

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

Response to consultation

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October 2020

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Foreword



On behalf of the Sentencing Council I would like to thank all those who responded to this consultation. I am also grateful to those who brought to the Council's attention the issues that gave rise to the changes in the consultation and to those who gave the Council the benefit of their expertise and experience in helping to refine the changes.

This was a somewhat technical consultation and unusually it covered a number of disparate topics but it attracted a large number of responses, many of which were very detailed and carefully thought through.

The Magistrates' Court Sentencing Guidelines and the associated explanatory materials are used in magistrates' courts throughout England and Wales many times a day and it is important that they provide clear guidance to court users. The Council is therefore particularly grateful to the many magistrates and other court users for their practical insight in response to the consultation. As a result, the proposals consulted on have been significantly amended and in some cases expanded.

Lord Justice Holroyde
Chairman, Sentencing Council

Introduction

Background

The Council considered suggestions from guideline users in magistrates' courts for improvements that could usefully be made to guidelines and the explanatory materials that accompany them. The Council consulted on proposed changes from 22 January 2020 to 15 April 2020. The [consultation](#) is available on the Council's website: www.sentencingcouncil.org.uk

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

Changes were consulted on for the following guidelines:

- Drive whilst disqualified
- Breach of a community order
- Totality

There were proposed changes to the following sections of the explanatory materials to the MCSG:

- Fines and financial orders:
 - Approach to the assessment of fines
 - Assessment of financial circumstances
 - Prosecution costs
 - Victim surcharge
- Road traffic offences – disqualification
 - 'Totting up' disqualification

There was also a proposal to add a reference and link to the Equal Treatment Bench Book (ETBB) to each page of the explanatory materials.

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

Summary of responses

There were 219 responses to the consultation. Some of the responses were from groups or organisations, though most were from individuals.

Breakdown of respondents

Type of respondent	Number of responses
Academic	1
Charity	7
Judiciary	7
Legal professional	13
Magistrate	139
Member of the public/ unknown	45
Police	1
Prosecutor	2
Public Sector	4

Overview

Most responses were broadly in support of the proposals, with many respondents simply agreeing with many of the proposals and others making suggestions for changes to the detail. Some respondents disagreed with the proposals and many of these included suggestions for changes that were outside the scope of the consultation and which would require changes to legislation. Details of the responses to each issue are detailed below.

Drive whilst disqualified

The issue

Offenders convicted of driving while disqualified are liable to be further disqualified for the new offence. Driving disqualifications start on the day they are imposed – a new disqualification cannot be set to start on the date that an existing one expires so, in order that an offender serves both the existing and new disqualification in full, the remaining period of the existing disqualification must be added to the new one. The changes consulted on sought to make this clear with reference to an example in a note before the sentence table.

The responses and subsequent changes

Of the around 200 responses to this question, most either simply agreed with or positively endorsed the proposed change. Around 40 respondents either criticised the proposals or made additional points.

Several respondents suggested giving an additional example showing the effect of an immediate custodial sentence.

Some respondents mentioned the 'maximum disqualification' suggesting that there could be situations where the new period of disqualification added to the existing unexpired term would exceed the 'maximum'. It appeared that these respondents had misinterpreted the top of the range of the disqualification periods in the table in the guideline as being a legal maximum.

The Council considered adding further examples to the guideline but felt that it would be clearer, more accurate and more comprehensive to provide a note setting out the procedure to be followed which addressed all of the points raised.

The Council has therefore:

- added a note before the sentence table reminding sentencers to check the unexpired term of disqualification
- changed the wording in the 'Penalty points/ disqualification' column in the sentence table to include the wording: '(plus any additional periods as set out below)'
- added information after the sentence table setting out the procedure to be followed
- added the statement: **'There is no statutory maximum period of disqualification.'**

The revised [drive whilst disqualified](#) guideline is in force from 1 October 2020.

Breach of a community order and Totality

The issues

There were two respects in which the Breach of a community order guideline was potentially misleading:

1. The reference to 'extend the length of order' in the table of penalties in the guideline; and
2. The reference to committing a new offence to the Crown Court for sentencing where a magistrates' court convicts during the currency of a community order imposed by Crown Court.

