⁵ Section 32(4). The maximum sentence on conviction on indictment for the 'basic' offence is ten years' imprisonment.

⁸⁶ Crown Prosecution Service., 2018. (n 57). The Sentencing Act 2020, section 66(2) states that "The court ... must treat the fact that the offence is aggravated by hostility of any of those types as an aggravating factor, and ... must state in open court that the offence is so aggravated".

⁸⁷ Section 42A(5).

⁸⁸ Section 42A(1)(a).

⁸⁹ Section 42A(1)(b).

⁹⁰ Section 42A(1)(d).

know that his presence is likely to result in harassment or cause alarm or distress to the resident.⁹¹ The test for this is whether “a reasonable person in possession of the same information would think that A's presence was likely to have that effect”.⁹²

3.1.4 Malicious Communications Offences

Behaviour which might amount to stalking could potentially be charged as a malicious communications offence. Section 1 of the Malicious Communications Act 1988 creates an offence of sending a letter, electronic communication, or article of any description which conveys a message which is indecent or grossly offensive, where the purpose of sending it is to cause distress or anxiety to the recipient. A course of conduct does not have to be proved. This carries a maximum sentence of two years' imprisonment on indictment. Similarly, the Communications Act 2003, section 127 discussed in Section 1.4 above, may be relevant. There is an SCEW Guideline for Communication Network Offences.⁹³

With so many charging options available, CPS guidance⁹⁴ notes that, in practice, prosecutors should charge offences in following order: first, stalking involving fear of violence or serious alarm or distress under section 4A of the 1997 Act; second, putting people in fear of violence under section 4 of the 1997 Act; and third, coercive and controlling behaviour under the Serious Crime Act 2015, section 76. As the maximum sentence for coercive and controlling behaviour is five years' imprisonment, the CPS Guidance states that this offence ‘is likely to be the most appropriate charge in relation to the powers available at sentence, even where section 2A stalking or 2 harassment are also available’. The data on stalking/harassment prosecutions and convictions is discussed at Section 3.4 below.

⁹¹ Section 42A(1)(c).

⁹² Section 42A(4).

⁹³ Sentencing Council., 2017. *Communication Network Offences Guideline*. Available at: < <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/communication-network-offences-revised-2017/> > [Last accessed 3 March 2024].

⁹⁴ Crown Prosecution Service., 2018. (n 57).

3.2 Sentencing Guidelines for Stalking and Harassment

3.2.1 Background

The SCEW introduced a Definitive Guideline covering ‘intimidatory offences’, effective from 1 October 2018.⁹⁵ The offences included in the Definitive Guideline are the four stalking- and harassment-related offences under the 1997 Act; the racially or religiously aggravated versions of those offences under the 1998 Act; disclosing private/intimate images;⁹⁶ coercive and controlling behaviour in an intimate or family relationship;⁹⁷ and making threats to kill.⁹⁸ The Consultation Document accompanying the Draft Guidelines explained the rationale for grouping these offences together:

As there are certain similarities between these offences, the Council decided to group them together under the title ‘Intimidatory’ offences. The title ‘Intimidatory’ has been used given that the definition of intimidate (to frighten, overawe, to subdue or influence) aptly covers the types of offences covered within this draft guideline... Given the crossover between the types of offences contained within this draft guideline, and some of the themes running through the revised domestic abuse guidance, it was decided to consult jointly on both guidelines.⁹⁹

The “revised domestic abuse guidance” referred to above was an update to guidance published in 2006. The SCEW stated that:

[the 2006] guidance is now out of date and does not reflect the changes in terminology, expert thinking and society’s views around this important and sensitive area of sentencing.¹⁰⁰

⁹⁵ Sentencing Council., 2018. *Intimidatory Offences Guideline*. Available at: < <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-sentencing-guidelines/about-published-guidelines/intimidatory-offences/>> [Last accessed 3 March 2024].

⁹⁶ Criminal Justice and Courts Act 2015, section 33.

⁹⁷ Serious Crime Act 2015, section 76.

⁹⁸ Offences against the Person Act 1861, section 16.

⁹⁹ Sentencing Council of England and Wales., 2017. *Intimidatory Offences and Domestic Abuse Guidelines Consultation*, at p 4. Available at: < <https://www.sentencingcouncil.org.uk/wp-content/uploads/Intimidatory-offences-Consulation-Paper-WEB.pdf>> [Last accessed 3 March 2024].

¹⁰⁰ Ibid.

For example, ‘according to the 2006 guidance, that an offence entailed domestic abuse should not have been considered a mitigating factor’.¹⁰¹ The aim of creating a revised standalone Domestic Abuse Guideline (which has been effective from 24 May 2018) was to have one which “would be cross referenced to by all other relevant guidelines” and would recognise that:

The domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship...Domestic abuse offences are regarded as particularly serious within the criminal justice system.¹⁰²

It is, therefore, essential to read the SCEW guidelines for sentencing stalking- and harassment-related offences alongside the revised guidance for domestic abuse where these offences have been committed in a domestic abuse context, given that a “critical point of the current Guideline is that it functions to position domestic abuse as being more serious than comparable non-domestic abuse offences”.¹⁰³

There are two sets of applicable guidelines specific to stalking- and harassment-related offences.¹⁰⁴ One covers the summary-only offences of harassment and stalking, as well as the racially or religiously aggravated versions thereof (for brevity, hereinafter referred to as the Summary Offences Guideline).¹⁰⁵ The other covers the triable either way offences of putting people in fear of violence and of stalking involving fear of violence or serious alarm or distress, and, again, the racially or religiously aggravated versions thereof (hereinafter the Either Way Offences

¹⁰¹ McPherson, R., Gormley, J., and Wheate., R., 2021. *The Sentencing of Offences Involving Domestic Abuse in Scotland*. Edinburgh. Scottish Sentencing Council. at p 31.

¹⁰² Sentencing Council of England and Wales., 2018. *Overarching Principles: Domestic Abuse*. Available at : <<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/domestic-abuse/>> [Last accessed 3 March 2024].

¹⁰³ McPherson, R., Gormley, J., and Wheate., R., 2021. (n 101), at p 32.

¹⁰⁴ Note that there are four Sentencing Council URLs: the same set of guidelines are duplicated for the magistrates court and the Crown court.

¹⁰⁵ Sentencing Council of England and Wales., 2018. *Harassment/Stalking/Racially or religiously aggravated harassment/stalking*. Available at : <<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/harassment-stalking-racially-or-religiously-aggravated-harassment-stalking/>> [Last accessed 3 March 2024].

Guideline).¹⁰⁶ The following section outlines the areas of commonality and difference between the two Guidelines.

3.2.2 Commonalities and Differences between the Summary Offences Guideline and the Either Way Offences Guideline

Both Guidelines approximately stipulate the same overall process sentencers should follow. For example, the Draft Guidelines stated that the approach courts should take to racially or religiously aggravated stalking- or harassment-related offences was to “decide on the sentence for the basic offence first, without taking account of the element of aggravation, and then make an addition to the sentence considering the level of aggravation involved”.¹⁰⁷ This approach is restated in the published Guidelines, and is Step Three. However, there are key differences between the two Guidelines, which reflect the comparative seriousness of the summary and either way offences. For example, the sentence range in the Summary Offences Guideline is a discharge to 26 weeks’ custody, whereas the sentence range in the Either Way Offences Guideline is a fine to eight years’ custody.

In both Guidelines, Step One requires sentencers to determine the offence category based on the offender’s culpability and the harm caused. In the Summary Offences Guideline, culpability is determined according to an A/B/C (High/Medium/Lesser) scale. By contrast, in the Either Way Offences Guideline, culpability is determined according to an A/B/C/D (Very High/High/Medium/Lesser) scale. The Category A (Very High) culpability in the Either Way Offences Guideline is marked by the “extreme nature of one or more culpability B factors or the extreme culpability indicated by a combination of culpability B factors may elevate to category A”.

Category A (High) culpability in the Summary Offences Guideline is roughly equivalent, in terms of the criteria used, to Category B (High) in the Either Way Offences Guideline; criteria which are common to both Guidelines are:

¹⁰⁶ Sentencing Council of England and Wales., 2018. *Harassment (fear of violence)/Stalking (fear of violence)/Racially or religiously aggravated harassment (fear of violence)/stalking (fear of violence)*. Available at : <<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/harassment-fear-of-violence-stalking-fear-of-violence/>> [Last accessed 3 March 2024].

¹⁰⁷ Sentencing Council of England and Wales., 2017. (n 99). at p 60.

- Conduct intended to maximise fear or distress
- High degree of planning and/or sophisticated offence
- Persistent action over a prolonged period
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: age, sex, disability, sexual orientation or transgender identity

Category B (Medium) culpability in the Summary Offences Guideline is roughly equivalent to Category C (Medium) in the Either Way Offences Guideline; criteria which are common to both Guidelines are:

- Conduct intended to cause some fear or distress
- Some planning; [and] Scope and duration of offence that falls between categories [High] and [Lesser]

Last, Category C (Lesser) culpability in the Summary Offences Guideline is roughly equivalent to Category D (Lesser) in the Either Way Offences Guideline; criteria which are common to both Guidelines are:

- Offender's responsibility substantially reduced by mental disorder or learning disability
- Little or no planning
- Offence was limited in scope and duration

The difference in the culpability criteria used between the Guidelines is that the Summary Offences Guideline includes the criterion of "Threat of (serious) violence" in the A and B categories. This criterion presumably does not appear in the Either Way Offences Guideline as the *actus reus* for the sections 4 and 4A offences in the 1997 already includes a threat of violence. Similarly, the Either Way Offences Guideline includes, in Category D, the criterion 'Conduct unlikely to cause significant fear or distress', which does not appear in the Summary Offences Guideline.

