

# Breach Offences Guideline

## Response to consultation

June 2018



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# Foreword



On behalf of the Sentencing Council I would like to thank all those who responded to the consultation on the draft Breach offences sentencing guideline. I also extend my thanks to the members of the judiciary who gave their time to participate in the research exercise undertaken to test and inform the development of the guideline, as well as the groups who hosted and attended feedback events.

The consultation on the Breach guidelines took place between October 2016 and January 2017, and responses were considered at meetings of the Council through to the Autumn of 2017. As with all Sentencing Council consultations, the views put forward by all respondents were carefully considered, and the range of views and expertise were of great value in informing the definitive guideline. As a result of those views a number of changes have been made across the package of guidelines. The detail of those changes is set out within this document.

Sentencing of breaches can be a particularly difficult exercise for sentencers, and one which it is necessary to undertake far too regularly. The harm present in a breach can extend to individuals or groups an order may be designed to protect, as well as to the wider criminal justice system where an order of the court and public confidence in sentencing is undermined. There are broad issues to consider in relation to addressing particular offending behaviour, while balancing this with achieving the broader aims of sentencing, including protecting the public and rehabilitating offenders.

This package of guidelines has been particularly complex to develop and finalise, not only due to the unique nature of a breach as distinct from other offences. During the early stages of developing the Breach guideline, the Council identified that it was necessary to develop a guideline for the Imposition of Community and Custodial sentences, as it was important to ensure any suspended sentences which the Breach guideline may eventually cause to be activated were fully intended to be imposed as custodial sentences. Some of the highest volume orders covered by the guideline are operating in a relatively new landscape of offender management provisions, and it has been important to understand breach practice and process to develop an effective guideline.

Guidelines are heavily informed by data and evidence of current sentencing practice, and as was highlighted during the consultation such data was limited for some of the guidelines included, limiting

our ability to assess their potential impact. The Council therefore delayed publication of the guideline to undertake its own data collection and analysis, to allow for a more informed impact assessment to be made. The delay was also necessary to enable further work to be undertaken to ensure system wide awareness and understanding of the Imposition guideline so that it is effectively applied in sentencing.

I am confident that the Breach guidelines will serve as a comprehensive package of guidance for sentencers across England and Wales, to assist in robust sentencing of breaches while promoting compliance with orders of the court.

**Lord Justice Treacy**  
**Chairman, Sentencing Council**

# Introduction

The Council consulted on a package of draft guidelines for Breach offences between 25 October 2016 and 25 January 2017. During the consultation period the Council attended events to discuss the consultation, which along with consultation responses informed revisions to the guideline. The Council are grateful to all who participated in events and responded to the consultation for their valuable contributions.

The consultation noted that this was a challenging project covering a broad range of breach offences, many of which were subject to a changing landscape. In developing the guidelines it was necessary to consider changes introduced to the way in which community and suspended sentence orders are managed and the relevance of this to breach proceedings, and to develop guidelines for breaches of new provisions which had been recently introduced relating to the management of newly released offenders. Other guidelines included related to orders designed to protect the public or individuals from offending behaviour, and careful consideration was required of factors relevant to assessing the seriousness of these breaches and appropriate penalties.

Where available the guidelines were developed with the assistance of statistical data, case transcripts and Court of Appeal cases. However, as was noted in the consultation document data was unavailable to enable a thorough examination of current sentencing practice for some of the breaches included, namely breach of community orders and suspended sentence orders. The Council held discussions with professionals to inform its proposals both before and during the consultation process, but it was keen to try to ensure that the impact of the guideline could be more effectively assessed prior to publishing the guidelines. For this reason, the Council considered consultation responses until the Autumn of 2017, but delayed publication of the definitive guidelines to explore further data options, and eventually decided to undertake its own data collection exercise.

Responses to the consultation were broadly positive, with sentencers welcoming a clear and structured approach to sentencing breaches and believing the penalties to be fair and proportionate. However some respondents raised concerns that the guidelines were too punitive:

We take the view that the Guidelines are too concerned with punishment for breaches, and have not given sufficient guidance to Courts on how to approach the individual circumstances of offenders. - **Criminal Bar Association**

From the outset the whole tenor of the guidelines is punitive. The focus is on the level of sanctions imposed. - **Howard League for Penal Reform**

The Council fully considered these views and some changes have been made to the definitive versions of the guidelines to ensure only the most serious breaches will attract the most punitive sentences, and that some of the guidelines provide greater balance in taking into account issues which may impede an offender's compliance with an order. However, as noted by the Chairman of the Council in the foreword to this response paper, it is important for the protection of the public and to the integrity of the criminal justice system that breaches of orders are robustly addressed by the courts. The Council consider that it is right and just that courts promote compliance with orders where possible, and ensure that the public and individuals are not at risk of continued criminality by offenders who breach orders. Those who seek to avoid their responsibility to comply with orders and who undermine an order imposed upon them cannot expect to do so without receiving sentences which reflect those Parliament has deemed appropriate.

The guideline will apply to all those aged 18 or over who are sentenced on or after 1 October 2018, regardless of the date of the offence.

# Summary of research

To date, there is very little published or unpublished data or information on the sentencing of some breach cases, namely breach of community orders and suspended sentence orders. Against this backdrop, a comprehensive programme of data collection, research and analysis was undertaken to draw together an evidence-base on current breach sentencing, as a platform for developing the guideline. For cases where evidence of current sentencing practice was not available for examination, a number of informal group discussions were held with probation staff and magistrates to find out about current practice with regard to issuing breach proceedings and sentencing breach cases.

During the consultation period, qualitative research was then carried out with magistrates and judges to explore how the draft guidelines might work in practice. This phase of research covered six types of breach: breach of a suspended sentence order, community order, protective order and sexual harm prevention order; failure to comply with a notification requirement, and failure to surrender to bail. Twenty-eight in-depth interviews were carried out with 16 Crown Court judges, 10 magistrates and two district judges.

In addition, the breach of community order guideline was discussed at a consultation event attended by 12 probation staff (from both the National Probation Service and Community Rehabilitation Companies). Similarly, the breach of community order and suspended sentence order guidelines were discussed with magistrates at two events, one large consultation event with around 80 attendees and a smaller event, attended by 10 magistrates. At both events sentencers were asked to sentence a hypothetical breach scenario using the draft guideline, to see how the guideline might work in practice and to pre-empt any problems with its implementation.

As a result of the findings from the interviews and exercises carried out at these events, in conjunction with the consultation responses, a number of adjustments were made to the wording of factors in the guideline and to sentence levels and suggested requirements. In this way, research played an important part in the development of this guideline, and the Council is grateful to the large number of sentencers and probation staff who participated in these research activities.

Looking ahead to monitoring and assessing the impact of the new guideline, from November 2017 to March 2018 the Council collected data on how breaches of protective orders, community orders and suspended sentence orders were currently being sentenced across a sample of magistrates' courts. An early extract of the data for breaches of community orders and suspended sentence orders has been used to form the basis of the resource assessment for the new guideline and will be used as a baseline for assessing its impact, once in force.

# Summary of responses

The consultation sought views from respondents on the ten separate guidelines. Views were sought on three main areas: the approach to assessing the seriousness of a breach; the additional factors that should influence the sentence; and the penalties or sentences. The consultation also included a number of case studies to obtain detailed responses on the workability of each draft guideline and whether any difficulties arose.

In total, 59 responses to the consultation were received of which 23 provided email or paper responses and 36 responded online.

## Breakdown of respondents

Type of respondent	Number
Charity/not for profit organisations	7
Legal professionals (collective responses)	4
Judiciary (including 6 collective responses)	37
Other/individuals	3
Academics (including 1 joint response)	2
Government departments	2
Police/law enforcement	2
Parliament (a collective response)	1
Prosecution	1
<b>Total</b>	<b>59</b>

Feedback received from the Council's consultation events and interviews with sentencers during the consultation period is reflected in the responses to individual questions below.

In general, there was a positive response to the proposals. However, the Council was also grateful for constructive criticism and considered suggestions for amending parts of the draft guidelines.

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

- the breach of community order, suspended sentence order and post-sentence supervision guidelines did not provide for a consideration of difficulties offenders face in complying with orders;
- concerns that the impact of the guidelines could not be adequately assessed;
- concerns that the penalties for Breach of suspended sentences did not align with the statutory presumption that a suspended sentence will be activated in the event of a breach;
- problems with the use of the word 'flagrant' as a culpability factor for some breaches, and the potential for a high volume of breaches to be assessed at the highest level of culpability; and
- clarification of matters relevant to the assessment of culpability and harm.