This second issue also applied to the Totality guideline where identical wording was used.

The consultation proposed:

1. Removing the reference to 'extend the length of order' in the table of penalties in the *Breach of a community order* guideline and inserting explanatory text below the table.
2. Clarifying the reference to committing a new offence to the Crown Court for sentencing where a magistrates' court convicts during the currency of a community order imposed by Crown Court to make it clear that the power was to commit the offender but not the new offence (unless there is a separate power to do so).

The responses and subsequent changes

Of the around 180 responses to the first of these proposals most either simply agreed with or positively endorsed the proposal. No respondents took issue with the legal position outlined in the consultation or with the proposed removal of 'extend length of order' from the sentence table. Around 35 respondents either criticised the proposed explanatory text or made additional points.

The Council agreed that the text could be more clearly worded and also agreed with those respondents who suggested making changes to the wording of the Technical guidance referred to in the proposed text. The Council agreed revised wording to reflect the suggestions and the [revised Breach of a community order](#) guideline is in force from 1 October 2020.

Most respondents agreed with the proposed change to the *Breach of a community order* and *Totality* guidelines, though some suggested alternative wording. However, one respondent pointed to a change to the relevant legislation that would be brought about by the Sentencing Code which was being considered by Parliament.

The Council concluded that the Sentencing Code (when enacted) will give magistrates' courts the power to commit any offence committed while a Crown Court community order is in force to the Crown Court to be dealt with alongside revoking/ resentencing for the community order and also any other outstanding summary offences which are imprisonable or carry disqualification. The Council therefore agreed a form of words that would apply both to the law as it stands on 1 October 2020, when the [revised Totality](#) guideline comes into force and when the Sentencing Code comes into force.

MCSG - explanatory materials

'Victim' surcharge

The issues

The consultation proposed additional text in the opening paragraph to the victim surcharge page of the explanatory materials setting out the legal position that the surcharge must be ordered except in certain limited circumstances. There were also proposals to clarify the wording on the order of priority of financial orders on the prosecution costs page. Thirdly, there was a proposal to change all occurrences of the term 'victim surcharge' to 'surcharge' to reflect the statutory wording.

The responses and subsequent changes

These proposals were largely welcomed and some respondents made helpful suggestions for improvements to the wording or presentation of the information. While the vast majority of respondents agreed that it should not be referred to as the 'victim surcharge' some felt that simply referring to it as the 'surcharge' did not adequately convey its purpose. Many respondents also made comments about the surcharge which could only be addressed by legislative changes.

The Council adopted some of the suggestions for minor changes to the wording and presentation to aid clarity and concluded that it was preferable to use the statutory language when referring to the surcharge. The revisions to the [surcharge](#) page and the [prosecution costs](#) page have been made with effect from 1 October 2020.

High income offenders

The issue

Fines are generally calculated with reference to an offender's income, but the existing guidance suggested that fines for high income offenders may need to be adjusted down in some situations. The Council considered that there was no justification for a high income offender paying a smaller proportion of their income as a fine than any other offender and consulted on removing that part of the guidance.

The responses and subsequent changes

Most respondents agreed with the proposal though some thought that the guidance should be expanded to positively state that a fine for a high income offender should not be reduced if it seems disproportionately high. A very small number of respondents disagreed with the principle and thought that the existing guidance should be retained.

The Law Society, while agreeing with the principle, suggested that the reasoning should be set out and the guidance should include a reference to looking at each case on its merits. The Council was not persuaded that a distinct approach to proportionality when fining a high income offender was required. A few respondents including the Magistrates Association raised the issue of whether there should be guidance on how reductions for a guilty plea should be applied if a fine reaches the statutory maximum. The Council felt that

no specific guidance on this issue was necessary as the principles were well understood; the sentence before any reduction for a guilty plea should be within the statutory maximum and the appropriate reduction should then be made.¹

The Council concluded that the change consulted on should be made. The revised [Assessment of financial circumstances](#) page is effective from 1 October 2020.

Exceptional hardship in ‘Totting up’ disqualifications

The issue

Where an offender incurs 12 or more penalty points on a driving licence, section 35 of the Road Traffic Offenders Act 1988 requires they must be disqualified for at least six months unless ‘the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified.’ The explanatory materials contained guidance for magistrates on how this should be applied but users had suggested that more information would be helpful.