Both Guidelines use the same 1/2/3 scale for assessing harm, and the criteria for each category is replicated across both.¹⁰⁸ Category 1 harm includes: "Very serious

¹⁰⁸ For further discussion see: Roberts, J.A., and Rafferty, A. 2011. Sentencing Guidelines in England and Wales: Exploring the new format. 9 *Criminal Law Review* 681-689.

distress caused to the victim; Significant psychological harm caused to the victim; [and] Victim caused to make considerable changes to lifestyle to avoid contact”.

Category 2 harm includes:

Some distress caused to the victim; Some psychological harm caused to the victim; [and] Victim caused to make some changes to lifestyle to avoid contact’. Category 3 harm includes: ‘Limited distress or harm caused to the victim.

In both Guidelines, Step Two requires sentencers to select a starting point sentence from a table displaying a range of sentencing options, based on the degree of culpability and harm identified in Step One. Further guidance is given to sentencers regarding fines, community orders, and custodial sentences. At this Step, courts should also take into account a non-exhaustive list of aggravating or mitigating factors, which are the same across both Guidelines. Statutory aggravations include previous convictions and offences committed on bail. Other aggravations include using a position of trust to facilitate the offence; the vulnerability of the victim; the sending of grossly violent or offensive material; and the impact of the offence on others, particularly children. Mitigating factors include no previous (relevant) convictions; remorse; good character; and certain serious medical conditions.

Step Three, which only applies to racially or religiously aggravated harassment/stalking offences, requires that:

Having determined the category of the basic offence to identify the sentence of a non-aggravated offence, the court should now consider the level of racial or religious aggravation involved and apply an appropriate uplift to the sentence.

Magistrates are directed to commit for sentence to the Crown Court where, “although the appropriate sentence for the basic offence would be within their powers, the appropriate increase for the aggravated offence would result in a sentence in excess of their powers”¹⁰⁹

¹⁰⁹ Under section 21 of the Sentencing Act 2020, magistrates can commit to Crown Court for sentencing either-way offences in certain circumstances. The Crown Court can then sentence a conviction for a summary-level offence with the same sentencing powers which would be available if the conviction was on indictment.

There are three levels of racial or religious aggravation (high, medium and low) and corresponding sentence uplift. Sentencers should “Increase the length of custodial sentence if already considered for the basic offence or consider a custodial sentence, if not already considered for the basic offence”, where there is a high level of racial or religious aggravation:

- Racial or religious aggravation was the predominant motivation for the offence.
- Offender was a member of, or was associated with, a group promoting hostility based on race or religion (where linked to the commission of the offence).
- Aggravated nature of the offence caused severe distress to the victim or the victim’s family (over and above the distress already considered at step one).
- Aggravated nature of the offence caused serious fear and distress throughout local community or more widely.

Sentencers should “Consider a significantly more onerous penalty of the same type or consider a more severe type of sentence than for the basic offence”, where there is a medium level of racial or religious aggravation:

- Racial or religious aggravation formed a significant proportion of the offence as a whole.
- Aggravated nature of the offence caused some distress to the victim or the victim’s family (over and above the distress already considered at step one).
- Aggravated nature of the offence caused some fear and distress throughout local community or more widely.

Finally, sentencers should “Consider a more onerous penalty of the same type identified for the basic offence”, where there is a low level of religious or racial aggravation:

- Aggravated element formed a minimal part of the offence as a whole.
- Aggravated nature of the offence caused minimal or no distress to the victim or the victim’s family (over and above the distress already considered at step one).

Both Guidelines include, in the remaining steps, consideration of: any factors which indicate a reduction for assistance to the prosecution; reduction for guilty pleas; the totality principle; and compensation and ancillary orders. The only difference here is that the Either Way Offences Guideline includes an additional step (Step Six) of an assessment of “Dangerousness”:¹¹⁰

For offences contrary to section 4 or section 4A of the Protection from Harassment Act 1997 the court should consider whether having regard to the criteria contained in Chapter 6 of Part 10 of the Sentencing Code it would be appropriate to impose an extended sentence (sections 266 and 279).

3.3 Sentencing Appeals

This section provides a qualitative summary of case law on sentencing stalking offences in England and Wales. Focus is given to appeals against sentence heard by the Crown Court, as this is where the application of the SCEW Guidelines to specific case facts is most closely examined, and the limits of each harm and culpability category are tested. To ensure this summary is relevant to the overall focus of this literature review, particularly given the large number of discrete stalking- and harassment-related offences in England and Wales (and the large number of reported cases), only stalking offences under sections 2A and 4A of the 1997 Act (i.e., not harassment) are considered. Additionally, to reflect current sentencing practice, the period covered here is from the effective date of the SCEW Guidelines (1 October 2018) to the writing of this literature review (February 2024). Interestingly, there were no reported cases found during this period concerning an appeal against sentence for a racially or religiously aggravated stalking offence under the 1998 Act.¹¹¹ Cases which are particularly illustrative – whether because they contain unique facts; are strongly representative of categories of seriousness; or contain particularly clear or sophisticated working out/reasoning – have been highlighted.

¹¹⁰ It is rare for the court, on an appeal against sentence, to overturn a decision on whether an offender was dangerous: *Howlett* [2019] EWCA Crim 1224.

¹¹¹ There are, however, a limited number of appeals against sentence for racially or religiously aggravated harassment offences under section 32 of the 1998 Act during this period. See, eg: *Nelson* [2022] EWCA Crim 1080 (an application by the Solicitor General for leave to refer the respondent's sentences as being unduly lenient granted, and suspended sentences quashed and substituted for terms of immediate custody).

Cases relating to the basic section 2A offence of stalking are discussed first, before moving on to cases relating to the section 4A offence.

Three appeals against sentence cases for a section 2A offence have been included in this summary, and total of 24 section 4A cases have been included. The far greater of number reported cases for section 4A offences compared to those for the basic section 2A offence of stalking are likely reflective of CPS practice to prioritise charging criminal conduct under section 4A or as coercive or controlling behaviour, “even where section 2A stalking ... are also available”.¹¹² The section 4A cases are divided and discussed under the headings of medium, high and very high seriousness, as for sentencing purposes a B2 category offence is the same as a C1, an A2 equivalent to B1, and A1 in its own category.

It is worth noting here that no offending, in any of the cases identified during the period under examination, was placed in the level 3 category of harm or in the ‘lesser’ category of culpability (level C for section 2A offences or level D for section 4A offences) by either the trial judge or the Appeal Court.

3.3.1 Section 2A Offences

Three section 2A cases of stalking were identified, and all were categorised as category A1 (high culpability, high harm) offending. This has a starting point of 12 weeks’ custody, and a sentence range of a high-level community order to 26 weeks’ custody.

The appellant in *Latta*,¹¹³ who had a number of previous convictions including for assault and threatening behaviour, had been acquitted by a jury of stalking involving fear of violence or serious alarm or distress under section 4A of the 1997 Act, but was convicted of the alternative charge of section 2A stalking. He was given a suspended sentence of 12 weeks’ imprisonment (suspended for 18 months) by the trial judge. The Appeal Court held that:

¹¹² Crown Prosecution Service., 2018. (n 57).

¹¹³ [2023] EWCA Crim 1171.

no criticism can be made of the judge's assessment of the period of custody which would have been justified in this case. Indeed...a longer period of custody might well have been justified.¹¹⁴

The offending involved the appellant stalking his ex-partner with whom he had a daughter by, *inter alia*, making multiple phone calls in which he accused her of being with someone else, threatening her if she was, and visiting her parents' address and her workplace. He also checked up where she had been after she had used an Uber account which was in his name. The complainant described being very scared and nervous; had had to change her job due to the appellant showing up at her workplace; felt too scared to send their daughter to playschool after he had also turned up there; and changed the shops where she used to go. She had also purchased extra security for her parents' house and had sought medical attention from her GP who prescribed her sleeping tablets.

In *Brown*,¹¹⁵ the appellant had been convicted of stalking and arson, and had a criminal record for harassment of a former partner. He was married to the complainant 25 years prior to the offending, but they had rekindled their relationship. He became verbally abusive and set fire to her summer house, for which he was arrested and released on bail with a condition of non-contact. However, he then engaged in a course of conduct amount to stalking over a four-week period. He sent her multiple messages, made numerous phone calls, and left gifts for her at her work. The complainant described being fearful around fire; suffered from sleepless nights, panic attacks and anxiety; and felt vulnerable at work. The Appeal Court (and the appellant) agreed with the trial judge's culpability/harm categorisation,¹¹⁶ but it was held that the 26-week starting point sentence on the stalking count was excessive. While the 12-week starting point sentence in the Guidelines required an uplift to reflect the previous harassment conviction and the offending while on bail, this was set by the Appeal Court at 20 weeks.¹¹⁷

¹¹⁴ However, due to the trial judge's improper application of statutory provisions requiring credit to be given for time remanded in custody and time spent on bail, the sentence was quashed. See: Criminal Justice Act 2003, section 240ZA; Sentencing Act 2020, section 325.