The Council has responded to these comments by:

- including an additional factor at the assessment of seriousness of breaches of community orders, suspended sentences and post-sentence supervision which provides for specified offender characteristics to be taken into account in considering compliance;
- undertaking a data collection exercise to inform the resource assessment of these guidelines;
- revising the penalties for breach of suspended sentences to more closely reflect the statutory presumption of activation, and restructuring the guidelines to enable a full assessment of whether activation would be unjust in all the circumstances;
- removing the word flagrant from the guideline, and providing for deliberate breaches to be distinguished from the most serious breaches in the culpability assessment; and
- including additional guidance as to relevant considerations in determining the culpability of an offender in committing a breach, and matters relevant to the assessment of harm.

In addition, the Council made a number of changes to each individual guideline. These changes included amendments to sentences for some of the guidelines, amendments to harm factors and additional aggravating and mitigating factors.

The detailed changes to the individual guidelines are discussed below.

# Breach of community orders, Suspended sentences and post-sentence supervision

## Criticism and concerns

While the majority of respondents were very positive regarding the proposals and welcomed a structured approach to sentencing these breaches, a small number of critical responses raised concerns regarding the guidelines. Some respondents were critical of the sentences proposed by the guidelines, believing them to be too onerous and risking significant inflation of the prison population:

We consider there to be a real risk that the new guidelines (on CO and SSO breaches) will generate an increase in custodial sentences without there being a commitment by the Ministry of Justice to meet the additional demand. We recommend that the Council present the Ministry of Justice with a more accurate estimate of impact as soon as possible after the guidelines take effect, to enable any expected increase in prison population to be factored into planning of the custodial estate – **Justice Select Committee**

A further and related concern raised by a small number of respondents was that the guidelines had been developed in the absence of data. This was in response to the consultation document highlighting that a lack of data was available to establish current sentencing practice for breaches of community orders (COs) and suspended sentence orders (SSOs) as discussed in the introduction to this response paper. The draft resource assessment explained the following:

*Estimating the resource impacts of the breach guidelines for SSOs and COs is problematic. Firstly, it is difficult to establish current sentencing practice for these orders. Although data exists on the number of COs and SSOs imposed and the number terminated for various reasons (including breach), there is no reliable data available on the action taken when a breach occurs. In particular, it is not known exactly how many breaches of these orders lead to a custodial sentence being activated, and if so, the length of the custodial sentence imposed. Also, as most of these breaches are dealt with in the magistrates' court, there are no case transcripts available for review.*

This elicited the following responses:



We are extremely concerned that the consultation has been published despite an absence of data. There is no information or data on the outcomes of most breach proceedings in magistrates' courts - neither the sanction used, nor the outcome of that sanction. There is also no research cited on the reasons why offenders breach sentences or orders. We feel that it is not possible to appraise these guidelines in the absence of that information. The Sentencing Council is tasked with assessing the impact and effectiveness of its guidelines. We appreciate that the necessary information is not in the public domain, but would urge the Council to put resources into finding and analysing this data before publishing any new guidelines on breach. - **Transform Justice**

I fail to understand how any guidelines in this area can usefully give guidance without very much more relevant data. The Sentencing Council, in the Consultation, raises the problem, but focuses on the lack of knowledge of current sentencing practice for some of the breaches included. But the problem is very much more complicated than that. We need to know much more about the specific breach, the offender and the service providers involved, before guidance can be helpful.' - **Nicola Padfield (academic)**

While the Council has a statutory duty to assess the impact of guidelines, this can only be undertaken where data is available to facilitate this. However, the Council shared concerns that a better informed estimate of the impact of the guideline should be available, and decided to delay publishing the guideline until all potential options to obtain and explore further data could be exhausted. The Council worked closely with the MOJ to establish whether any additional data held by the MOJ was suitable to inform this guideline. In particular, consideration was given to unpublished data on sentences passed for breaches of COs and SSOs. However, on review, it was determined that the unpublished data were not of sufficient quality to draw meaningful conclusions. The Council therefore decided to invest resources in undertaking its own data collection exercise to explore outcomes for breaches and provide for a more informed resource assessment. Further detail on the data collection, the analysis conducted and the anticipated impact of the guideline is included in the definitive resource assessment.

A further complexity identified in the development of the breach guidelines and a concern noted by some respondents was that SSOs were sometimes being imposed as a more severe form of community order, and not as the custodial sentence which they are. The Council were alert to this early in the development of the breach guideline and had concerns, which some respondents shared, that this could result in SSOs being activated when it may not have been fully intended by the court that a custodial sentence be served. The Council therefore paused work on the breach guideline to take proactive and robust steps to address this matter. This included developing and publishing a guideline for the Imposition of Community and Custodial sentences, to ensure that suspended sentences are only imposed where custody is the intended sentence. In anticipation of

the publication of the Breach guideline, the Chairman of the Sentencing Council recently wrote to all sentencers in England and Wales reminding them of the need to observe the Imposition guideline, and also agreed with the Director of NPS that Probation Officers should not recommend SSO's as a sentence in pre sentence reports, as they are not a stand alone sentence. They are a custodial sentence and should only be imposed when the court has determined that the custody threshold has been crossed and custody is unavoidable.

It is important to note that while published data on current sentencing practice was very limited, the development of the guideline did include a thorough evidence gathering exercise to explore current breach sentencing practice. This included analysis of Crown Court transcripts relating to breaches, and extensive discussions with sentencers in the Crown Court and magistrates' courts' and probation officers and Community Rehabilitation Companies regarding the breach process and sentencing outcomes. The Council sought to understand and explore issues offenders face in complying with orders, the level of tolerance before breach proceedings are instigated by offender managers, and how the seriousness of a breach is assessed and court responses to breaches. These discussions underpinned the models developed to assess the seriousness of a breach. The factors identified as relevant met with broad approval from respondents, as will be explained in the relevant sections of this response document. In response to some of the concerns raised in consultation, revisions to the definitive guideline take into account other offender circumstances which the draft guideline did not provide for.

Other wider concerns raised related to the new contracts for managing orders. A small number of respondents, including the Justice Select Committee, suggested that the guideline should encourage sentencers to explore the quality of the offender management during the sentencing exercise;

We believe it (the guideline) should also require sentencers to consider whether supervision by the probation services has been of sufficient quality to be effective. We recommend that the guideline for CO breaches remind sentencers to consider the individual circumstances of the offender, including the reasons for the breach taking place and any shortfall in the quality of supervision by probation services which may have contributed to the likelihood of a breach.- **Justice Select Committee**

A similar point was made in relation to 'through the gate' services which are relevant to post-sentence supervision. The Council firmly take the view that it would be inappropriate for the guideline to require sentencers to undertake such an assessment. While our exploration of current practice illustrated that sentencers are very likely to explore and question any issues around non-compliance and take into account offenders' comments in this respect when sentencing, assessing the quality of offender management is not within the remit or responsibility of sentencers and the Council do not agree that the guideline should impose such an exercise.

## Breach of community orders, suspended sentence orders and post-sentence supervision: Assessment of seriousness

### Compliance assessment

Question's 1, 4 and 14 related to how the guideline assesses the seriousness of breaches of community orders, suspended sentence orders and post-sentence supervision. As was stated in the consultation document, the Council concluded from evidence considered in developing the guideline, including analysis of cases and discussions with sentencers and offender managers, that the primary factor in assessing seriousness of the breach was the prior level of compliance with the community order or requirements of a suspended sentence. As post-sentence supervision provisions were intended to operate in a similar way to a community order (although with a purely rehabilitative focus) the Council decided that compliance was also the most relevant factor relating to the seriousness of any breach.

The assessment of seriousness in all of these draft guidelines therefore included guidance on which factors should be considered in assessing the level of compliance;

The court must take into account the extent to which the offender has complied with the requirements of the community order when imposing a sentence.

In assessing the level of compliance with the order the court should consider:

- i) overall attitude and engagement with the order as well as the proportion of elements completed;
- ii) the impact of any completed or partially completed requirements on the offender's behaviour; and
- iii) proximity of breach to imposition of order.