The Council therefore consulted on a fuller explanation.

The responses and subsequent changes

This is the question in the consultation that provoked the most interest. In summary:

- Several respondents made suggestions that would require changes to legislation.
- Others simply agreed with the proposals.
- Some respondents felt that while the intention stated in the consultation was: ‘more information on the procedure to be followed in such cases and guidance on the consideration of exceptional hardship applications would assist in ensuring that these are dealt with fairly, consistently and in line with legislation and case law’, the impact of the proposals would be to weaken rather than strengthen the test for exceptional hardship.
- Many magistrates wanted examples of what does and does not constitute exceptional hardship stating that otherwise decisions will continue to be inconsistent.
- Some respondents felt that the guidance did not accurately reflect the legislation or case law.

There were numerous suggestions as to how the explanation could be made clearer and more accurate. There were some points about which respondents gave conflicting views.

With regard to guidance on considering a discretionary period of disqualification, the Justices’ Clerks’ Society referred to *Jones v DPP* [2001] R.T.R 8 as authority for explicitly pointing sentencers towards imposing *at least* the totting ban by including:

if the court thinks that the defendant should be disqualified for the longer period under the totting up provisions, impose points and a totting disqualification. Where the defendant has persistently offended against Road Traffic laws, it is likely that the totting provisions will apply, rather than a discretionary disqualification

¹ See for example, *R v Roth* [2020] EWCA Crim 967

Whereas the Law Society said:

We note that the guideline also contains an often-missed point that a totting disqualification may be disproportionate and there is a possibility that a discretionary disqualification may be more appropriate.

It is important that the guideline is not too formulaic, otherwise it may remove the discretionary nature of imposing a disqualification and which may be to the detriment of a defendant who is trying to strongly argue for a discretionary period of short disqualification and where the tribunal considers this to be an appropriate sentence, and not disproportionate to impose the totting disqualification. In our experience it is an option most magistrates forget, and so having a reminder of the discretionary disqualification power in the guideline would be a useful reminder.

On the same point a magistrate suggested this form of words:

The court should take into account the seriousness of the offence and the offender's driving record in determining whether the threshold for a discretionary disqualification has been crossed. If this is not the case points should be imposed even if this results in the driver becoming liable to a totting disqualification.

One respondent suggested that 'the guidance should make it clear that preference should be given to imposing a disqualification shorter than the ordinary minimum period rather than no disqualification at all, as per the power given in s.35(1) RTOA 1988; imposing no disqualification at all should be a highly exceptional occurrence, reserved only for the most highly exceptional cases.'

One magistrate felt that the guidance could be strengthened by a statement such as: 'by their very nature successful applications for exceptional hardship will be rare'.

Several magistrates made the point that unrepresented offenders were at a disadvantage when seeking not to have a 'totting' ban imposed and that those who could afford a 'clever' lawyer would find a way to avoid disqualification. Others were concerned that notwithstanding the reference to the Equal Treatment Bench Book the circumstances of lower income offenders and their families (particularly in rural areas) would not be appreciated by many courts.

Several respondents felt that too much emphasis was put on 'exceptional circumstances' which makes it seem as though there is no other possible ground for avoiding or reducing the disqualification.

A barrister specialising in road traffic law pointed out that the proposed wording fails to identify that the burden of proof is on the defendant to the civil standard.

The Council carefully considered the various views and suggestions and agreed a revised version of the guidance that more closely reflected the wording in the legislation and incorporated several of the points made above, taking into account case law. The Council rejected the idea of providing examples of exceptional hardship as these will inevitably be case specific, but has incorporated more guidance on matters a court should take into account. Inevitably, because the [revised guidance](#) is more comprehensive, it is also longer but the Council is satisfied that it is as concise as it can be while still covering all the necessary points. It takes effect from 1 October 2020.

Equal Treatment Bench Book

The issue

Sentencing guidelines ensure that there is a consistency of approach to sentencing which encourages fair and proportionate sentencing but guidelines alone cannot preclude disparity of outcomes for different groups. The Council is committed to taking steps to address concerns around equality and diversity in sentencing across all of its output.