¹¹⁵ [2023] EWCA Crim 457.

¹¹⁶ Note that there is some discrepancy in the judgment as to whether this was category A1 or A2 offending, but the reasoning and context suggest that references to category A2 are typographical errors.

¹¹⁷ The ultimate sentence, taking account of the guilty plea, was 12 weeks' custody.

3.3.2 Section 4A Offences of Medium Seriousness

For section 4A offences, the lowest categories of seriousness in the cases identified were C1 (medium culpability, high harm) and B2 (high culpability, medium harm). The starting point (36 weeks) and sentence range (12 weeks to 18 months) is the same for both of these categories. Seven such cases are discussed here.

Two cases identified resulted in suspended prison sentences. In *Moses*,¹¹⁸ a C1 case involving one count of assault and one of stalking, the Appeal Court quashed the original sentence of nine months' immediate custody. The Court held the appropriate starting point for the stalking was a reduced one of 12 months' imprisonment, but following a 25% guilty plea discount and taking into account the impact of Covid-19 on prisoners, the substituted sentence was one of nine months' custody, suspended for 18 months, and 100 hours of unpaid work. The appellant's stalking behaviour occurred over a period of approximately 35 days after separating from his ex-partner. It involved him, on separate occasions: showing up at his ex-partner's address; letting himself into a barn and her domestic property for brief periods of time; parking in her driveway before smashing a bottle on the ground and being abusive towards her; approaching her car while she was waiting in it and banging on the roof; aggressively following her car; and making numerous phone calls to her. The complainant stated that the appellant's conduct had made her struggle to trust people and had had an effect on her son. The appellant had previous convictions, including for assault and for breaching a non-molestation order.¹¹⁹

In *Bell*,¹²⁰ a B2 case involving two separate indictments for stalking, the Attorney-General's application to appeal the sentence as unduly lenient was dismissed. The offending on the first indictment, which received a nine-month sentence, suspended for 12 months, also related to a campaign of harassment following a breakup. This involved the offender, *inter alia*, making repeated phone calls; tracking the victim's telephone; cutting the valves of the victim's car tyres on multiple occasions; asking to resume the relationship; driving past the victim's house and following her in her car;

¹¹⁸ [2020] EWCA Crim 1169.

¹¹⁹ The breach related to a different former partner, where he had given her a mother's day card on behalf of their infant son.

¹²⁰ [2021] EWCA Crim 1275.

forcing his way into her house; and posting degrading and insulting messages online. The offending on the second indictment, which received a 12-month sentence, suspended for 24 months, involved him: intruding into the (same) victim's garden; walking outside the family home; parking nearby; and throwing things at the victim's car. The prosecution argued that if the two indictments were to be considered together as a single course of conduct the relevant category would be 2A, while each considered individually would be 2B. The trial judge considered that the offences should be treated separately, and sentenced consecutively, given that the offender had been arrested and charged but had still persisted. The victim stated she was worried about the appellant's dangerousness and had been afraid to take night shifts at her work. The offender had a previous record of harassment, and other aggravating features included offending on bail, but his full-time employment, guilty pleas, and low number of previous convictions were held to justify a suspended sentence. The offender's counsel noted there was no violent behaviour, grossly offensive material, or impact on children.

Two cases in which the category of offending was downgraded on appeal from B1 to C1 were *Doherty*¹²¹ and *Watson*.¹²² In another case, *Cosby*,¹²³ the category of offending was reduced from B1 to B2. *Doherty* was a case involving one count of neighbour stalking, in which a sentence of 40 weeks' custody was substituted for an original sentence of 30 months. Here the Appeal Court held that the allocation of high culpability was incorrect due to the relatively short period of offending in the charge (two and a half weeks) and the appellant's mental disorder (bipolar disorder and autism).

In *Watson*, a 27-month sentence was quashed and substituted with one of 16 months' imprisonment (taking into account a 10% guilty plea reduction). The appellant, who had no relevant previous convictions, had made over 120 threatening phone calls over a period of four days to his ex-partner. This was aggravated by the domestic context, including the effect on the victim's children and the offending occurring while on bail for assaulting the victim. While the Appeal Court held that the culpability was properly categorised at level C due to the appellant's lack of planning

¹²¹ [2022] EWCA Crim 1430.

¹²² [2023] EWCA Crim 1290.

¹²³ [2022] EWCA Crim 1773.

and the limited duration of offending, the appropriate sentence was near the top of the range, and that only immediate custody was appropriate.

In *Cosby*, which was also a case of stalking involving a substantial number of phone calls made over the course of a few days and was aggravated by a domestic context, the Appeal Court reduced the category of offending from B1 to B2. However, the Court substituted the original nine-month sentence with an identical nine-month sentence and stressed its reasons for this as being the domestic aggravation and the application of totality principle (the appellant was also convicted on the same indictment of actual bodily harm).

Two cases which the Appeal Court categorised as B2 stalking, and which also included a conviction for attempting to pervert the course of justice (whereby the offender sought the victim to drop the charges), were *Deanus*¹²⁴ and *Basri*.¹²⁵ In *Deanus*, the Appeal Court held a sentence of 12 months for stalking, consecutive with a 12-month sentence for perverting the course of justice, to be excessive. The offender had bombarded his ex-partner with messages, emails, letters and phone calls, and had turned up to her work and home addresses and followed her. He had asked the victim to drop the charges on a few occasions, but this was not intimidatory, prolonged, or accompanied by threats or offers of money. In mitigation, he was deemed to be young and immature, had no previous convictions, had gainful employment, and had expressed remorse. The Appeal Court agreed with the trial judge's B2 categorisation, but held that the starting point should have been in the middle, not at the top, of the category. Taking totality into account, the overall sentence was halved to 12 months' custody, with six-month sentences on each count.

In *Basri*, by contrast, the Appeal Court increased the sentence from one of ten months' custody (concurrent on each count of stalking and of attempting to pervert the course of justice) to one of two years' custody (16 months for stalking consecutive with eight months for attempting to pervert the course of justice) following an application by the Solicitor-General. A decade prior to the stalking libelled, the complainant (then aged 14) was sexually assaulted by Mr Basri, a family

¹²⁴ [2019] EWCA Crim 2021.

¹²⁵ [2020] EWCA Crim 1218.

friend. Thereafter, the complainant assisted him with going about his daily life as he was deaf. When he began repeatedly expressing his love for her, she asked him to stop contacting her, but he continued and threatened suicide if she would not marry him. He was charged with stalking, but the charge was not proceeded with and left on file. However, in a second course of conduct, he continued to send her messages from various online accounts and used her details to make accounts on dating websites. Additionally, he offered £5000 for her to drop the charges, which gave rise to the charge of attempting to pervert the course of justice. He eventually pleaded guilty to this latter charge and to the second stalking course of conduct, for which he received the original ten-month total sentence. The Appeal Court took the full context of Mr Basri's behaviour into account, and stated:

[T]he total sentence of 10 months' imprisonment failed properly to reflect the seriousness of the offending. We see considerable force in [the Solicitor-General's] submission that [the stalking] was a category 1B offence, but even if it was placed into category 2B on the basis that the level of harm caused by it fell just short of "very serious distress", the level of harm certainly justified a significant upward movement from the starting point. The aggravating features ... necessitated a further significant upward movement. This was a serious case of further offending on bail against a young woman who had been the victim of repeated previous offences and inappropriate behaviour by Mr Basri. It was a further indication that the lenient penalties imposed on Mr Basri for earlier offences had failed to deter him from continuing to make his victim's life a misery. There is no suggestion of any mental health issues affecting Mr Basri's culpability.

3.3.2 Section 4A Offences of High Seriousness

The starting point for A2 (very high culpability, medium harm) and B1 (high culpability, high harm) category offences is two and a half years' custody, and the sentencing range is between one and four years. One A2 case was identified in the period examined. Additionally, nine B1 cases have been included in this summary.

In the A2 case of *Watman*,¹²⁶ an appeal against a sentence of two years' custody was dismissed. The appellant had been convicted of one count of section 4A stalking which occurred over a period of nine days. After the complainant, his ex-partner, refused to meet him due to Covid-19 lockdown restrictions, he sent over 100 abusive messages and made 30 phone calls to her. The appellant then shared her phone number with friends and asked them to contact her with requests for nude pictures; he signed her up to an escort agency; and he changed the profile names on her Disney and Netflix accounts to "cheap cunt", which was seen by her children. He immediately confessed to the offending when questioned by police, was previously of good character, had a good job and stable home accommodation, had been sober for a year, and was considered low risk in the background report. However, given the sophisticated nature of the stalking and the impact on the complainant's children, the Appeal Court held that the trial judge correctly categorised the offending as A2 and that the sentence was not excessive.

A B1 case which attracted a sentence at the bottom of the sentencing range (12 months) is *Mitcheson*.¹²⁷ However, this low sentence was passed due to the offender's guilty plea, to reflect the principle of totality, and because of the offender's mental disorder stemming from negative childhood experiences. The offending was, in fact, in line with the two and a half year starting point.