Consultation responses, events and road testing confirmed a highly positive response to the assessment of compliance by sentencers who agreed that the level of compliance is the appropriate measure of the seriousness of a breach:

Clear and fair – **Magistrate**

The guideline allows the sentencer discretion after determining whether compliance was low, medium or high level. This will be useful due to the many different types of orders that can be imposed and the varying circumstances of breach - **Magistrate**

Breach offences form a regular part of sentencing in the Crown Court. The issues that they raise occur frequently and are exceeded only by those that involve the discount for guilty pleas. All judges are familiar with the general principles such as the nature of the breach (or further offence), the period of time between the original order and the breach and the defendant's compliance with specific conditions. We think that it would be very useful to have all these principles combined into a single guideline. This is as much for consistency of approach as for ease of reference. – **Council of HM Circuit Judges**

The Committee welcome the proposed guideline which will assist in achieving greater consistency in dealing with breaches of Community Orders – **Legal Committee of District Judges**

Breaking the guideline up into low, medium and high levels of compliance, plus a band of wilful and persistent non-compliance, will provide some consistency in sentencing. There is discretion within the bands which will dilute consistency but allow sentence to reflect the individual circumstances of each case.- **Magistrate**

A small number of other respondents believed the assessment of seriousness in the draft guideline did not fully take into account the circumstances of offenders, or provide for aggravating and mitigating factors to be assessed, and were critical of this:

We conclude that the existing guideline on CO breaches, by reminding sentencers to consider the offender's ability to comply with an order and the reasons for the breach, is more helpful to sentencers than the new draft guideline which focuses mainly on the objective level of compliance with the order. We do not consider that the risk of double counting justifies omitting aggravating and mitigating factors from the new guideline—especially for offenders whose circumstances have materially changed since the imposition of the CO. We are particularly concerned that the draft guideline should take account of vulnerable offenders, including those who are disabled because of mental health conditions or learning disabilities. This could be achieved by including aggravating and mitigating factors, while alerting sentencers to be mindful of the risk of double counting. Factors in mitigation should include having a mental health condition or learning disability that is linked to the commission of the offence – **Justice Select Committee**

Many offenders have community orders imposed in order to tackle a specific need for rehabilitation that causes their offending, for example drug treatment and alcohol treatment requirements. In our experience there are many offenders with drug, alcohol or mental health problems which are not solved overnight. They can lead chaotic lifestyles that mean they miss appointments. Such offenders are more likely to breach their orders in the early stages while their abuse or mental health problems are still in treatment. The proximity of the breach to the imposition of the order in their case may be misleading as a consideration of seriousness as it may well reflect substance or mental health issues still being pervasive with the offender rather than the offender wilfully ignoring the order. In our submission there should be some acknowledgement within the guidelines recognising this. We suggest an additional fourth factor for courts to consider of “iv) mental health or substance misuse suffered by the offender where this impacts upon their ability to comply.” – **Criminal Law Solicitors' Association**

We take the view that the Guidelines are too concerned with punishment for breaches, and have not given sufficient guidance to Courts on how to approach the individual circumstances of offenders.’ - **Criminal Bar Association**

We feel this (the omission of aggravating and mitigating factors) is a significant gap. – **Transform Justice**

The consultation document explained that the models developed to assess the seriousness of offences, and in particular the focus on the level of compliance, did not provide for a further step to consider aggravating and mitigating factors, as many relevant factors would result in ‘double counting’ of compliance related matters. However, the Council carefully considered the points raised and agreed that the guideline should provide for particular offender circumstances or characteristics to be considered in assessing compliance. The definitive guideline therefore

includes a fourth factor to be considered in the assessment of compliance to balance the assessment and address some of the concerns raised. The new factor is:

*evidence of circumstances or offender characteristics, such as disability, mental health issues or learning difficulties which have impeded offender's compliance with the order*

The Council does not agree that the factor should include consideration of issues such as chaotic lifestyle or addiction, as this would be likely to result in a high proportion of offenders seeking to avoid their responsibility to comply with the order. The Council considers it crucial to public confidence in sentencing and the integrity of the justice system that offenders are expected to comply with orders, many of which provide opportunities to address issues which may be related to offending. Where offenders do not comply, the public have a right to expect that non-compliance is robustly addressed by the courts. The additional factor therefore provides discretion to the court to consider issues which are relevant in individual cases while appropriately restricting which matters are relevant to the compliance assessment.

A small number of respondents suggested the number of times the order had been breached should be specified as relevant to seriousness. The Council made the decision when developing the guideline that numbers of previous breaches should not be specified as a measure in assessing seriousness, as this would risk indicating that the guideline would be seen as providing 'chances', when even a first breach may be particularly serious. The factor 'overall attitude and engagement with the order as well as the proportion of elements completed' provides for the court to consider previous breaches without specifying numbers. This also addresses other suggestions that the particular elements of the order which were breached should be relevant to the assessment of seriousness, as it provides for the court to consider the particular circumstances of the breach, and undertake a balanced assessment of the offender's engagement with requirements.

The Council considers, and the majority of respondents agreed, that the assessment of compliance provides the court with the flexibility to assess the level of breach appropriately, and the penalties available provide for the penalty to be tailored to suit an offender's circumstances and encourage compliance in appropriate cases.

### **Breach of community order penalties**

There was broad approval of penalty levels by respondents and in the events held to discuss the guideline with sentencers and Probation and CRC representatives, although some thought that the proposed penalties were too restrictive, others thought they should be more punitive. Overall, there was significant approval of the range of penalty options and that the penalties available enable the court to tailor the penalty to suit an individual's circumstances. A small number of respondents suggested rather than additional unpaid work hours being specified, a percentage uplift to the

original hours imposed would be more appropriate. The Council considered this but concluded that due to the minimum and maximum hours which apply to community orders this could complicate sentencing, as well as resulting in a lack of consistency of sentences for breach as unpaid work hours in an original order may vary widely.

A number of respondents felt that the guideline was overly focused on additional unpaid work and highlighted that this is often not very effective for offenders who may have demonstrated difficulty in completing unpaid work. Greater prominence was suggested to the use of curfews as a penalty instead. A number of Probation Officers made the same suggestion, for the same sorts of reasons. The Council agreed with this view and of the value of a curfew as a penalty for breach, and the definitive guideline gives greater prominence to curfews as a response to breach and specifies appropriate curfew durations at each penalty level.

Some respondents questioned the proposed penalty for wilful and persistent non-compliance, which aligns with legislation and directs that the offender be sentenced to custody even where the original offence did not merit custody. The Council consider that the penalty would be appropriate in the case of an offender who has demonstrated such a level of disregard for a court order and who fails to engage, leaving the court with no alternative to a custodial sentence.

A point was noted by the District Judge (Magistrates' Court) Legal Committee in relation to the guideline specifying the option of 'extend the length of the order'. It was noted that different provisions are available depending on whether the compliance period is being extended, or the length of requirements. To clarify, it was suggested that the wording should be amended to 'extend length of any requirement/extend length of order'. This change has been effected to the definitive guideline.

### **Community orders – technical guidance**

Respondents broadly approved of the inclusion of technical guidance, many stating that it is a useful and concise summary. A number did question point iv which reflects the Imposition guideline in being clear that a suspended sentence must not be imposed as a more severe form of community order. A small number of respondents disapproved of this, believing that a suspended sentence was sometimes the only way to focus an offender on complying, by adding the threat of custody. The Imposition guideline is clear that a suspended sentence is a custodial sentence and as such should only be passed where the structured sentencing exercise in the Imposition guideline has been followed and a custodial sentence deemed to be unavoidable.

### **Breach of suspended sentence penalties**

A number of sentencers and other respondents raised concerns that the penalties in the draft guideline included a number of options for non-activation of a suspended sentence;

The MA made clear in its response to the Council's consultation on the imposition of community and custodial sentences that we were concerned (with the Council) to ensure suspended sentences were only used where a custodial sentence was fully intended. By the same token, it is important that the clarity of the distinction between a suspended sentence (which is a custodial sentence) and a community order (which is not) is maintained, and that has implications for breach. Unlike community orders, the law is clear that a breach of a suspended sentence order should normally result in custody, and the MA would say that this should be the case for situations where there has not been a high level of compliance. – **Magistrates' Association**

The NCA supported this point in their response, although suggested full activation of the sentence for any case other than those involving a high level of compliance:

We firmly believe that any breach that leads to a custodial sentence being considered should involve the activation of the whole sentence and not a proportion of it. As such, medium compliance should lead to the activation of the whole sentence in the same way as low compliance. A suspended sentence should be viewed as a warning that if you re-offend or fail to comply with conditions you will come back to court and go to prison for the original crime that was committed. Compliance with the order should not be given undue weight when considering whether to reduce the original sentence. We agree a minor breach should not immediately lead to the activation of the custodial sentence but there needs to be a threat as to what will happen in the event of non-compliance that is real and meaningful to the offender, at the time the order is imposed. – **National Crime Agency**

Other responses and road testing of the guideline also indicated a perception of the penalty options as too lenient, with concerns raised that the proposed penalties undermined the statutory presumption of activation where a breach occurs. While the consideration of whether activation of a sentence would be unjust includes an assessment of the level of compliance and the nature of any new offence, the Council agreed that it was unlikely Parliament intended in drafting the legislative provisions that an offender who only partially complies with an order would avoid having their sentence activated.