The Council consulted on including a link to the [Equal Treatment Bench Book](#) (ETBB) in any page of the explanatory materials that involves the exercise of judicial discretion. The ETBB (which is published by the Judicial College) contains extensive information and practical advice which helps to ensure that there is fairness for all involved in court proceedings.

The responses and subsequent changes

Most respondents agreed with this proposal, though some doubted whether it would serve any useful purpose and many pointed out that there would not be time to refer to the ETBB in a busy court. Others suggested that more specific references to the relevant section of the ETBB would be more useful than a reference to the entire document. The Howard League applauded the Council's intention but stated:

However, if the Sentencing Council is committed to non-discrimination at sentence, the core information contained within the ETBB must be incorporated more comprehensively within the guidelines. The Howard League is doubtful that the proposal in question 10 – to include in relevant explanatory materials a three-line reference to the 427 page ETBB – is likely to be particularly effective in fostering equal treatment.

We set out for consideration two ways in which this could be achieved more effectively: by more focused references to the ETBB material within the existing sentencing guidelines and by creating further overarching guidelines in relation to certain groups. Either one of these approaches could be pursued separately, although they are likely to be most effective pursued together.

The Council agreed with the Howard League and others that the inclusion of a link to the ETBB was not a complete answer to the issues, but was satisfied that it was a useful step. At present it is not possible to link to specific sections of the ETBB but if this becomes possible in future the Council will consider doing so. The Council will continue to work with guideline users and other interested parties to explore ways in which issues around equality and diversity can be address in guidelines and supporting materials.

General matters relating to the explanatory materials

Some respondents raised matters that were outside the scope of the consultation. Most of these were matters that would require changes to legislation and are therefore not within the remit of the Council. One issue that was raised was whether the Council should be providing 'guidance' as opposed to sentencing guidelines which courts are obliged by legislation to follow. The explanatory materials to the MCSG have been in existence for many years and the content was extensively revised and updated by the Council (following consultation) in 2015. They are supplementary to guidelines and are provided to give magistrates and other guideline users additional information to assist in the sentencing

process. It is not a fully comprehensive set of guidance on every issue that may arise, and is not a substitute for the assistance and advice of legal advisers to magistrates in court. The explanatory materials often reference legislation and the content reflects case law and current best practice. Insofar as the guidance reflects the law, sentencers must, of course, follow it. Where there is discretion or flexibility the wording seeks to make this clear and it is expected that magistrates with the advice of their legal advisers will follow the guidance where it applies.

Impact of the changes

Resource impact

The changes made as a result of this consultation are not expected to have a significant impact on correctional resources. This is explored in more detail in a [resource assessment](#) published by the Council.

Equality and diversity

As a public body the Council is subject to the Public Sector Equality Duty (PSED) which means it has a legal duty to have due regard to:

- the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010;
- 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 relevant protected characteristics are: race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment.

As noted above the Council is committed to ensuring that courts take into account relevant equality considerations in sentencing and as part of that commitment has added a link to the Equal Treatment Bench Book in any page of the explanatory materials that involves the exercise of judicial discretion.

Conclusion and next steps

As a result of the consultation the Council has made the changes set out in the sections above. The amended versions of the guidelines and explanatory materials are published on the Council's website (<https://www.sentencingcouncil.org.uk>) on 1 October 2020 and come into force on that date.

It is customary for the Council to publish new guidelines in advance of them coming into force, but as these are all modifications to existing guidelines or existing pages in the explanatory materials, it has not been possible to do this (without causing unnecessary confusion by having two version of the same guideline or page of the explanatory materials in existence at once). The Council has given prior notice of the changes to the Judicial College so that they can update any relevant training materials.

The final resource assessment is published on 1 October 2020 on the Council's website.

The Council will continue to keep the MCSG under review and welcomes suggestions for future improvements to the guidelines and the supporting explanatory materials.