The Court of Appeal held that 18-month sentences for counts of stalking were appropriate in the cases of *Shah*¹²⁸ and *Matthews*.¹²⁹ In *Shah*, the appellant had pleaded guilty to stalking, disclosing private sexual photos, and criminal damage. The total sentence was one of three years, with an 18-month term for the stalking. The appellant had sent his ex-partner many belittling and abusive messages and had frequently turned up at her workplace. This caused her supervisor to arrange for her never to be left alone during breaks and to be escorted by security to and from the car park. The appellant argued that the offending was sporadic and isolated, with no threats of violence, and that the 'B' culpability categorisation was therefore mistaken. However, the Appeal Court dismissed the appeal, holding that the trial

¹²⁶ [2020] EWCA Crim 1417.

¹²⁷ [2023] EWCA Crim 1614.

¹²⁸ [2024] EWCA Crim 50.

¹²⁹ [2022] EWCA Crim 681.

judge's categorisation was justified as the offending was over a prolonged period of four months. In *Matthews*, the offending comprised two counts of stalking which were given consecutive sentences of 18 months on appeal, for a total of three years.¹³⁰ The appellant, who had previous convictions for harassment of former partners, had bombarded an ex-partner with phone calls and messages, posted abusive messages online, and threatened to attend her work. The Appeal Court held that the appropriate starting point was a lowered one of two years, as duration of the offending (one month on count 1 and two weeks on count 2) was relatively short.

The cases of *Booth*,¹³¹ *Mayers*,¹³² and *TDM*¹³³ resulted in similar sentences and are illustrative of the approach courts take to stalking cases involving a context of domestic abuse. In *Booth*, the appellant and complainant were parents to a 12-year-old child and been separated for approximately three years. The stalking consisted of: cutting cables to a TV, lamp, Christmas tree lights, and a Sky box; hundreds of phone calls; and setting fire to the complainant's car which was completely destroyed. Both the complainant and the child were very frightened of the appellant and afraid to leave their home. The Appeal Court held that due to the domestic context and other aggravating features, the trial judge's starting point of 30 months was justified.¹³⁴ In *Mayers*, the stalking was the most recent instalment in a long history of domestic abuse, and comprised of vicious phone calls, voicemails threatening violence, and driving slowly past the complainant's house. It was held that the ultimate sentence of 30 months' imprisonment was not manifestly excessive due to the context of domestic abuse over a prolonged period. In *TDM*, the appellant had pursued a persistent and protracted course of stalking conduct spanning more than two years, which included relentless messages, sending cards and letters, sitting outside the complainant's property in his car, and following the complainant and her son. When she moved home from London to East Sussex to escape him (which meant giving up her employment), he moved into a flat at the end of her street. This caused the complainant to lose confidence, suffer from anxiety and nightmares, and become too unwell to work. The offending was aggravated by the appellant

¹³⁰ The original sentence was two years' custody on each count, for a total of four years.

¹³¹ [2023] EWCA Crim 448.

¹³² [2021] EWCA Crim 1822.

¹³³ [2020] EWCA Crim 119.

¹³⁴ The ultimate sentence was 25 months due to the guilty plea.

exploiting contact arrangements to engage in the stalking. Dismissing the appeal against the 30-month sentence,¹³⁵ the Appeal Court referenced the SCEW's *Overarching Principles – Domestic Abuse* Guideline and stated that the appellant's good character and lack of previous convictions:

carries little to no weight in the [domestic] context of this offence ... [T]he ability of the offender in such cases to have a public and private face can allow abuse to go unnoticed; and ... good character in relation to conduct outside these offences should generally be of no relevance where there is a proven pattern on behaviour.

Sitting towards the top of the sentencing range for category B1 offending, the cases of *Hodges*¹³⁶ and *Parsons*¹³⁷ are illustrative of the weight courts attach to lifestyle changes that victims of stalking make. In *Hodges*, the appellant and complainant were friends, but after the friendship soured the appellant would attend the complainant's house on an almost daily basis. He made threats to her, broke into her property, took her car keys, and on one occasion tried to pull her out of her car. This caused the complainant to change the locks on her door, stay out of her house all day, and made her unwell due to stress. The appellant argued that the case should have been categorised as B2, as there were no dramatic changes to the victim's lifestyle such as moving to a new area or assuming a new identity. The Appeal Court disagreed and upheld the 27-month sentence, stating that by changing the locks on her door and staying out of her home, the complainant had "adopted a lifestyle, central to which is avoiding contact with the appellant. To alter one's life to live in that way is...a considerable step to take".

In *Parsons*, the offending comprised one count of stalking and one count of grievous bodily harm. The appellant and complainant were ex-partners. He had, *inter alia*, fitted tracking devices to the complainant's car; followed her to a remote campsite where she was on holiday with her children and slashed her car tyres and ransacked their tents; and followed her to a hen party and sent her messages describing the clothing she wore. This caused the complainant to add bolts to her doors and install

¹³⁵ The trial judge had applied a 20% guilty plea discount.

¹³⁶ [2020] EWCA Crim 185.

¹³⁷ [2023] EWCA Crim 1212.

CCTV, which the Appeal Court took into account when upholding the 40-month sentence for the count of stalking.¹³⁸

3.3.3 Section 4A Offences of Very High Seriousness

The most serious cases, category A1, have a starting point of five years' custody and a range from three and a half to eight years.

In both *McMahon*¹³⁹ and *Marshall*,¹⁴⁰ the stalking behaviour was originally categorised by the trial judge as B1, before being elevated to A1 due to the aggravating features. In *McMahon*, the appellant was convicted of stalking his ex-partner. He made a large number of phone calls to her, threatened to commit suicide by setting fire to himself, and showed up at her house with a can of petrol which he poured on himself and on her front door. The aggravating features included the domestic context; committing the offences while on bail; and his criminal record of being sentenced on 31 occasions for 57 offences including harassment and domestic violence. The background report noted that he was at high risk of offending. The Appeal Court dismissed his appeal against a sentence of 40 months' imprisonment (reduced from 54 months due to his guilty plea), holding that the trial judge correctly categorised the offending as A1.

In *Marshall*, the Appeal Court held that a starting point sentence of six years (which was reduced to 54 months due to a guilty plea and further reduced to 44 months due to COVID-19 prison conditions) was not manifestly excessive, stating "indeed, it could easily have been longer". The appellant had been convicted of one offence of stalking and one of witness intimidation. He had been in a three-week relationship with the complainant, who broke it off due to the excessive amount of calls and messages he was sending her. Immediately following this, he sent her a barrage of gruesome and offensive messages over a four-month period which included graphic threats to kill her and her daughter and to rape her mother. The trial judge placed the offending at category B1, but found that the offending was elevated to A1 due to the

¹³⁸ The Appeal Court reduced the sentence for the count of grievous bodily harm as the trial judge had not adequately taken the totality principle into account.

¹³⁹ [2023] EWCA Crim 598.

¹⁴⁰ [2021] EWCA Crim 325.

offender's extensive criminal record of threats and violence against women, as well as the offending occurring while he was on a community order for breaching a (fourth) restraining order against another former partner.

*Patterson*¹⁴¹ is an unusual case in that the offending was placed in the most serious category, but the stalking course of conduct was committed entirely online, with the victim and offender never having met and having no connection to one another. The single count of stalking in the indictment was over a period of seven months, but the behaviour had been ongoing for four years. It began when the appellant added the complainant as a Facebook friend and made unwanted contact, expressing his love for her and saying he was her guardian angel. After he was arrested and bailed, he continued to contact the complainant. The complainant worked as an artist, which required maintaining a public and social media presence as an essential tool to promote her work. Over the four years, she described suffering serious distress and panic attacks, resulting in intensive group therapy; becoming isolated from friends and harm to her romantic relationships; an inability to use social media; and increasing fear as the appellant became bolder and more persistent, including posting photographs of himself holding weapons. Background reports highlighted some psychotic illness due to drug abuse, but stated that the appellant was not suffering from schizophrenia or bipolar disorder as he had claimed. The Appeal Court held that the judge was correct to place the offending in category A1, noting that the seven-month period of stalking being sentenced for had to be seen in the context of a four-year history of such behaviour, and also the sophistication of the stalking whereby the appellant would use different online accounts. However, the Appeal Court held that the trial judge was not justified in increasing the starting point above five years' custody, and that the appropriate sentence would have been one of four and a half years, which was reduced to three years to account for his guilty plea.

In *Millington*,¹⁴² *Vinton*,¹⁴³ and *Robinson*,¹⁴⁴ extended sentences were imposed after an assessment of dangerousness was made, which is based on safety and risk considerations.¹⁴⁵ There are many similarities across these cases, which involved

¹⁴¹ [2021] EWCA Crim 1475.

¹⁴² [2022] EWCA Crim 265.

¹⁴³ [2022] EWCA Crim 1693.

¹⁴⁴ [2022] EWCA Crim 1217.

¹⁴⁵ Step Six in the Either Way Offences Guideline.

appellants with significant criminal records stalking and assaulting ex-partners.¹⁴⁶ In *Millington*, an appeal against an extended sentence of eight years, with a five-year determinate custodial element, was dismissed. The stalking included threats to the complainant and her family and friends; leaving weapons in her house; following her to work; forcing his way into her house; entering her garden wearing a balaclava and black clothes; pouring petrol on her brother's car; and stalking her on social media. The appellant had 38 convictions for 53 offences, including for domestic abuse. The complainant had suffered serious distress and had lost her job due to the offending. In *Vinton*, an appeal against an extended sentence of seven years and three months, with a four year and three-month determinate custodial element, was dismissed. The appellant had 53 previous convictions for 84 offences including offences committed against ex-partners. The stalking involved threatening and abusive messages and phone calls, threats of violence to the complainant and her friends and family, and following her when she was walking her dog and taking her children to school. The assaults included strangulation to the point of choking and punching the face, as well as the use of weapons. Similarly, in *Robinson*, the Appeal Court imposed an extended sentence of seven years and three months, with a four year and three-month determinate custodial element.¹⁴⁷ The appellant had made graphic threats of violence (including death threats) to the complainant and her family and friends, constant phone calls and messages, and had damaged her car. The complainant described ongoing anxiety, constantly checking doors and windows and CCTV footage, and that her children would not sleep alone.