The definitive guideline therefore includes revised penalties, which align more closely with the statutory provisions regarding activation and reflect case law in applying a proportionate reduction to activated sentences in appropriate circumstances.

#### Failing to comply with requirements

In the draft version of the guideline medium compliance offered a non-activation option, and high level of compliance did not provide for activation of the sentence. In the definitive guideline these penalties have been revised to reflect the statutory presumption. Medium compliance provides for

activation with a proportionate reduction for completed unpaid work or curfew requirements and there is not an option of no activation. At high compliance, both an activation with a proportionate reduction and a non-activation option are available.

#### Breach by commission of further offence

While the statutory presumption of activation has been more closely reflected in the definitive guideline, the Council also considered responses which suggested penalties would be unjust in all the circumstances. Some respondents pointed out that full activation for a new offence similar in type and gravity which is committed towards the end of the period of a suspended sentence could be unjust, particularly for a similar but not particularly serious offence which attracts custody, with theft cited as one example. To address this, this category of breach has been amended to have the same options available as for new offences less serious than the original offence but requiring a custodial sentence, so that activation with a proportionate reduction is available in cases where there has been high or medium compliance.

Only multiple and serious new offences attract full activation and do not take into account the prior level of compliance with the order or provide for a proportionate reduction to be applied to the activated sentence. This reflects current sentencing practice.

#### Proportionate reduction to activated sentence

The District Judge (Magistrates' Court) Legal Committee disagreed that proportionate reductions should be limited to considering punitive requirements:

The Legal Committee agrees with the proposed penalties. The observation is made that compliance with requirements within the original order should not be limited to punitive requirements. There should be some consideration of compliance with rehabilitative requirements, especially if there is evidence of some change in the offender's behaviour since imposition of the original order and activation of the term in whole or in part may impact on the offender's prospect of rehabilitation. That would be consistent with the wording of the legislation which does not limit compliance to punitive requirements alone.- **DJ Legal Committee**

Case law considered in the development of the guideline highlighted that requirements relevant to a proportionate reduction involved a deprivation of liberty of an offender, and the Council decided that the consideration should not be widened to other requirements. Any assessment of the impact of other requirements will be made in the compliance assessment which will be relevant to all penalties except for multiple and/or serious new offences.



A small number of respondents were unclear as to how to determine the proportionate reduction in relation to requirements completed. The Council considers that this is a matter for the sentence to determine, and has included the following wording in the definitive guideline;

*'It is for the court dealing with the breach to identify the appropriate proportionate reduction depending on the extent of any compliance with the requirements specified'.*

A further point raised related to the option to extend the supervision period of the order, which is contained within the penalties and the text at the bottom of the unjust section, as supervision is no longer attached to an SSO as a formal requirement. However, the wording in the guideline reflects the statutory language and refers to the period of time during which the offender is subject to community requirements of an order.

### **Unjust in all the circumstances**

Testing of the guidelines and responses highlighted that the positioning of the guidance on whether activation would be unjust in all the circumstances was causing confusion as to when it was relevant.

There is a disconnect between the penalty levels section and the guidance upon the meaning of "unjust in all the circumstances". Both seek to provide guidance upon when suspended sentences should be activated or not, however they do so in different ways leading to conflicting guidance as to the correct approach. When deciding whether or not to activate a suspended sentence should the court use the guidance as to what the breach involves or the guidance as to the meaning of unjust? **CLSA**

To provide greater clarity as to when this consideration should be undertaken, this section of the guidance has been included directly beneath the penalty levels section of each type of breach rather than at the end of the guideline. This makes it clear that the consideration of whether activation is unjust in all the circumstances serves as a 'step two' for sentencers; once the penalty for the breach is identified (the guideline confirms that the penalties already provide for a consideration of the statutory factors of compliance and the nature of any new offence), other circumstances which may cause activation to be unjust is considered.

Respondents approved of the content of this guidance, particularly the factors highlighted as relevant to the question of whether activation would be unjust, and the inclusion of wording reminding sentencers that the original sentencing court determined that a custodial sentence was appropriate in the original case:

I agree with the factors that have been mentioned which would cause the activation to be unjust.-

**Magistrate**

I am pleased to see and I think it is important to reiterate that the original sentencing bench determined that a custodial sentence was appropriate, all too often the original sentencing exercise is questioned when considering a breach when it shouldn't be.- **Magistrate**

The Justice Select Committee response did not agree and recommended that this section of the guideline invite sentencers to revisit the original sentence.;

We are concerned about the prospect of some offenders facing activation of Suspended Sentence Orders that were imposed inappropriately, before the new Sentencing Council Imposition guideline took effect. With these offenders particularly in mind, we recommend that the draft guideline on SSO breaches be amended to explain how the 'unjust in all the circumstances' test should be applied to offenders whose original offence clearly fell short of the custody threshold.

The Council considers it would be inappropriate to ask the court dealing with a breach to examine the sentence of the court imposing the order. As discussed earlier in this response paper, the Council shared concerns regarding activation of suspended sentences which may not have been fully intended as custodial sentences. The Imposition guideline was issued to address inappropriate imposition of suspended sentences, and the publication of the breach guideline has been delayed to enable effective communication and practice development with sentencers and NPS to ensure the appropriate imposition of these orders.

Other respondents stated that the guideline should be clear that the consideration of factors which would cause activation to be unjust should be limited to factors not present at the time the suspended sentence was imposed;

Mitigating factors will already have been raised in relation to the original sentence. Only new and exceptional factors should be considered – **Central and South West Staffs Bench**

The Council agreed with this point, and the definitive guideline includes the following wording;

*'Only new and exceptional factors/circumstances not present at the time the suspended sentence order was imposed should be taken into account.'*

### **Breach of post-sentence supervision penalties**

The majority of responses to the draft guideline for Breach of PSS focused their response on criticism of PSS as a policy, rather than the content of the guideline. Criticisms largely related to what was largely seen as a paradox of short term custodial sentences being imposed for a policy

which is intended to have a rehabilitative focus, potentially disrupting the rehabilitation of offenders and creating additional resource burden on prison places.

The Council is unable to effect changes to the policy and can only develop guidelines within the legislative framework set by Parliament. The guideline seeks to provide structure and consistency to this new area of sentencing and include proportionate penalties for breach of post sentence supervision.

A number of respondents highlighted that the statutory wording on court responses to breach of PSS states that the court 'may' rather than 'must' deal with the breach in one of the ways specified, and thought the guideline should reflect this. This has been effected in the definitive guideline by the inclusion of wording at the compliance assessment which states:

*'where the court determines a penalty is appropriate for a breach of a post sentence supervision requirement...'*

As in the draft guideline, the penalties reflect the very limited penalties provided by legislation. The penalty options include non-custodial sentences for all but the most serious breach of a Supervision Default Order. The only other changes made based on responses were:

- The penalty for breach of PSS at a low level of compliance was reduced to up to 7 days committal to prison rather than 14 as proposed in the draft guidelines, to ensure any breach of an SDO could be treated more severely than an initial breach of PSS.
- The lowest curfew hours penalty was increased from two to four, as it was thought unlikely that a court would impose a penalty of such short duration.

# Failure to surrender to bail

## Culpability factors

While the majority of respondents approved of the culpability categories, some respondents thought the guideline should distinguish between section 6(1) and section 6(2) Bail Act offences. Respondents proposing a distinction thought that a 6(2) offence represented a lower level of culpability than a 6(1), as a reasonable cause had been present in the initial failure to surrender. One respondent, the Criminal Law Solicitors' Association, thought that a 6(2) offence should automatically be captured by culpability category C. However, the statutory maxima for each section of the offence is the same, and the Council do not agree that an offender should automatically attract a lower culpability categorisation for having a reasonable cause for an initial failure but may then decide to deliberately avoid surrendering. It is likely that such offences would largely be limited to cases where the offender surrenders late in the day so would therefore attract a lower culpability and harm assessment.

