

## Consultation Stage Resource Assessment

### Changes to the Magistrates' Court Sentencing Guidelines and associated explanatory materials

#### Introduction

This document fulfils the Council's statutory duty to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services.<sup>1</sup>

#### Rationale and objectives for new guideline

The Council has received suggestions from guideline users in magistrates' courts on improvements that could usefully be made to guidelines and the explanatory materials that accompany them.

The proposed changes relate chiefly to the Magistrates' Court Sentencing Guidelines (MCSG) but may also impact on sentencing in the Crown Court for breach of a community order.

#### Scope

As stipulated by section 127 of the Coroners and Justice Act 2009, this assessment considers the resource impact of the proposed changes on the prison service, probation service and youth justice services. It has also considered the impact of the proposed changes on fines, given that fines account for a large proportion of sentences, especially in magistrates' courts. Any resource impacts which may fall elsewhere are therefore not included in this assessment.

This resource assessment covers proposed changes to existing guidelines for sentencing adults or organisations:

- Amending the explanatory materials to the MCSG;
- Adding information on disqualification to the *Drive whilst disqualified* guideline; and
- Amending the *Breach of a community order* and *Totality* guidelines to ensure that they are not misleading.

The proposals do not apply to guidelines for sentencing children and young people.

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

## Current sentencing practice

### Magistrates' courts statistics

In 2018, around 1.1 million adult offenders<sup>2,3</sup> were sentenced in magistrates' courts. The majority of these offenders will have been sentenced with reference to offence specific and/or overarching principle guidelines in the MCSG. The number of adult offenders sentenced at magistrates' courts has remained generally stable over the past decade, with 1.2 million adult offenders sentenced in 2008.

### Disqualification from driving statistics

The Ministry of Justice publishes statistics on the number of offenders disqualified from driving each year.<sup>4</sup> These statistics show that in 2018, around 63,000 offenders were directly disqualified from driving (i.e. convicted for an offence and disqualified), and 31,000 offenders were disqualified under the penalty point system (i.e. disqualified through accumulating points on their driving licence).<sup>5</sup>

### Driving whilst disqualified

Around 8,500 adult offenders were sentenced for driving whilst disqualified in 2018. Community Orders (COs) are the most frequently used disposal for this offence (comprising 34 per cent of offenders sentenced in 2018), followed by immediate custody (24 per cent) and suspended sentence orders (SSOs, 21 per cent). In addition to these penalties, the sentencer may also extend the driver's disqualification beyond the expiry of the existing ban, or add points to their driving licence.

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<sup>2</sup> Numbers over 1 million have been rounded to the nearest 0.1 million, numbers over 10,000 have been rounded to the nearest 1,000, numbers over 1,000 have been rounded to the nearest 100 and numbers under 100 have been rounded to the nearest 10.

<sup>3</sup> The source of data for this bulletin is the Court Proceedings Database (CPD), which is maintained by the Ministry of Justice (MoJ). Every effort is made by MoJ and the Sentencing Council to ensure that the figures presented in this publication are accurate and complete. However, it is important to note that these data have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, care should be taken to ensure data collection processes and their inevitable limitations are taken into account when those data are used.

<sup>4</sup> See 'Overview tables' table A6\_6, Criminal Justice System Statistics Quarterly:  
<https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2018>

<sup>5</sup> There are known issues with this disqualification data; for example, there are cases where an offender is not recorded as having been disqualified for an offence where a disqualification should be mandatory. For more information see the footnotes to the published tables, linked to above.

## Breach of a community order

Table 1 below shows that around 71,000 COs were terminated in 2018. Around 61 per cent of COs ran their full course, while 14 per cent were terminated early due to failure to comply with requirements, and 11 per cent were terminated early due to conviction of an offence.<sup>6,7</sup> The number of offenders dealt with for breach of a CO at court per year is not known.

**Table 1: Percentage of Terminations of Community Orders by reason, 2018**

	2018
Ran their full course	61%
<b>Terminated early for:</b>	
Good progress	9%
Failure to comply with requirements	14%
Conviction of an offence	11%
Other reasons	5%
<b>All Community orders (=100%)</b>	<b>71,484</b>

The proposed amendments to the *Breach of a community order* guideline take into account feedback received from users of the guideline. The intention is that the proposed amendments will clarify points that may be unclear in the existing guideline.

## Key assumptions

To estimate the resource effect of the proposed changes, an assessment is required of how they will affect aggregate sentencing behaviour. This assessment is based on the objectives of the changes, and draws upon evidence gathered during the development of the proposed changes. However, some assumptions must be made, in part because it is not possible precisely to foresee how sentencers' behaviour may be affected across the full range of sentencing scenarios. Any estimates of the impact of the proposed changes are therefore subject to a substantial degree of uncertainty.

Historical data on changes in sentencing practice following the publication of guidelines can help inform these assumptions, but since each guideline is different, there is no strong evidence base on which to ground assumptions about behavioural change. The assumptions thus have to be based on an assessment of the effects of changes to the wording of the guideline.

The resource impact of the proposed amendments is measured in terms of the change in sentencing practice that is expected to occur as a result of the changes.

<sup>6</sup> See 'Probation 2018', table A4.22, Offender Management Statistics Quarterly: <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2018>

<sup>7</sup> Further statistics on community orders and breaches can be found in the Sentencing Council's final resource assessment for breach of COs, SSOs and PSS: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Resource-assessment-breach-of-COs-SSOs-and-PSS-final.pdf>

Any future changes in sentencing practice which are unrelated to the publication of the proposed amendments are therefore not included in the estimates.

It remains difficult to estimate with any precision the impact the proposed amendments may have on probation resources, although as the changes do not relate to custodial sentences it is fairly certain that they will not have an impact on prison resources.