Finally, the longest sentence for stalking, by a large margin, was imposed in *McNeill*.¹⁴⁸ The appellant was convicted following trial of four section 4A offences and six breaches of a restraining order. The Appeal Court upheld a total sentence of nine years, with each count of stalking attracting concurrent sentences (to account for the principle of totality) of eight years' imprisonment. The appellant, a 74-year-old woman, had made false allegations over a three-year period about numerous parents, teachers, police, social workers, and clergy, claiming they were members of a satanic cult which imported babies for ritual slaughter and cannibalism and

¹⁴⁶ All convictions followed guilty pleas at various stages.

¹⁴⁷ The trial judge had imposed a determinate sentence of five years and five months, with a three-year extension.

¹⁴⁸ [2019] EWCA Crim 1566.

sexually abused children. She posted material about the allegations online which included the personal details of some of the parents, including names, addresses, phone numbers, email addresses, and photographs. This material was viewed by over four million people. The families then began receiving intimidating calls and emails from others, and were forced to move homes, shut down their businesses, withdraw their children from school, and carry tracking devices and panic alarms. They were put in fear of both paedophiles attracted by the fantasy that their children were available for abuse, and also of those seeking vengeance for the supposed child abuse. The offences were aggravated by the fact the appellant had exploited her skills as a systems analyst and web publisher to engage in sophisticated stalking, and because she had abused her position of trust as a McKenzie Friend (i.e., someone who assists people involved in litigation proceedings) to gain access to confidential material received in court proceedings which she thereafter published. In its final paragraph of the judgment, the Appeal Court stated:

In all the circumstances, we consider that the sentence passed on the appellant was, if anything, a lenient sentence. By no stretch of the imagination can it be described as manifestly excessive. This appeal is entirely without merit and accordingly will be dismissed.

3.4 Data on Stalking and Harassment Offences in England and Wales

Prior to publishing its Definitive Guideline on Sentencing Intimidatory Offences, the SCEW gathered data on sentencing in cases involving: harassment; stalking; putting people in fear of violence; stalking involving fear of violence or serious alarm or distress; and the racially or religiously motivated versions of those offences.¹⁴⁹ The data covered the period from 2007 to 2017 overall, but the data for stalking offences only relates to the years post-2013, as this is when those offences came into force. A summary of the data is as follows:

¹⁴⁹ Sentencing Council of England and Wales., 2017. (n 95).

- The number of adults sentenced for harassment under section 2 of the 1997 Act varied between 3408 to 4830 per year, and generally increased over the ten-year period. No more than 258 of these in any one year were sentenced in the Crown Court, with the remainder being sentenced in the Magistrates' Court. The most common sentence across all years was a community sentence, with a much smaller proportion receiving custodial sentences. The average custodial sentence ranged from two to three months, and there was a general downward trend.
- The number of adults sentenced for putting people in fear of violence under section 4 of the 1997 Act varied between 517 to 806 cases per year, and were broadly evenly split between the Crown Court and Magistrates' Court. The most common sentence in 2007 was a community sentence (23%), followed by 17% of cases receiving a suspended sentence and 15% receiving an immediate custodial sentence. By 2017, the most common sentence was one of immediate custody (42%) followed by a suspended sentence (36%) and a community sentence (18%). The average custodial sentence ranged from six to eleven months.
- The number of adults sentenced for stalking offences under section 2A of the 1997 Act ranged from 192 in 2013 to 422 in 2017. The vast majority (over 90%) of these were sentenced in the Magistrates' Court. The most common sentences in 2017 were a community sentence (40%) followed by a suspended sentence (30%). The average custodial sentence ranged from two to three months.
- The number of adults sentenced for stalking involving fear of violence or serious alarm or distress under section 4A of the 1997 Act ranged from 41 in 2013 to 212 in 2017, and were broadly evenly split between the Crown Court and Magistrates' Court. The most common sentence in 2017 was one of immediate custody (42%) followed by a suspended sentence (38%) and a community sentence (16%). The average custodial sentence ranged from nine to 14 months.
- The number of people sentenced for racially and religiously aggravated versions of the 1997 Act offences was consistently low. The number of adults sentenced for racially or religiously aggravated stalking (without violence) or

harassment under section 32(1)(a) of the 1998 Act ranged from 76 to 143.

The number of adults sentenced for racially or religiously aggravated stalking (with violence) or harassment under section 32(1)(b) of the 1998 Act ranged from 28 to 46.

There is no updated data from the SCEW to compare current sentencing practice for these offences with the sentencing practice prior to the introduction of the Definitive Guideline. The Office for National Statistics does publish statistics on the number of prosecutions and convictions for stalking- and harassment-related offences.

However, there are limitations to this. Most notably, the Office of National Statistics (ONS) does not break down the data into discrete offences as the SCEW did, but combined stalking/harassment offences.

The data from the Crime Survey for England and Wales for the year ending March 2023 (published in November 2023)¹⁵⁰ indicates that the estimated number of victims of stalking in the last year among people aged 16 to 59 years has fluctuated from 21,137 people in 2013/14 to 10,587 people in 2022/23. However, the statistics note that these figures should be treated with caution as there is missing data for October 2022 to January 2023, and estimates for the year ending March 2022 onwards are not designated as National Statistics.

In the ONS figures for Crime in England and Wales: year ending September 2023 (published January 2024),¹⁵¹ it is noted that “In the year to September 2023, stalking and harassment accounted for a third (33%) of all police recorded violence”; and that:

There were 678,746 stalking and harassment offences recorded by the police in the year ending September 2023. This was a 5% decrease from the year ending September 2022, following rises since the year ending March 2012.

¹⁵⁰ Office for National Statistics., *Stalking: Findings from the Crime Survey for England and Wales*. Available at:

<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/stalkingfindingsfromthecrimesurveyforenglandandwales>> [Last accessed 3 March 2024].

¹⁵¹ Office for National Statistics., 2023. *Crime in England and Wales: year ending Sep 2023*. Available at:

<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingseptember2023>> [Last accessed 3 March 2024].

4.0 Risk Assessment and Risk Management

4.1 Offender characteristics

As suggested throughout this report, research on stalking has found that stalkers most commonly target those with whom they have had an intimate relationship. When stalking occurs in this context it has been described as an extension of partner abuse, facilitated by the range of intimate knowledge the stalker will have about their victim.¹⁵² Common stalking behaviours include, but are not limited to, telephone calls, personal contact, following and surveillance.¹⁵³ Stalkers may also make use of technology to facilitate their stalking, often referred to as “cyberstalking”. The UN has addressed this in its training handbook for criminal justice practitioners dealing with cyberviolence against women and girls:

Cyberstalking can also be described as ‘the use of technology to stalk and monitor someone’s activities and behaviours in real-time or historically’.

Cyberstalking is usually seen as an extension of offline stalking, using technological tools, and it involves a set of unwanted, repetitive, intrusive, threatening, and harassing behaviours which in some instances are seen as a relatively normal relational or dating practice.¹⁵⁴

Stalkers are most likely to be male, typically older than other offenders, likely to have a diagnosed mental health disorder, substance issue and/or previous convictions.¹⁵⁵ Ex-partners have been found to constitute the largest sub-category in stalking classification.¹⁵⁶ Strand and McEwan examined same-gender stalking in Sweden

¹⁵² Logan, T. and Langhinrichsen-Rohling, J., 2022. Intimate Partner Violence and Intimate Partner Stalking. Chapter in *Handbook of Interpersonal Violence and Abuse Across the Lifespan*, Geffner, R., White, J.W., Hamberger, L.K., Rosenbaum, A., Vaughan-Eden, V., and Vieth, V.I., (eds.), Chambridge: Springer.

¹⁵³ Sheridan, L.P., Blaauw, E., and Davies G.M., 2003. Stalking: Knowns and unknowns. 4(2) *Trauma, Violence, and Abuse* 148-162.

¹⁵⁴ United Nations Office on Drugs and Crime., 2022. *A Training Handbook for Criminal Justice Practitioners on Cyberviolence Against Women and Girls*. at p 39.

¹⁵⁵ Sheridan, L.P., Blaauw, E., and Davies G.M., 2003. (n 153); Mohandie, K., Meloy, J.R., McGowan, M.G., and Williams, J. 2006. The RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers. 51(1) *Journal of Forensic Sciences* 147-155.

¹⁵⁶ Ibid.

and Australia and found no significant difference in offender characteristics between those who carry out same and opposite gender stalking.¹⁵⁷

Boon and Sheridan have proposed four sub-categories of stalking: (i) ex-partner (ii) infatuation (iii) delusional fixation (iv) sadistic.¹⁵⁸ Within their study, 70% of victims reported that stalking intensified and became more violent over time.¹⁵⁹ Motivations for stalking have been found to include: rejection; seeking intimacy; resentment; incompetence; and predatory intentions, with most offenders falling into the category of those rejected or seeking intimacy.¹⁶⁰ The smallest group have been found to be those preparing to carry out a sexual attack.