In response to a point raised in consultation, the word 'excuse' in culpability category C has been replaced with the word 'cause' to align with the wording of the legislation. Culpability category B has been amended to 'cases falling between A and C'.

## Harm factors

Respondents broadly approved of the approach to assessing harm, and in particular that Crown Court cases are assessed at a higher level of harm than cases in magistrates' courts.

In light of the different sentence levels in the Magistrates' Court and the Crown Court for this offence, it is right to acknowledge the greater harm caused in respect of Crown Court proceedings, especially the impact upon victims and witnesses to the most serious and traumatic offences. –  
**District Judge (Magistrates' Court) Legal Committee.**

A small number of respondents did not approve of the asterisked guidance in the harm section of the guideline, which sets out the magistrates power to commit a case to the Crown Court for sentence where harm is particularly severe. The Magistrates' Association thought that it would be preferable to include this as an additional harm 1 factor. However, the purpose of the presentation of this information in developing the guideline was predominantly to remind magistrates courts of the power to commit for sentence in cases where this may be appropriate. It would not be appropriate to include this within a specific harm category, as it could result in a low threshold of assessment of this type of case when it should be relatively exceptional.

In testing of the guideline one judge felt the instruction was contrary to encouraging magistrates courts to retain cases for sentencing rather than committing them to the Crown Court. In the definitive

guideline additional wording has been included to clarify that this provision should only be used where the magistrates' court anticipates a sentence outside of their three month maximum powers.

A further point raised in relation to the harm assessment was how to assess the harm where a trial has proceeded in the absence of an offender failing to surrender, so no delay was caused to the proceedings. This point was made by a small number of respondents and by a member of a solicitor's panel who were asked to review the proposed revised guideline. It is thought that as the harm factors include a consideration of the impact upon the administration of justice, this would include any disruption to the commencement of any sentence imposed and the guideline adequately provides for such cases.

Finally, some respondents thought that the point in proceedings in which the failure occurred should be considered in the harm assessment. The Council considered this during the development of the guideline, but noted that an offender may fail to surrender to a first or second hearing for a serious offence requiring committal to Crown Court, which could be just as serious in terms of the consequences of a substantial delay to the administration of justice and harm and distress caused to victims, and should therefore be capable of attracting a Harm 1 or Harm 2 assessment.

## Sentences

Most issues raised with the draft guideline were in relation to proposed sentence levels. It was suggested that starting points in some cases were too low, and in others too high. In response to these points and consideration of these issues, the following changes have been made to the definitive guideline;

- i) A3 starting point has been increased from 7 days to 14 days, and A2 cases increased from 14 days to 21 days. This is because respondents noted that the proposed levels in the draft guideline represented a reduction from current sentencing practice, as in the existing SGC guideline for this offence the most deliberate breaches currently attract a 14 day custodial sentence starting point irrespective of harm caused. Further, it was noted that sentences of 7 days imprisonment or less are not practically possible, as with a guilty plea reduction this could reduce a sentence to an effective period of less than 5 days, which is the lowest period of custody to which an offender can be sentenced.
- ii) The starting point of A1 cases was reduced from 13 weeks to 6 weeks as 13 weeks was considered too high by a number of respondents, and the sentence range amended to 4 weeks - 6 months imprisonment. The definitive guideline includes additional guidance stating; *'In A1 cases which are particularly serious and where the consequences of the delay have a severe impact on victims and witnesses, a sentence in excess of the specified range may be appropriate.'*

- iii) Community orders were agreed as a starting point for B2 and C1 cases, with the express instruction that these include a curfew and/or unpaid work requirement only, to ensure a suitably punitive penalty other than a short term custodial sentence. For category B2 this represents an increase from the starting point of a fine proposed in the draft guideline, as some respondents submitted this was too low. However, the category range still provides for a fine to be imposed in appropriate cases.

An additional point considered by the Council was that the guideline should include an instruction that any custodial sentence imposed for the FTS offence should normally be consecutive to a custodial sentence imposed for the substantive offence. Wording to this effect has been added at step two of the guideline.

#### Aggravating and mitigating factors

Some respondents suggested the duration of the period between the failure to surrender and the subsequent arrest or surrender should be an aggravating factor. However, as Harm factors 1 and 2 provide for substantial delay to proceedings, this could present a risk of double counting and it has not been included. One respondent submitted that 'genuine misunderstanding of bail or requirements' is rarely credible and would encourage weak excuses, whereas another thought this would be best placed as a culpability C factor. A small number of respondents thought a history of breach of court orders should not aggravate a failing to surrender offence. As these factors will be relevant in some cases and not others, they have not been amended as it is considered that sentencers will apply appropriate weight to the factors depending on the circumstances of the case. The aggravating factor 'breach committed shortly after order made' was removed as it was submitted that this would be irrelevant.

# Breach of Protective Order, Criminal Behaviour Order, Sexual Harm Prevention Order and Failing to comply with a notification requirement

## Culpability

This group of guidelines apply to breaches of orders designed to protect individuals or the wider public from specific behaviour. The consultation asked respondents if they agreed with the proposed approach to the assessment of culpability for these breaches. For breach of protective orders, criminal behaviour orders and sexual harm prevention orders the proposed culpability factors which were subject to consultation are as follows;

A	<ul style="list-style-type: none"> <li>• Flagrant, serious or persistent breach</li> </ul>
B	<ul style="list-style-type: none"> <li>• Factors in categories A and C not present</li> </ul>
C	<ul style="list-style-type: none"> <li>• Minor breach</li> <li>• Breach just short of reasonable excuse</li> </ul>

The majority of responses were positive regarding the proposed culpability factors for these three breaches, and were supportive of the overall approach to assessing seriousness in the draft guidelines, although some respondents did request more specific guidance regarding culpability B category factors. However, while the majority of respondents, particularly sentencers, supported the approach to assessing seriousness, a number of responses raised concerns regarding the likelihood of a high number of cases falling within culpability category A. These respondents were concerned

that the majority of breaches would be assessed as deliberate, which the wording ‘flagrant, serious or persistent’ included in Category A was interpreted to mean.

Testing of the guidelines with sentencers also highlighted this issue, with judges feeling the sentences arrived at as a result of these factors were considerably higher than they would currently impose.

A further point regarding culpability was discussed in an article published in Sentencing News as a response to the consultation paper.<sup>1</sup> The article addressed breaches of PO’s, CBO’s and SHPO’s directly, and the way in which culpability is dealt with in these guidelines. It was noted that the consultation paper highlighted that culpability A factors represent a deliberate intention to disregard the order of the court, whereas the draft guideline does not provide clear guidance as to what culpability ‘speaks to’, posing a risk that culpability and harm will be conflated. The Council considers that harm is intrinsically linked to culpability in orders with a preventative purpose. This is because to ensure the culpability in a breach is effectively assessed it is necessary to consider an offender’s intention and motivation in committing a breach, which may be to cause harm to an individual or a group. The Council therefore decided that the guideline should provide guidance in this respect. In the definitive guideline additional guidance has been included at step one regarding which factors are relevant to the level of culpability in a breach;

### **Culpability**

**In assessing culpability, the court should consider the intention and motivation of the offender in committing any breach.**

To ensure guidance on culpability for these breaches is clearer and to provide for appropriate categorisation, slight amendments to the culpability factors for breach of a protective order, criminal behaviour order and sexual harm prevention order have also been effected in the definitive version of the guideline. A number of respondents questioned the use of the term ‘flagrant’. While this term is commonly used to describe a serious breach, the Council agreed that it should be removed if its definition were not clear to all users of the guideline.

The culpability factors in the definitive guideline have therefore been revised, to be clear that category A is reserved for very serious and persistent breaches, while category B captures a deliberate breach falling between category A and C. Testing of the guideline illustrated that such a distinction is clear to sentencers.

In the draft guideline for Failing to comply with a notification requirement, which applies to sex offenders, this issue did not arise, as the factors were expressed differently with category B already providing for deliberate breaches. However, at culpability category A the word ‘flagrant’ has been replaced with the word ‘determined’ for consistency and to avoid issues with interpretation and

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<sup>1</sup> ‘A response to the Sentencing Council’s Consultation Paper on Breach Offences’, Rory Kelly and Lyndon Harris, Sentencing News Issue 3 2016, 10<sup>th</sup> December 2016.



application of the factor. The additional wording relating to considering an offenders intention and motivation in assessing culpability has also been included in the failing to comply guideline.