## Resource impacts

This section should be read in conjunction with the proposed amendments available at: <http://www.sentencingcouncil.org.uk/consultations/>.

### Explanatory Materials to the MCSG

The proposed amendments to the Explanatory Materials to the MCSG include a proposal to remove and replace the guidance on fines for high income offenders.

The existing wording states that:

*Where the offender is in receipt of very high income, a fine based on a proportion of relevant weekly income may be disproportionately high when compared with the seriousness of the offence. In such cases, the court should adjust the fine to an appropriate level; as a general indication, in most cases the fine for a first time offender pleading not guilty should not exceed 75 per cent of the maximum fine. In the case of fines which are unlimited the court should decide the appropriate level with the guidance of the legal adviser.*

The proposed new wording states only that:

*The court should ensure that any fine does not exceed the statutory maximum for the offence.*

It is therefore possible that the proposed change could cause an increase to the value of fines from some high income individuals. However, the number of high income individuals sentenced to fines is believed to be very low: in 2018, around 440 adult offenders<sup>8</sup> were given fines of over £2,500 for their principal offence, of whom around 80 were given fines over £10,000. Therefore any increase to the value of fines imposed is expected to be small when compared to the total value of fines imposed across all offenders each year.

The other proposed changes to the Explanatory Materials to the MCSG relate to the surcharge, prosecution costs and disqualification. As these do not relate to prison or probation services, they will not have an impact on these correctional resources.

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<sup>8</sup> May include some sole traders.

## Drive whilst disqualified

The proposed change to the driving whilst disqualified guideline involves including additional wording about disqualification only. Therefore this will not have an impact on prison or probation services, or on the value of fines.

## Breach of a community order

There are two proposed amendments to the wording of the *Breach of a community order* guideline.

The first proposed amendment clarifies that the court may extend the length of requirement(s) or the length of the order to allow time for the completion of requirement(s), but this is not a standalone option for dealing with a breach. This reflects the correct legal position as set out in guidance issued to magistrates' courts by the Justices' Clerks' Society in March 2019. If it is the case that in some circumstances this guidance is not currently being followed, then it is possible that this change could lead to additional requirements being added to the community order, which could lead to them becoming more onerous or to an increase in the use of fines for a breach.

A data collection exercise was conducted in magistrates' courts across England and Wales between 23 April and 30 September 2019.<sup>9</sup> As part of this exercise, sentencers were asked to give details about how they dealt with breaches of COs (plus breaches of SSOs and three other offences). Indicative analysis of a provisional extract of this data suggests that less than five per cent of offenders sentenced for breach of a CO may have received a stand-alone extension to the order.<sup>10</sup> Therefore it is anticipated that some individuals may receive fines or more onerous Community Order requirements when the proposed changes are made.

However, it should be noted that imposing a stand-alone extension to the order is not a lawful way of dealing with a breach and therefore any change in practice that results from the proposals will be correcting an erroneous interpretation of the law and the guideline.

The second proposed amendment to the wording of the *Breach of a community order* guideline relates to where an offender is convicted by a magistrates' court for a new offence, while a community order issued in the Crown Court is in force. In these circumstances, the *Totality* and *Breach of a community order* guidelines state that:

*[T]he magistrates' court may, and ordinarily should, commit the offender to the Crown Court, in order to allow the Crown Court to re-sentence for the original offence and the additional offence.*

However, feedback received from users suggests that this wording is potentially misleading, as the Court of Appeal<sup>11</sup> has clarified that the breach legislation does not

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<sup>9</sup> The data collected as part of this exercise will be analysed in more detail for the evaluations of each of the guidelines they cover.

<sup>10</sup> When considering the figures presented, it is important to bear in mind that the data represent a small proportion of all breaches, and so may not be representative of all sentencing practice. If the figures are biased then any estimate of the impact will be incorrect. There is no straightforward way of checking how representative the data are, because there is no reliable alternative source to compare with.

<sup>11</sup> R v De Brito [2013] EWCA Crim 1134.

give magistrates' courts the power to commit the new offence to the Crown Court. The wording has therefore been amended to:

*[T]he magistrates' court may, and ordinarily should, commit the offender to the Crown Court, in order to allow the Crown Court to resentence for the original offence. Only where there is a power to do so, the magistrates' court may also commit the new offence to the Crown Court for sentence.*

Again, this amendment reflects the correct legal position and it is expected that the principles set out in the amendment are already being followed. If the amendment did affect sentencer behaviour, then any impact would relate to the venue for sentence, and not to average sentencing severity. The amendment will therefore not have an impact on prison or probation resources, or on the value of fines.

## Risks

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

An important input into developing these proposed amendments is an assessment of current sentencing practice. The Council uses this assessment as a basis to consider whether current sentencing levels are appropriate or whether any changes should be made. Inaccuracies in the Council's assessment could cause unintended changes in sentencing practice when the proposed amendments come into effect.

This risk is mitigated by information that is gathered by the Council as part of the development of the proposed amendments, and the consultation phase.

### **Risk 2: Sentencers do not interpret the changes as intended**

If sentencers do not interpret the changes as intended, this could cause a change in the average severity of sentencing, with associated resource effects. However, most of the proposed changes relate to fines, costs or disqualification, which do not have an impact on prison or probation resources.

The Council takes a number of precautions in issuing changes to guidelines to try to ensure that sentencers interpret them as intended. Proposed changes are agreed on by considering evidence gathered from users and other interested parties, in conjunction with Council members' experience of sentencing.

Consultees can also feed back their views of the likely effect of the proposed amendments, and whether this differs from the effects set out in the consultation stage resource assessment. The Council also uses data from the Ministry of Justice to monitor the effects of its changes to guidelines.