In their most recent research, Sheridan et al. found stalkers to be “generalist offenders” who were prone to committing non-stalking related violent and non-violent offences.¹⁶¹ “Specialists” were found to be more likely to have been charged with domestic abuse related offences and found to have breached a civil protection order.¹⁶²

4.2 Recidivism and Risk Management

Mohandie et al. have found that stalkers tend to reoffend around half of the time and that legal intervention tends not to act as a deterrent to their behaviour.¹⁶³ Similarly, Bendin et al. found that many stalkers re-offend quickly but that rates of recidivism depended on the definition of recidivism employed, perhaps unsurprisingly with wider definitions being linked to higher rates of re-offending.¹⁶⁴ The most significant

¹⁵⁷ Strand, S. and McEwan, T.E., 2011. Same-gender stalking in Sweden and Australia. 29(2) *Behavioral Sciences and the Law* 202-219.

¹⁵⁸ Boon, J.C.W. and Sheridan, L., 2001. Stalker Typologies: A Law Enforcement Perspective. 1(2) *Journal of Threat Assessment* 75-97.

¹⁵⁹ Ibid.

¹⁶⁰ Mullen, P.E., Pathé, M., Purcell, R., and Stuart, G.W. 1999. Study of Stalkers. 156(8) *American Journal of Psychiatry* 1133-1295.

¹⁶¹ Sheridan, L., Bendlin, M., and House, P. 2022. Stalkers: Specialists Versus Generalists. 37(17-18) *Journal of Interpersonal Violence* 16779-16798 at 1679.

¹⁶² Ibid.

¹⁶³ Mohandie, K., Meloy, J.R., McGowan, M.G., and Williams, J. 2006. (n 155). The do not elucidate on what is meant by “legal intervention”, that is to say, whether this refers to arrest, conviction and/or the use of protective orders.

¹⁶⁴ Bendlin, M., Sheridan, L., and Johnson, A., 2022. Stalking Recidivism: A Comparison of Operational Definitions. 37(9-10) *Journal of Interpersonal Violence*. For further discussion on effectiveness of sentencing see: Gormley, J., Hamilton, M., and Belton, I., 2022. *The Effectiveness of Sentencing Options on Reoffending*. Sentencing Council of England and Wales.

predicator of recidivism found in their study was a prior criminal history.¹⁶⁵ Eke et al. also found a criminal history to be the biggest predictor of recidivism, especially where the previous convictions were of a serious nature.¹⁶⁶ Young age and a history of mental health issues were also found to inform rates of recidivism. They also found that offenders convicted of stalking offenders were more likely to reoffend in general.¹⁶⁷

It has been suggested that interventions designed to address stalking behaviour need to focus on the offending context in which the stalking takes place.¹⁶⁸ The joint inspection carried out by the CPS and HMCPSP in England and Wales discussed the role of offender programmes in this context, recommending that where these do not exist, consideration should be given to their introduction since:

Harassment and stalking offenders can have specific and complex needs to address the sometimes fixated and obsessive nature of their behaviour.¹⁶⁹

In their meta-analysis of existing research on stalking, Churcher and Nesca found that approximately a third of stalkers are violent to their victims and that nearly a third of victims suffer physical harm as a result of stalking.¹⁷⁰ The most significant risk factors found were the existence of a prior intimate relationship with the stalker, a history of offending or violent behaviour, the use of threats as part of the stalking, and substance abuse of the part of the offender.¹⁷¹ This aligns with findings by Groenen and Vervaeke.¹⁷² For McEwan et al.:

¹⁶⁵ Ibid.

¹⁶⁶ Eke, A.W., Hilton, N.Z. Meloy, J.R., Mohandie, K., and Williams, J. 2011. Predictors of recidivism by stalkers: A nine-year follow-up of police contacts. 29(2) *Behavioural Sciences and the Law* 271-283.

¹⁶⁷ Ibid.

¹⁶⁸ Sheridan, L., Bendlin, M., and House., P. 2022. (n 161).

¹⁶⁹ HMICFRS., 2017. *Living in fear – the police and CPS response to harassment and stalking*. Available at: < <https://hmicfrs.justiceinspectorates.gov.uk/publications/living-in-fear-the-police-and-cps-response-to-harassment-and-stalking/> > [Accessed 5 March 2024]. at p 78.

¹⁷⁰ Churcher, F. P. and Nesca, M. 2013. Risk factors for violence in stalking perpetration: A meta-analysis. 7(2) *FWU Journal of Social Sciences*.100-112.

¹⁷¹ Ibid.

¹⁷² Groenen, A. and Vervaeke, G., 2009. Violent Stalkers. Detecting Risk Factors by the Police. 15(3) *European Journal on Criminal Policy and Research* 279-291. They additionally found vandalism to be a predictor of violence, especially when combined with threats and substance abuse.

physical IPV [intimate partner violence] should be taken seriously as unique risk factor when managing intimate stalking cases.¹⁷³

Sheridan and Davies also emphasise that when stalkers threaten violence or death, this should be taken very seriously.¹⁷⁴ Elsewhere, a number of feminist commentators have explicitly emphasised stalking as a risk factor for femicide.¹⁷⁵ Monckton Smith provides the following eight stage pattern for such killings, which centralises the role of stalking:

1. A history of control of stalking (convictions and/or allegations).
2. An early relationship marked by intense commitment.
3. A relationship dominated by control.
4. A trigger event which challenges this control (e.g., separation).
5. Escalation in control or the advent of stalking.
6. A change in thinking or focus (e.g., how they are going to deal with the loss of control).
7. Planning a homicide.
8. Homicide and/or suicide.¹⁷⁶

Empirical evidence on the links between stalking and femicide is somewhat underdeveloped in Scotland, but the historic lack of recognition to stalking given to cases where women have been killed by their partners has been highlighted. Most notably, following *HM Advocate v Drury*, in which the plea of provocation on the basis of infidelity was put before the court following the murder of Marilyn McKenna by her ex-partner Stuart Drury, the BBC aired *In the Shadow of the Stalker*, highlighting the stalking and post-separation abuse McKenna had experienced at the hands of Drury before her death. The subsequent appeal of Drury remains the leading authority on

¹⁷³ McEwan, T. E., Daffern, M., MacKenzie, R.D., and Ogloff, J.R.P. 2017. Risk factors for stalking violence, persistence, and recurrence. 28(1) *The Journal of Forensic Psychiatry & Psychology* 38-56 at 51.

¹⁷⁴ Sheridan, L. and Davies, G.M., 2001. Violence and the prior victim–stalker relationship. 11(2) *Criminal Behaviour and Mental Health* 102-116.

¹⁷⁵ Dobash, R.E., Dobash, R.P. (2015). *When Men Murder Women*. Oxford: Oxford University; Proctor, K., 2017. Stalking as a gender-based violence. Chapter in *The Routledge Handbook of Gender and Violence*, Lombard, N. (Ed). London: Routledge.

¹⁷⁶ Monckton Smith, J., 2021. *In Control: Dangerous Relationships and How They End in Murder*. London: Bloomsbury Publishing.

the law of murder in Scotland,¹⁷⁷ but has been the subject of repeated criticism for treating the relationship between McKenna and Drury as ongoing.¹⁷⁸

There exist several risk assessment tools which can be used if someone is experiencing stalking in the context of an abusive relationship. The Domestic Abuse Stalking and Harassment Questionnaire (DASH)¹⁷⁹ has been developed in the UK and contains a yes/no questionnaire to risk factors associated specifically with intimate partner homicide.¹⁸⁰ Multi-agency risk assessment conferences (Marac) are also commonly employed in Scotland¹⁸¹, although there is no statutory obligation for such conferences to take place.¹⁸² These are local meetings undertaken to discuss those at risk of serious harm or murder as a result of domestic abuse. Referrals are made when someone is scored as a visible high risk on the DASH checklist. There is also potential for escalation and a repeat referral within 12 months of the last referral to Marac. At the time of writing, Marac operate in 26 out of 32 Scottish local authorities. Most (60%) are chaired by Police Scotland (the remaining 40% have a multi-agency chair).¹⁸³ Multi-agency public protection arrangements (MAPPA) can be statutory partnership arrangements used to manage the risk posed for certain categories of offender, such as sexual offenders subject to notification requirements, mentally disordered offenders and others considered to pose serious risk of harm.¹⁸⁴ In their review of Police and CPS responses to stalking and harassment, HMICFRS recognised the role MAPPA can play in offender management:

¹⁷⁷ *Drury v HM Advocate* 2001 S.L.T. 1013.

¹⁷⁸ Cowan, S., Kennedy, C., Munro, V., 2019. *Scottish Feminist Judgments: (Re)Creating Law from the Outside In*. Oxford: Hart; Scottish Law Commission., 2021. *Discussion Paper on the Mental Element in Homicide*. Edinburgh: Scottish Law Commission.

¹⁷⁹ Liem, M. and Koenraadt, F., 2018. *Domestic Homicide: Patterns and Dynamics*. London: Routledge. at p 161.

¹⁸⁰ Ibid.