## **Harm factors**

The harm factors agreed for the draft guidelines were all slightly different, and tailored to the potential harm associated with each order breached. For example, the harm factors included in the breach of a criminal behaviour order guideline provide for the fact that breach of a positive requirement (such as for an offender to undergo alcohol addiction treatment) may present a risk of continuing criminal behaviour in the event of a breach.

Responses were broadly positive to the approach to assessing harm, although a small number of respondents did suggest the wording in the harm categories was too vague and that more specific examples of harm should be included at each category. The Council considered this but concluded that given the broad range of activity to which the factors may apply it would not be possible to provide an exhaustive list.

Respondents were particularly positive regarding the risk of harm being included in the harm assessment, agreeing that harm should assess the risk posed by any breach. During testing of the guidelines, however, while judges agreed with risk being included in the harm assessment it did not seem obvious to most of the judges that the assessment of risk in the breach activity should relate to considering the original offence for which the order was imposed. The definitive guideline therefore includes the following additional guidance on the consideration of risk of harm, to be clear and to ensure consistency of approach in this respect:

*In assessing any risk of harm posed by the breach, consideration should be given to the original offence(s) for which the order was imposed and the circumstances in which the breach arose.*

A small number of respondents noted that caution should be exercised in assessing harm present in a breach of a protective order in the context of a coercive and controlling relationship, as harm could be categorised as lower than may be appropriate. One magistrate respondent stated that there should be some advice to exercise caution as the harm may not be immediately obvious. The Council agreed with this point and the breach of protective order guideline includes additional wording to accompany the harm assessment guidance which states;

*'care should be taken in assessing harm where the breach is committed in the context of domestic abuse and there is evidence of a controlling and coercive relationship'.*

## Sentences

The responses showed broad approval for the proposed sentence levels, and for sentence ranges that are more reflective of the statutory maximum for the offences. The majority of respondents believed the penalties to be proportionate, although a small proportion thought in some cases they were too lenient. As already noted, some respondents did not approve of the proposals and thought the penalties were too high, noting a marked difference between sentences in existing guidance. These concerns were exacerbated due to the issue already highlighted regarding the culpability assessment. This resulted in concerns by some respondents that the majority of offences would result in the finding of a deliberate breach and therefore a Category A assessment, which would inflate sentences. The proposed revisions to culpability factors will address these concerns and provide for greater balance in the culpability assessment.

A number of respondents particularly welcomed the clear guidance on assessing seriousness in the 'Failing to comply with a notification requirement' guideline, and the associated sentences, although one respondent did raise concerns that sentences for this offence will significantly increase. In developing the guideline and sentence levels the Council considered Court of Appeal cases, and comments made in sentencing that the harm inherent in this offence is not restricted to a lack of compliance with an administrative process. Cases examined illustrated that this breach can be committed by an offender who may seek to conceal their past offending in an attempt to gain access to potential victims and go on to commit further offences. Intention and motivation is therefore crucial to the assessment of seriousness of this breach, and the Council considers that the sentence levels more appropriately reflect seriousness.

An issue raised by the HM Council of Circuit Judges was in relation to the differing penalties for Breaches of PO's and SHPO's. In relation to the proposed sentences for breach of a protective order they responded:

We agree with these as they stand but we question whether there should be a distinction between this offence and breach of a SHPO. We find it difficult to see the logic in this. Both carry the same maximum sentence but some breaches of protective orders in e.g. domestic violence or harassment may be very serious and indeed more serious than equivalent breaches of SHPO's. The type of additional aggravating features is very similar but there is a greater number with this offence.

The Council considered this, but did not revise the sentence levels to achieve parity with sentences for Breach of SHPO's, as the Council decided during the guideline development that sentences for SHPO's should be the highest of all the orders included within the guideline, given the very particular type of harm posed by this breach.

A further amendment made to sentences related to the sentences for category B1 breach of protective orders and Breach of CBO, as it was noted at the post consultation stage that these were disproportionate to sentences for the A2 offence, which included a higher starting point and a lower

category range. The definitive guideline therefore amends the starting point of this category in both guidelines to a 1 year custodial starting point and broadens the category range to include a non-custodial option of a community order.

## **Aggravating and mitigating factors**

It was proposed by some respondents that 'long period of compliance' be removed as a mitigating factor, as some respondents thought that an offender should not be able to rely on this where they may not have had an opportunity to breach, for example by not knowing the address of the subject of a protective order prior to a breach and therefore being unable to contact them. The Council considered this but believe that courts are experienced in appropriate application of these factors, and in the circumstances outlined an offender would not be likely to receive credit for long compliance.

In response to a submission the aggravating factor 'history of disobedience to court orders' has been qualified with 'where not already taken into account at Step One' in the definitive guideline. This is to reduce the risk of this being double counted if considered as a previous conviction, which would be a statutory aggravating factor.

# Breach of disqualification from acting as a director

## Culpability factors

There was broad approval of proposed culpability factors included in the draft guideline although, as for other draft guidelines, a number of respondents questioned the use of the word 'flagrant' and its definition. It was thought that a lack of clarity around the word flagrant could lead to inconsistent classification of culpability. There was a further complication in that there are only two categories of culpability for this offence, and the Council considered that 'deliberate' would not be an appropriate culpability category as it is difficult for this type of breach to be anything other than deliberate. In analysis of cases to develop the guideline only one case did not involve a wholly deliberate breach, and related to a disqualified person setting up and managing a charity, failing to appreciate the disqualification was not restricted to commercial activity.

The Council therefore decided that due to the low volumes of this offence and a lack of familiarity with them for sentencers, more descriptive factors would be useful for inclusion in this guideline. Post consultation discussions were held with prosecutors of these offences to identify such factors and those which make offences more serious. These were identified as factors which were included as aggravating factors in the draft guideline, relating to offences involving deceit, dishonesty and concealment of disqualified status. As a result, the high culpability factors in the definitive guideline have been amended to include this type of activity.

## Harm factors

A number of respondents questioned the assertion made in the consultation document that the harm or risk of harm in these breaches would always be of a financial nature:

The potential harm is not always financial. Directorship of a 'company' can have a major influence on the lives not only of its employees but of its pensioners (British Home Stores and further back Robert Maxwell come to mind) and its customers - and in the case of companies providing, for example, medical services or nursing home care the risks to life and health are acute.- **Magistrate**

If it was a charity it might not be financial harm but reputational harm and loss of the service to the users- e.g. Kid's Company – **Magistrate**

We suggest that “harm” be broadened to include non-financial harm. While harm is predominantly financial in nature, it could conceivably be non-financial such as when a director has been disqualified for health and safety breaches. – **Insolvency Service**

The Council agreed with these points and the harm factors have been amended to reflect that harm could be non-financial in the definitive guideline.

Guidance on assessing risk of harm has also been included as for a number of other breaches, as this is also relevant to this breach offence.

## Sentences

Sentence levels in the draft guideline were intended to be broadly in line with current sentencing practice which is heavily weighted towards custodial sentences. A small number of respondents thought that the proposed penalties were too harsh, and questioned whether custody should even be required for offences of this type. Given the amendments proposed to culpability factors, the Council considered whether custody would be an appropriate sentence in cases not involving dishonesty, deceit or concealment although such cases have previously attracted custodial sentences. The Council decided that any case falling within culpability category A or causing or risking the highest level of harm should attract a starting point of a custodial sentence. For cases of lesser culpability and medium to low harm, non-custodial starting points have been included.

## Aggravating and mitigating factors

The changes to culpability factors effectively removed the most significant aggravating factors which had been included in the draft guideline, as these are now taken into account at step one of offence seriousness. However, a number of additional aggravating factors were proposed by respondents, including the Insolvency Service, some of which provide balance to mitigating factors.

Those included in the definitive guideline are:

- breach committed shortly after order made;
- breach continued after warnings received;
- breach is continued over a sustained period of time;
- breach involves acting as a director in multiple companies;
- breach motivated by personal gain; and
- offence committed on licence or while subject to post sentence supervision.

Mitigating factors included in the draft guideline have been retained, and two new factors added.

These are:

- evidence of voluntary reparation/compensation made to those suffering loss; and
- breach activity minimal or committed for short duration.