Consultation respondents

A Donnelly	C McKenzie	Helen Gyselynck
Adrian Clancey	C Watson	Helen Rlaton
Aidan Murphy	Cas Burke	Hilary Whiteway
Aidan Yau	Chris Brammeier	Howard League
Alan Atkinson	Chris Grimshaw	Howard Riddle CBE
Alan Evans	Chris Townsend	Hugh Daglish
Alan Morris	Christine	Ian Allott JP
Alan Percival	Christopher Hills JP	Ian Finch
Alan Speed JP	Conor Maher	Ian Matthews
Alex Walker	Criminal Bar	Ian Matthews JP
Alistair Borland	Association	J Cole
Amanda Coneley	Cycling UK	J Kiddey JP
Amanda Parker	David Homer	J M Polly Kemp
Andrew Flaherty	David Marklew	J Mitchell
Andrew N Backway	David Rose	James Ball
Andrew Thompson	David Swales	James Brennan
Andrew Turek	Debbie Gibbs	Jane Davies
Andrew Wilson	Deborah Backhaus	Jane Smith
Andy Williams	Debra lee	Jane Summers
Ann Crighton	Debra Storr	Janet Lear
Anne Ryan	Del Hunter	Jean Watt
Annie Mihell	Denis Alabaster	Jennifer James
Anon	Dorte Reid	Jeremy Batchelor
Anon	Douglas Steele	Jeremy Madams
Anon	Dr David Miers	Jeremy Wray
Anon	Duncan Turnbull	Jilly Peace
Anon	East Kent Bench	Jo King
Anon	Edward Beaman	Jo Matson
Anon	Erica Taylor	John Baker
Anon	ESS Ward	John Hutchinson
Avik Mukherjee	Fatima Shah	John Littlemore
Barry Johnston	Fiona McDougal	John Stroud-Turp
Basil Howard	Flora Jeferzade	Jon Rosenthal
Benjamin Savage	Frances Janusz	Jonathan Hill
Benjamyn H Damazer	Frederick Fearn JP	Joshua Harris
JP DL	Gary Greene	Judith Killen
Beverley Miller	Gary J Price	Julian Bennett
Beverley Wride	Gary Wallis	Julian Evison
Bob Cinnamon	Georgina Glover JP	Julie Donaghey
Bob Mayley	Gill Fryzer	Justices' Clerks'
Bobby Bell BB Law Ltd	Gillian Clare-Lowry	Society
Brian Smith	Graham Teece	Kate Terry
C Bedford	Guy Cecil	Keith Gosden
C Day JP	Heather Rothwell	Ken Heckle
C Delaney		

Law Society	Paul Conlon	Sarah McLaughlin
Len Vickery JP	Paul English	Sarah Roberts
Leslie G Derrick	Paul Gane	Scott Wichall
Linda Cottrell	Paul Heywood	Sharon Bierer
Linda Frampton	Paul Megson	Sharon Williams
Lisa Jinks	Paul Thacker	Sian Jones-Evans
Lorna Houldsworth	Paul Wassell	Simon Beecroft
Louis Groves	Peter Clinch	Simon Mitchinson
M Mann	Peter Mahoney	Simon Monks
M Robb JP	Peter Roberts	Simon Trott
Magistrates Association	Peter Stanley	Stephen Bradley
Mark Aspinall	Philip Parsons	Stephen Brown
Mark Perry	Prison Reform Trust	Stephen Fryer
Martin Alderman	Rachael Yarwood	Steve Smith
Martin Crawford-Brown	Raymond Cross	Steven Chatfield
Martyn Clarke	Richard Blackman JP	Steven Knight
Michael Coates	Richard Kings	Sue Mitchell
Michael Pook JP	Richard Lehman	Suffolk Magistrates' Bench
Mike Evans	Richard Weare	Susan Grossey
Mike Prouten	Road Peace	Sylvia Williams
Miss Martin	Rob Lowe	Tessa Sweeney
Mr B Chauhan	Robert Zara	Tiffany Rooney
Ms Christine Williams	Roger Jackson	Patterson
Neil Greig	Ron Johnson	Tim Harrison
Neil Pearson	Roy Ashman	Timothy J Parker JP
Nick Moss DTJ	S Hays	Usman Rasul
Nicky Loveday	S Holden JP	West London Bench
Nigel Barnes	S Kane	
Nigel Peacock	S Sterling	
PACTS	Sara Pye	
Patrick Hayes	Sarah Gartland	