¹⁸¹ Multi-Agency Public Protection Arrangements (MAPPA) are also used to assess and manage the risk posed for certain categories of offender such as sex offenders who are subject to notification requirements under the Sexual Offences Act 2003; mentally disordered restricted patients; offenders who are as posing a risk of serious harm by reason of their conviction, as per section 10 of the Management of Offenders etc. (Scotland) Act 2005.

¹⁸² Ibid. There is also currently no Scottish Government funding provided for Marac.

¹⁸³ SafeLives. *Toolkit for Marac in Scotland*. at p 6. Available at: <
<https://safelives.org.uk/sites/default/files/resources/SafeLives'%20Marac%20Toolkit%20%e2%80%93%20Scottish%20Version.pdf>> [Accessed 5 March 2024].

¹⁸⁴ The duty for MAPPA arises from the Management of Offenders etc (Scotland) Act 2005, section 10.

Perpetrators of harassment and stalking can be dangerous and can have complex needs. Offenders should be carefully managed in order to address their offending behaviour and reduce the risk of harm to the public.

Multi-agency public protection arrangements (MAPPA) mean the police, probation and prison services can work together with other agencies to assess and manage violent and sexual offenders in order to protect the public from harm. MAPPA are well established and exist in all police force areas.¹⁸⁵

In terms of policing, some Police forces in England and Wales have recognised that ‘blocking’ a stalker may escalate their behaviour (whilst also hampering evidence gathering) and advise victims to ‘mute, not block’.¹⁸⁶ In Scotland, it has been recognised that some officers continue to advise victims to ‘block’ stalkers.¹⁸⁷

Where an offender is considered to be particularly high risk and an “exceptional offender”, and where they have been convicted of a serious violent or sexual offence in the High Court, it is open to the sentencer to consider the need for an Order for Lifelong Restriction (OLR). This has previously been utilized in cases involving stalking. For example: in *B(A) v HM Advocate*,¹⁸⁸ where the accused was convicted of 11 charges including assault, abduction, threatening or abusive behaviour and stalking, an OLR was imposed. An appeal against the imposition of this indeterminate life sentence was later dismissed. It was held that it was legitimate for the judge to take into account allegations not proved in assessing patterns of offending and that he was entitled to find that the risk criteria for an OLR had been met.

¹⁸⁵ HMICFRS., 2017. (n 169). at p 77.

¹⁸⁶ See for example: Sussex Police and Crime Commissioner., 2020. *Mute, don’t block your stalker*. Available at: < <https://www.sussex-pcc.gov.uk/about/news/mute-don-t-block-your-stalker/> > [Accessed 5 March 2024].

¹⁸⁷ This has also been the subject of discussion at an online event hosted by the Scottish Institute for Policing Research (SIPR) on ‘Stalking and Harassment’, attended by the Assistant Chief Constable Lead for Major Crime, Public Protection and Local Crime and chaired by Dr Rachel McPherson, Thursday 20 October 2022.

¹⁸⁸ [2021] HCJAC 43.

5.0 Perceptions of Sentencing

This section summarises research relating to the knowledge and understanding of stalking as an offence amongst both the public and those working in the criminal justice system (including the police, prosecution service, and victim support organisations). Thereafter, victim experiences of stalking and the criminal justice system are considered.

5.1 Public and Criminal Justice Perceptions

A Scottish study, undertaken before the introduction of section 39, found high awareness of stalking as a concept amongst the public, but that this was often understood in the context of celebrity victims rather than in a domestic context.¹⁸⁹ More recent research in the United Kingdom and internationally has yielded similar results. Specifically, public perceptions of stalking are often informed by high-profile celebrity cases,¹⁹⁰ and there appears to be a general perception that stalking is more serious or harmful where the perpetrator and victim are strangers or acquaintances (rather than ex-partners), and that the greater degree of prior intimacy between the perpetrator and the victim, the less likely people are to label the conduct as stalking.¹⁹¹ It has been posited that this may be due to a view that:

victims have little or no knowledge of the characteristics, motives or usual behaviour of unknown persons [and stranger stalkers are] therefore ... more difficult to predict and control.¹⁹²

¹⁸⁹ Morris, S., Anderson S.N., and Murray, L., 2002. *Stalking and harassment in Scotland*. Social Research Findings No.67/2002.

¹⁹⁰ Boehnlein T., Kretschmar, J., Regoeczi, W., and Smialek, J. 2020. Responding to Stalking Victims: Perceptions, Barriers, and Directions for Future Research. 35 *Journal of Family Violence* 755; Brady, P.Q., Reyns, B.W., Landhuis, J., and Griffin, V.W. 2023. APPLIED stalking: What the next generation of stalking victims consider to be 'stalking' and why victims report their experiences to the police. 84 *Journal of Criminal Justice* 102028.

¹⁹¹ Scott, A.J., 2019. Stalking: How perceptions differ from reality and why these differences matter. Chapter in *The Routledge International Handbook of Legal and Investigative Psychology*, Bull, R. and Blandon-Gitlin, I. (eds). London: Routledge; Sheridan, L., Scott, A.J., and Nixon, K., 2016. Police officer perceptions of harassment in England and Scotland. 21(1) *Legal and Criminological Psychology* 1–14.

¹⁹² Scott, A.J., 2019. (n 191).

However, one study found that where participants were not asked about their perceptions of stalking in the abstract, but were provided instead with contextual information about stalking behaviour following the breakdown of a relationship, these perceptions differed considerably.¹⁹³ Some research has also found that stalking is perceived to be more serious where the victim is a woman and the perpetrator is a man, and there is some (albeit inconsistent) research suggesting that women tend to perceive stalking more seriously than men do and to believe that certain behaviour constitutes stalking.¹⁹⁴ Most, if not all, studies indicate that women are more often victims of stalking than men, but different statistics show a wide variation in this discrepancy.¹⁹⁵

Given that numerous studies have confirmed that the majority of stalking offences are not committed by strangers,¹⁹⁶ but actually occur in a domestic abuse context (84% of stalking cases sampled at random from across England and Wales involved complaints against ex-partners, and three-quarters reported prior domestic abuse),¹⁹⁷ the public perceptions outlined above are problematic. However, these perceptions are sometimes replicated by those who work in the criminal justice system. A 2016 study of 135 English and 127 Scottish police officers found that both the English and Scottish officers were more likely to label behaviour as harassment, and to deem intervention as being necessary, when the perpetrator was a stranger.¹⁹⁸ It has been suggested that a lack of common understanding of stalking amongst the CPS and police in England and Wales is due to the lack of clarity about what constitutes the offence, in the absence of an exhaustive statutory definition.¹⁹⁹ There has more recently been an attempt to remedy this by updating the CPS

¹⁹³ Duff, S.C. and Scott, A.J., 2013. Understanding perceptions of stalking: the impact of additional contextual information regarding the breakdown of relationships. 3(2) *Journal of Criminal Psychology* 136.

¹⁹⁴ Scott, A.J., 2019. (n 191).

¹⁹⁵ Scott, A.J., 2019. (n 191); Boehnlein T., Kretschmar, J., Regoeczi, W., and Smialek, J. 2020. (n 189); Morris, S., Anderson S.N., and Murray, L., 2002. (n 189); Korkodeilou, J., 2014. Dealing with the unknown: Learning from stalking victims' experiences. 16(4) *Crime Prevention and Community Safety: An International Journal* 253; Archer, N., Butler, M., Avukatu, G., and Williams Savanta, E., 2022. *Public knowledge of and confidence in the criminal justice system and sentencing: 2022 research*. Sentencing Council for England and Wales.

¹⁹⁶ Brady, P.Q., Reynolds, B.W., Landhuis, J., and Griffin, V.W. 2023. (n 190).

¹⁹⁷ Crown Prosecution Service., 2020. *Stalking analysis reveals domestic abuse link*. Available at: < <https://www.cps.gov.uk/cps/news/stalking-analysis-reveals-domestic-abuse-link> > [Accessed 5 March 2024].

¹⁹⁸ Sheridan, L., Scott, A.J., and Nixon, K., 2016. (n 191).

¹⁹⁹ HMICFRS., 2017. (n 169).

guidance on the manipulative tactics stalkers use (such as ‘love-bombing’ with flowers/cards/declarations of love, or making counter-allegations of abuse),²⁰⁰ and by explicitly linking stalking with domestic abuse.²⁰¹ International research suggests that the perceptions of individuals working in the criminal justice system are strongly influenced by the type of agency for which they work, with those working in domestic abuse services agencies more likely to describe a stalking victim as one who is stalked by an ex-partner than a stranger.²⁰²

5.2 Victims’ Experiences of the Criminal Justice System

As most stalking is carried out in the context of domestic abuse, this is where most research on victims’ experiences is focused. Individual actions constituting a stalking course of conduct may be unremarkable, and are often not criminal offences *per se*,²⁰³ but research has shown that it is the compounding effect of a range of frequent pursuit tactics, as opposed to the specific types of individual behaviours themselves, which cause victims to suffer harm.²⁰⁴ Such harms can include feelings of fear, anxiety, depression, suicidality, helplessness, distress, anger, and distrust; and can manifest by the victim changing phone numbers, daily routines, jobs, and names, as well as reducing social outings or relocating homes.²⁰⁵

In the 2002 Scottish study by Morris et al., victims expressed dissatisfaction about having to repeat the entire story to police after each isolated incident of stalking, and noted a tendency for police to dismiss the behaviour complained of as “only domestic”.²⁰⁶ While there have been major strides in recent years towards recognising the impact of domestic abuse, and a move away such conduct being trivialised in the criminal justice system, issues remain. Victims in both Scotland and

²⁰⁰ Crown Prosecution Service., 2020. *Behaviour focus on ‘love-bombing’ and other manipulative behaviours when charging controlling offences*. Available at: < <https://www.cps.gov.uk/cps/news/prosecutors-focus-love-bombing-and-other-manipulative-behaviours-when-charging-controlling> > [Accessed 5 March 2024].