Other standard guideline factors relating to an offenders personal circumstances are also included in the definitive guideline.

# Breach of disqualification from keeping an animal

There was broad approval of the draft guideline from respondents, with the RSPCA in particular welcoming a guideline for this offence:

At present, due to the lack of Guidelines, there is no harmonised approach to this issue and the RSPCA welcomes the first Guidelines on this area – **RSPCA**.

Very few suggestions were made regarding amendments to the draft guideline.

## Culpability factors

To be consistent with the approach taken in other definitive guidelines the word ‘flagrant’ was removed and substituted for ‘serious and/or persistent’ for a breach of the highest culpability. While descriptive factors were included in the guideline for the breach of a director’s disqualification, the Council considered that sentencers will have no difficulty in identifying a serious breach of this type.

## Harm factors

Only a very small number of points were raised in relation to harm factors. The first was:

I'd like to consider that reason for the imposition of the order. If it was as a result of a serious offence, even a more minor breach might be viewed more seriously.- **Magistrate**

The same amendment to the harm assessment wording has been included in this guideline to clarify what should be considered in assessing risk of harm, which addresses this point.

A second point was that subjectivity may affect the harm assessment depending on a sentencers own sensitivities in relation to animal related offences:

But harm to animals may be harder for some sentencers to allocate to categories, depending on their own sensibilities and attitude to animal welfare? – **Magistrate**

The Council did not consider that subjectivity will impede a sentencers assessment of harm, given that the factors specify the levels of harm necessary in each category and the prosecution will present evidence as to any harm caused or risked by an offence.

The Metropolitan police response noted that the highest level of harm in the Sentencing Council's dangerous dogs guideline is limited to 'serious', and that the Breach guideline sets a higher threshold with very serious harm specified in the highest harm category. This was in order to be consistent with other Breach guidelines, such as breach of a protective order and breach of a sexual harm prevention order, and to be clear on the threshold of harm required to attract the highest harm assessment.

## Sentences

Some respondents thought sentence levels for this offence were too low:

Our response to this is that all the sentences are too low. It has already been determined that offenders are unfit to keep animals either because of serious cruelty to animals or in keeping dangerous animals. Sentences for breaches should better reflect the seriousness of the original offences.- **Central and South West Staff Bench**

Although the legislative provisions provide for a statutory maximum sentence of 51 weeks, this is a summary only offence, and given the lack of commencement of extended sentencing powers for magistrates' the maximum sentence remains as 6 months imprisonment. The starting point of a category A1 offence is therefore as high as the guideline can sensibly go to allow for any adjustment to the sentence if aggravating factors are present.

## Aggravating and mitigating factors

There was broad approval of aggravating and mitigating factors. An additional aggravating factor proposed was harm caused to multiple animals. The Council agreed that this should aggravate an offence and it has been included, with the caveat that it should only be relevant where not taken into account at Step One.



# Analogous orders

Respondents broadly approved of the section on analogous orders, which provides guidance on sentencing offences analogous to Criminal Behaviour Orders. A small number thought it unnecessary to include guidance on public space protection orders given they are very low volume, while others thought there was value in their inclusion for this reason due to a lack of familiarity for courts in sentencing them.

Some respondents questioned why a full guideline was not included for Breach of a Football Banning Order (FBO):

(Agree with analogous orders) save for breaches of a football banning order. These breaches are dealt with regularly by the courts and should therefore, it is suggested, be the subject of more detailed guidance within in the guideline (of the kind given in respect of breaches of disqualification for keeping an animal).- **NCA**

During consideration of the scope of the guideline both breach of FBO's and breach of disqualification from keeping an animal were considered. However, it was considered that analogy can be drawn between FBO's and CBO's, whereas there is no other guideline within the breach guideline package which could be considered analogous to breach of disqualification from keeping an animal.

A number of suggestions were made regarding other orders which may be analogous to other breach offences. These included breaches of specific sex offence related orders, as well as restraining orders which are made on acquittal. It was identified that these would more appropriately be captured within the scope of the individual guidelines. Specifically, the scope of the SHPO guideline has been expanded to include breach of sexual harm risk orders and foreign travel order prohibitions, as the statutory maximum sentence is the same and the culpability and harm factors would translate across to those breaches.

Similarly, there is no substantive difference between protective orders made on conviction, and those made on acquittal under section 5a, so the scope of the guideline has been expanded to capture this offence.

# Orders not included

The consultation included a list of orders not included and the rationale for not including them. While the majority of respondents agreed that it was not necessary to include those listed, there were a small number who raised objections.

One of these was the National Crime Agency, who objected to the lack of inclusion of Breach of Serious Crime Prevention Orders. Their response highlighted an increase in the volumes of these orders being applied for, as part of their prosecution strategy. They also questioned the consultation document rationale that only five of these orders had been made in the last ten years, as this figure actually related to numbers of orders breached, which had not been clear from the data analysed. The NCA response stated:

*The NCA and its precursor makes significant use of the SCPO regime and we have secured 232 SCPOs since 2008. Of these 209 are still extant, with 112 actively monitored by the NCA (the remaining 97 are for individuals still serving prison sentences). Recent figures show that there are about 314 SCPOs granted across all agencies. These figures will increase as SCPOs are an integral part of our prosecution strategy. Since 2011 the National Crime Agency (NCA) and its predecessor the Serious Organised Crime Agency (SOCA) have secured nine convictions (five in the last 18 months) for breaches of Serious Crime Prevention Orders and seven for Financial Reporting Orders (which have not been included in the review), making a total of 16. This is only for the NCA and does not include orders prosecuted by other agencies and police forces. This low number needs to be taken in the context that SCPOs are not 'live' until release from prison. Given the long sentences given to NCA targets and that these orders were only granted from 2008, many are only becoming live recently. FROs, although being phased out, are still in force for 15 years from conviction. As such more breaches for these orders are expected over time.*

While breach volumes are still very low (with 16 offenders sentenced for the offence over the period 2011-2016), given that this information was not available to the Council in considering whether to include SCPO's in the guideline, work was undertaken to consider if they should be included.

SCPO's are provided for by the Serious Crime Act 2007. Schedule 1, as amended by Section 47 of the SCA 2015 and Schedule 5, of the Modern Slavery Act 2015 (Section 7) sets out that an SCPO can be made where an offender is convicted of one of the following types of offences:

- Drug trafficking
- Slavery
- People trafficking; (Amended by the Protection of Freedoms Act 2010, Schedule 9, paragraph 142)
- Firearms offences

- Prostitution and child sex offences
- Armed robbery
- Money laundering
- Fraud
- Offences in relation to public revenue (amended by Taxation (International and Other Provisions) Act 2010, Schedule 7, paragraph 101(2))
- Bribery (Amended by the Bribery Act 2010, Schedule 1, paragraph 14)
- Counterfeiting
- Blackmail
- Computer misuse
- Intellectual property
- Environment (as amended by Schedule 22 of the Marine and Coastal Access Act 2009, Part 5, B)
- Organised Crime

The extensive coverage of these orders provide for an extremely broad range of activity to be present in a breach, and considerable breadth in the nature of the crime for which it was imposed, which is at the forefront of considering the harm in a subsequent breach offence. Harm in a breach may range from physical to financial, and some breach offences may include greater risks of harm and others only realised harm. The breach guideline package currently includes ten different guidelines, and while some are similar, detailed consideration of the specific breach offence was necessary to develop factors and sentence levels for each guideline. For this reason, it was decided that it would not be possible to develop one guideline which could adequately address all of the potential breaches of a SCPO, given that the assessment of each type of breach would require consideration of the original offence and the behaviour prohibited by an SCPO, as was the case for the other breach guidelines.

A further submission regarding a potential breach that the guideline should capture was put forward informally by MOJ, in respect of breaches of Slavery and Trafficking Prevention (STPO) and Risk Orders (STRO) which are provided for by section 15 of the Modern Slavery Act 2015. An STPO can only be made if a defendant has been convicted of a trafficking or slavery offence, and the court is satisfied that there is a risk the defendant may commit further offences, and it is necessary to protect others from harm. Breach of a STPO is punishable with up to 5 years' imprisonment. Slavery and Trafficking Risk Orders (STROs) were introduced under section 23 of the Modern Slavery Act 2015. An order can be made if a defendant has not been convicted of a trafficking or slavery offence but is nevertheless thought to pose a risk of harm and it is necessary to protect others. The court must be satisfied that the defendant has acted in a way which means that there is a risk that a trafficking or slavery offence will be committed. An order can be made by a magistrates' court on application by the police, NCA or Immigration Office, and can prohibit the defendant from doing anything described in the order necessary to protect others from harm likely to occur. Breach of a STRO is punishable with up to 5 years' imprisonment.

