

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

January 2020

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

## **Consultation**

Published on 22 January 2020

The consultation will end on 15 April 2020

# About this consultation

- To:** This consultation is open to everyone including members of the judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice.
- Duration:** From 22 January 2020 to 15 April 2020
- Enquiries (including requests for the paper in an alternative format) to:** Office of the Sentencing Council  
Royal Courts of Justice  
(full address as below)  
Tel: 020 7071 5793  
Email: [info@sentencingcouncil.gov.uk](mailto:info@sentencingcouncil.gov.uk)
- How to respond:** Please send your response by 15 April 2020 to:  
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Room EB20  
Royal Courts of Justice  
Strand  
London WC2A 2LL  
Email: [consultation@sentencingcouncil.gov.uk](mailto:consultation@sentencingcouncil.gov.uk)
- Additional ways to feed in your views:** This consultation exercise is accompanied by a resource assessment, and an online questionnaire which can be found at:  
[www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)
- Response paper:** Following the conclusion of this consultation exercise, a response will be published at: [www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)
- Freedom of information:** We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents' names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.  
In addition, responses may be shared with the Justice Committee of the House of Commons.  
Our [privacy notice](#) sets out the standards that you can expect from the Sentencing Council when we request or hold personal information (personal data) about you; how you can get access to a copy of your personal data; and what you can do if you think the standards are not being met.

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# Introduction

## What is the Sentencing Council?

The Sentencing Council is the independent body responsible for developing sentencing guidelines which courts in England and Wales must follow when passing a sentence. The Council consults on its proposed guidelines before they come into force and on any proposed changes to existing guidelines.

## What is this consultation about?

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 Council has considered these helpful suggestions and has produced this short consultation paper in order to seek the views of a wide range of guideline users on the proposals.

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

## Which offences and guidelines are covered by the proposed changes?

The proposals are for minor changes to the following guidelines:

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

There are 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 is 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 do not apply to guidelines for sentencing children and young people.

## What other changes did the Council consider?

The Council also considered replacing the current non-binding guidance on sentencing the offences of driving or attempting to drive with a specified drug above the specified limit and in charge with a specified drug above the specified limit – so-called 'drug driving' offences – with definitive sentencing guidelines. The Council has decided to consult on these guidelines separately at a later date, once more evidence has been gathered.

## **Responding to the consultation**

Through this consultation process, the Council is seeking views on the usefulness, accuracy and clarity of the proposed changes and anything else that you think should be considered.

In the following sections the proposed changes are outlined in detail and you will be asked to give your views. You can give your views by answering some or all of the questions below either by email to [consultation@sentencingcouncil.gov.uk](mailto:consultation@sentencingcouncil.gov.uk) or by using the online <https://consult.justice.gov.uk/>.

### **What else is happening as part of the consultation process?**

This is a 12 week public consultation. As this is a relatively limited consultation in terms of its scope, the Council has not planned any consultation meetings but would be happy to arrange a meeting to discuss any of the issues raised if this would be helpful. Once the results of the consultation have been considered, the updated guidelines and explanatory materials will be published and used by all courts.

Alongside this consultation paper, the Council has produced a resource assessment. This can be found on the Sentencing Council's website: <https://www.sentencingcouncil.org.uk/consultations/>

***Question 1: What is your name?***

***Question 2: What is your email address?***

***Question 3: What is your organisation?***

# 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. The Council has been informed that although the guideline does state that a disqualification imposed for this offence should be for a period ‘beyond the expiry of the current ban’, sentencers do not always notice this and a clear statement would be helpful to avoid them falling into error.

## Current position

The sentencing table for the offence reads:

### Step 2 – Starting point and category range

Having determined the category at step one, the court should use the appropriate starting point to reach a sentence within the category range in the table below. The starting point applies to all offenders irrespective of plea or previous convictions.