²⁰¹ Crown Prosecution Service., 2020. (n 200).

²⁰² Boehnlein T., Kretschmar, J., Regoeczi, W., and Smialek, J. 2020. (n 190).

²⁰³ HMICFRS., 2017. (n 169).

²⁰⁴ Morris, S., Anderson S.N., and Murray, L., 2002. (n 189); Brady, P.Q., Reyns, B.W., Landhuis, J., and Griffin, V.W. 2023. (n 190); Crown Prosecution Service., 2020. (n 200).

²⁰⁵ Korkodeilou, J., 2014. (n 195).

²⁰⁶ Morris, S., Anderson S.N., and Murray, L., 2002. (n 189).

England and Wales report that police sometimes do not see the bigger picture, with multiple reports having to be made before any action is taken.²⁰⁷ Recent reviews undertaken by Lombard and Proctor and Houghton et al. in Scotland looking at the experiences of complainers in domestic abuse case have highlighted the inconsistent experiences of complainers and poor communication they receive from COPFS and Victim Information and Advice (VIA). For example, whilst in some courts it is practice to meet with complainers to discuss matters such as plea negotiations, in other courts, fiscals do not communicate at all with complainers.²⁰⁸ Delays in courts proceedings were also identified as a significant problem which contributed to complainers' distress and (negative) perceptions of the criminal justice system.²⁰⁹ Some of these issues may be addressed by HMIPS in their review of domestic abuse cases prosecuted at summary level, ongoing at the time of writing.²¹⁰

It has been found in Scotland and internationally that victims' experiences of the criminal justice system are best improved where they are listened to, provided with support, and kept in the loop by police; are given practical assistance and advice regarding safety planning, how to avoid the stalker's behaviour, and how best to document the offending; and where the court process is explained, including relating to giving evidence, prosecutorial decision-making, and sentencing.²¹¹ Research into victims' perceptions and experiences of sentencing stalkers and case outcomes has yielded nuanced results. Some research has simply highlighted a need for a fuller understanding of this issue.²¹² Research from England and Wales indicates victims feel frustration over charges used, that is to say harassment or stalking-related offences, rather than stalking itself.²¹³ For them, this lead to a feeling that the criminal nature of stalking was not being recognised by the criminal justice

²⁰⁷ Lombard, N. and Proctor, K., 20023. *Women's Lived Experiences of Coercive Control, Stalking and Related Crimes, as they progress through the Criminal Justice System*. Glasgow: SCCJR; HMICFRS., 2017. (n 169).

²⁰⁸ Lombard, N. and Proctor, K. 20023. (n 208). This was also a key finding in: Houghton, C., Morrison, F., Warrington, C., and Tisdall, E.K.M. 2023. *Domestic Abuse Court Experiences: The perspectives of victims and witnesses in Scotland*. Edinburgh: Scottish Government.

²⁰⁹ Houghton, C., Morrison, F., Warrington, C., and Tisdall, E.K.M. 2023. (n 208).

²¹⁰ HMIPS., 2023. *The prosecution of domestic abuse cases at summary level*. Available at: < <https://www.prosecutioninspectorate.scot/media/1f0njbz3/final-tor-da-may-2023.pdf> > [Accessed 5 March 2024].

²¹¹ Lombard, N. and Proctor, K. 20023. (n 208); Boehnlein T., Kretschmar, J., Regoeczi, W., and Smialek, J. 2020. (n 190).

²¹² Archer, N., Butler, M., Avukatu, G., and Williams Savanta, E., 2022. (n 195).

²¹³ Korkodeilou, J., 2014. (n 195). at p 12.

system.²¹⁴ Victims also expressed a desire for longer custodial sentences, both for their own protection and so the offender can receive appropriate treatment. This was accompanied by a desire that offenders should be psychiatrically assessed.²¹⁵ Whilst this is an understandable view for victims to have, the context in which an accused person can be subject to psychiatric assessment and treatment clearly sits within broader rules of criminal law and criminal procedure, in all jurisdictions. Elsewhere, concerns have been raised about bail conditions used in stalking cases (bail conditions not being used), the remanding of suspects, or the issuing of protection orders being under-utilised.²¹⁶

A recent Scottish study found mixed attitudes to victims' perceptions of sentencing, albeit most expressed disappointment.²¹⁷ Feelings included relief, anger, happiness, satisfaction, and feeling both more or less safe and/or in control. Of those who responded to the study, the largest proportion said that the best outcome from going through the criminal justice system would be "feeling safe" and "for the abuse to stop", with the least-common responses being that "the perpetrator was sent to prison" or "the perpetrator was punished in some way".²¹⁸

6.0 Conclusions and Recommendations

Given the overlap between stalking and domestic abuse, recommendations arising from the *Review of Sentencing Cases Involving Domestic Abuse* are also relevant to this review.²¹⁹ It is also relevant that COVID-19 and the introduction of the Domestic Abuse (Scotland) Act 2018 have individually and in combination, have changed the landscape in this area and the effects of these changes in a short period of time are still being properly understood.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ HMICFRS., 2017. (n 169).

²¹⁷ Lombard, N. and Proctor, K. 2023. (n 208).

²¹⁸ Ibid.

²¹⁹ McPherson, R., Gormley, J., and Wheate., R., 2021. (n 101).

Distinct data on stalking

Given that COPFS practice is now to include many allegations of stalking in course of conduct charges under section 1 of the Domestic Abuse (Scotland) Act 2018, it is likely that data on stalking is going to be less readily available. It would be helpful for some demarcation to be made between those section 1 cases involving stalking and those not in order for data on this offence to be available. Similarly, it would be useful for the Scottish Government to provide specific data on both stalking and section 127 of the Communications Act 2003 within their annual Criminal Proceedings publications.

The limitations of specific data related to section 39, particularly in relation to conviction rates, sentencing and breaches of non-harassment orders, means the landscape in terms of sentencing is obscured. Such limitations would pose particular issues for the development of a guideline in this area. These limitations also pose potential issues in terms of monitoring a key area relevant to policy development and legal responses to violence against women- a current priority for Police Scotland and COPFS. Commitment to monitoring the landscape is reflected in section 14 of the Domestic Abuse (Scotland) Act 2018 which includes a reporting duty to Scottish Ministers. As such, it is suggested that future work is required as a priority. Specifically, a review of existing data limitations, how data capture in this area may be improved and what information would be most beneficial to criminal justice stakeholders and researchers in this area.

Given the research which suggests that stalking offenders are likely to breach protective orders, it is also imperative that data related to breaches of non-harassment orders is collected in such a way that it is readily accessible.

Implications for sentencing guidelines

All relevant factors of a case must be considered, including the seriousness of an offence. The evidence base shows that offences related to stalking can cover a broad spectrum of harm to victims and culpability on the part of the offender. It is, therefore, an area that entails a significant number of considerations. Notably, given

that many stalking offences occur within the context of domestic abuse and/or violence against women and girls (VAWG) more generally, this is something sentencing guidance may wish to explicitly address. Indeed, for example, the English and Welsh Guideline on stalking specifically notes that an “offence committed in a domestic context” is an aggravating factor and the guideline prominently signposts the “Overarching Principles – Domestic Abuse.” Any Scottish guideline on this area (for reasons including clarity for victims and the public) may wish to consider a similarly clear approach.²²⁰

Given the data on the domestic nature of many stalking offences, it would seem that any guideline would need to be able to account for how the context of domestic abuse may increase the harm inflicted on victims and how it may increase the culpability of perpetrators. Whilst domestic abuse can and does impact men, it is a key area relevant to VAWG. It is rooted in the historical inequality of women, and as such, typically manifests as male perpetrated course of conduct against women in the context of intimate relationships. Escalation of abuse often arises at the end of a relationship, and this is when stalking-type behaviours are more likely to be experienced. These stalking-type behaviours can be diverse and designed to distress victims in various ways. Stalking-type behaviours may also be surreptitious. Indeed, an emergent challenge evidenced in the literature is how to provide a clear recognition of ‘love bombing’, ‘romantic’ and other manipulative behaviours that might be utilised as part of this VAWG course of conduct. This is one area where guidance may be beneficial.

Finally, it is worth concluding by signposting that sentencing statements and guidelines in this area offer the opportunity to communicate sentencing principles to the public and (perhaps) to move the public’s understanding of the offence away from celebrity-style stalking, aligning it more closely with the context in which it is most likely to occur. For this reason, any guideline (or guidelines) might be particularly useful in expressing disapproval of offending behaviour such as VAWG. This expression, in large part, could stem from the communicative aspects of

²²⁰ Any guideline would need to be read alongside existing Scottish Sentencing Council Guidelines on Sentencing Principles and Sentencing Process (the latter notes the statutory aggravation under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016).

sentencing statements and guidelines in terms of making it clearer (to the public, victims, and offenders) the factors have been taken into account.

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