The MOJ asked whether this was an order which could be considered for inclusion within the breach guideline. The question was also posed as to whether this was a breach which could be included as analogous to sexual harm prevention orders, given that each offence can include both prevention and risk orders. However, it is thought the culpability and harm factors for these breaches would differ, as an initial assessment identified the potential for both physical and financial harm in a breach of a STOP or STRO, and there were not sufficient cases to enable an examination of factors which may be present in a breach to adequately provide for an informed guideline to be developed post consultation.

The Council appreciates that respondents who made submissions requesting the inclusion of other breaches may be disappointed. However, to assist with sentencing of other orders, the definitive guideline has additional text included at the analogous orders section, in accordance with the Coroners and Justice Act which provides for courts to consider any guideline which may be relevant to the case they are sentencing. The wording included is:

*'where an offence is not covered by a sentencing guideline a court is also entitled to use, and may be assisted by, a guideline for an analogous offence subject to differences in the elements of the offences and the statutory maxima.'*

Given the breadth of offences covered within the breach guideline, it is likely this may offer some assistance to courts in sentencing other breaches.

# Public Sector Equality Duty

The Public Sector Equality Duty (PSED) is a duty set out in section 149 of the Equality Act 2010 (the 2010 Act) which came into force on 5 April 2011. It is a legal duty which requires public authorities (and those carrying out public functions on their behalf) to have “due regard” to three “needs” or “limbs” when considering a new policy or operational proposal. Complying with the duty involves having due regard to each of the three limbs:

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

Under the PSED the protected characteristics are: race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment. The protected characteristic of marriage and civil partnership is also relevant to the consideration of the first limb of the duty.

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

The Council have considered data available in relation to offenders sentenced for breach offences. This data includes volumes of offenders sentenced grouped by gender, ethnicity and age and is available to view in the statistical tables which accompany the guideline. No equality and diversity issues have been identified in relation to the breach guidelines which are intended to apply equally to all demographics of offenders.

# Conclusion and next steps

The consultation has been an important part of the Council's consideration of this guideline. Responses received from a variety of sources informed changes made to the definitive guideline.

The guideline will apply to all adults aged 18 or over sentenced on or after 1 October 2018, regardless of the date of the offence.

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

# Annex A: consultation questions

## **Breach of community Order**

Question 1: Do you agree with the proposed approach to the assessment of seriousness of breach of a community order? Please state if there are any other factors which you think should be included in the assessment of seriousness.

Question 2: Do you have any general comments on the proportionality of the proposed sentences?

Question 3: Do you have any general comments on additional technical guidance included? Is there any further information which should be included?

Question 4: Do you have any general comments on the draft guideline for breach of a community order?

## **Breach of a suspended sentence order**

Question 5: Do you agree with the proposed approach to the assessment of seriousness of breach of a suspended sentence order by failure to comply with a community requirement? Please state if there are any other factors which you think should be included in the assessment of seriousness.

Question 6: Do you have any general comments on the proportionality of the proposed penalties?

Question 7: Do you agree with the proposed approach to the assessment of seriousness of breach of a suspended sentence order by the commission of a further offence? Please state if there are any other factors which you think should be included in the assessment of seriousness.

Question 8: Do you agree that the proposed levels of penalty are appropriate?

Question 9: Do you have any general comments on the section relating to the unjust test? Please state if there are other factors which you consider are relevant to the assessment of whether activation would be unjust.

Question 10: Do you have any comments on the placement of information within the guideline?

Question 11: Do you consider that the sentence imposed in case study A is appropriate? If you do not agree, please tell us what sentence should be passed and why.

Question 12: Do you consider that the sentence imposed in case study B is appropriate? If you do not agree, please tell us what sentence should be passed and why.

Question 13: Do you have any general comments on the draft breach of suspended sentence order guideline?

**Breach of post sentence supervision**

Question 14: Do you agree with the proposed approach to the assessment of seriousness of breach of post sentence supervision?

Question 15: Do you have any general comments on the proportionality of the proposed sentences?

Question 16: Is there any other information or guidance which should be included within the breach of post sentence supervision guideline?

**Failing to surrender to bail**

Question 17: Do you agree with the proposed culpability factors?

Question 18: Do you agree with the proposed approach to the assessment of harm? Please state your reasons if you do not.

Question 19: Do you have any general comments on the sentence ranges and starting points?

Question 20: Are there any aggravating or mitigating factors that should be added or removed?

Question 21: Do you have any other general comments on the draft guideline for failure to surrender?

**Breach of a protective order**

Question 22: Do you agree with the proposed approach to the assessment of culpability?

Question 23: Do you agree with the proposed approach to the assessment of harm?

Question 24: Do you have any general comments on the sentence ranges and starting points?

Question 25: Are there any aggravating or mitigating factors that should be added or removed?

Question 26: Do you have any other general comments on the draft guideline for breach of a protective order?

**Breach of a criminal behaviour order**

Question 27: Do you agree with the proposed approach to the assessment of culpability?

Question 28: Do you agree with the proposed approach to the assessment of harm?

Question 29: Do you have any general comments on the sentence ranges and starting points?

Question 30: Are there any aggravating or mitigating factors that should be added or removed?

Question 31: Do you have any other general comments on the draft guideline for breach of a criminal behaviour order?



**Breach of a sexual harm prevention order**

Question 32: Do you agree with the proposed approach to the assessment of culpability?

Question 33: Do you agree with the proposed approach to the assessment of harm?

Question 34: Do you have any general comments on the sentence ranges and starting points?

Question 35: Are there any aggravating or mitigating factors that should be added or removed?

Question 36: Do you have any other general comments on the draft guideline for breach of a sexual harm prevention order?

**Failing to comply with a notification requirement**

Question 37: Do you agree with the proposed approach to the assessment of culpability?

Question 38: Do you agree with the proposed approach to the assessment of harm?

Question 39: Do you have any general comments on the sentence ranges and starting points?

Question 40: Are there any aggravating or mitigating factors that should be added or removed?

Question 41: Do you have any other general comments on the draft guideline for breach of a notification requirement?

**Breach of a disqualification from acting as a director**

Question 42: Do you agree with the proposed approach to the assessment of culpability?

Question 43: Do you agree with the proposed approach to the assessment of harm?

Question 44: Are there any aggravating or mitigating factors that should be added or removed?

Question 45: Do you have any other general comments on the draft guideline for breach of a disqualification from acting as a director?

**Breach of a disqualification from keeping an animal**

Question 46: Do you agree with the proposed approach to the assessment of culpability?

Question 47: Do you agree with the proposed approach to the assessment of harm?

Question 48: Are there any aggravating or mitigating factors that should be added or removed?

Question 49: Do you have any other general comments on the draft guideline for Breach of a Disqualification from keeping an animal?

**Analogous orders**

Question 50: Do you agree with the proposed list of analogous breaches and the approach to dealing with these, and that they should be included within the definitive guideline?

Question 51: Do you agree with the breaches not included in the draft guideline and the rationale for not including them? Please give your reasons if you do not.

**Equality and Diversity**

Question 52: Are there any equality and diversity issues that the guideline does not take into account?

# Annex B: consultation respondents

1. The Insolvency Service
2. National Crime Agency
3. Metropolitan Police Service
4. CPS
5. Rory Kelly and Lyndon Harris (via Sentencing News article)
6. Lord Chancellor
7. Justice Select Committee
8. Law Society
9. NSPCC
10. RSPCA
11. Howard League
12. Women in Prison
13. Womens Aid
14. Transform Justice
15. Prison Reform Trust
16. Magistrates' Association
17. Council of HM Circuit Judges
18. Legal Committee of HM Council of District Judges (magistrates' courts)
19. Victim's Commissioner
20. Oxford Bench
21. SE London Bench
22. Central and SW Staffordshire Bench
23. Jan Clare (retired Probation Officer)
24. Criminal Bar Association
25. Criminal Law Solicitors Association
26. Professor Nicola Padfield
27. London Criminal Courts Solicitors' Association
28. Anne Arnold (District Judge)
29. Colin Smith (Magistrate)

And 30 other unnamed magistrate, probation officer or individual responses