Level of seriousness	Starting Point	Range	Penalty points/disqualification
Category 1	12 weeks’ custody	High Level community order – 26 weeks’ custody	Disqualify for 12 – 18 months beyond expiry of current ban (Extend if imposing immediate custody)
Category 2	High level community order	Medium level community order -12 weeks’ custody	Disqualify for 6 – 12 months beyond expiry of current ban (Extend if imposing immediate custody)
Category 3	Low level community order	Band C fine – Medium level community order	Disqualify for 3 – 6 months beyond expiry of current ban OR 6 points

- Must endorse and may disqualify. If no disqualification impose 6 points
- [Extend disqualification](#) if imposing immediate custody

## The proposed change

In order to make the position entirely clear to sentencers and other guideline users, including offenders, the Council proposes to add the following text above the sentence table:

**Note:** Check the period which remains on the existing disqualification, and the expiry date. This information is necessary as all disqualification periods must begin on the day of sentence – there is no provision for consecutive disqualifications. (For example, if 4 months is remaining on the current disqualification, and the court is imposing a 12 month disqualification for this offence, it will be necessary to disqualify for 4 months + 12 months = 16 months from the day of sentence.)

**Question 4: Do you agree with the proposed change to the Drive whilst disqualified guideline? If not, please provide any alternative suggestions.**

# Breach of a community order and Totality

## The issues

There are two respects in which the *Breach of a community order* guideline is 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 applies to the *Totality* guideline where identical wording is used.

## Extend the length of order – current position

The Justices' Clerks' Society (JCS) Sentencing Committee has considered the question of whether a court may extend the length of a community order as a stand-alone means of dealing with a breach of that order. The JCS view is that whilst a community order may be extended upon breach to allow more onerous requirements to be completed, such an extension is not by itself a sanction to deal with the breach and in April 2019 it issued guidance to magistrates' courts to that effect.

The [Breach of a Community Order](#) guideline includes 'extend length of order' (circled) in the options for dealing with a breach.

Overall compliance with order	Penalty
Wilful and persistent non-compliance	Revoke the order and re-sentence imposing custodial sentence (even where the offence seriousness did not originally merit custody)
Low level of compliance	Revoke the order and re-sentence original offence OR Add curfew requirement 20 – 30 days* OR 30 – 50 hours additional unpaid work <del>extend length of order</del> add additional requirement(s) OR Band C fine
Medium level of compliance	Revoke the order and re-sentence original offence OR Add curfew requirement 10 – 20 days* OR 20 – 30 hours additional unpaid work <del>extend length of order</del> add additional requirement(s) OR Band B fine
High level of compliance	Add curfew requirement 6 – 10 days* OR 10 – 20 hours additional unpaid work <del>extend length of order</del> add additional requirement(s) OR Band A fine



The use of ‘/extend length of order/’ may suggest that extending the length of the order is a stand-alone option to deal with the breach, which the Council accepts it is not.

### **Extend the length of order – the proposed change**

In order to ensure that the guideline does not lead sentencers to impose an unlawful penalty for the breach, the Council proposes removing ‘extend length of order’ from the table of penalties and adding the following paragraph under the table:

The court may extend the length of requirement(s) or the length of the order to allow time for the completion of requirement(s): it is not a standalone option for dealing with a breach, see also Technical guidance below.

The relevant section of the Technical guidance reads as follows:

### **Technical guidance**

- a. If imposing more onerous requirements the length of the order may be extended up to 3 years or six months longer than the previous length, whichever is longer (but only once).

***Question 5: Do you agree with the proposed change to the Breach of a community order guideline regarding extending the length of an order? If not, please provide any alternative suggestions.***

### **Offender convicted of an offence while serving a community order – current position**

The *Breach of a community order* guideline replicates the wording in the *Totality* guideline regarding the procedure to be followed when an offender is convicted of an offence while subject to a community order. This is not strictly a breach of a community order – the information was included in the breach guideline for completeness. The wording in the *Totality* guideline has remained unchanged since it was published in 2012.

It was pointed out to the Council that the following wording was potentially misleading:

Where an offender, in respect of whom a community order made by a Crown Court is in force, is convicted by a magistrates' court, the 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.

Paragraph 22, Schedule 8 of the Criminal Justice Act 2003 states:

- (1) Where an offender in respect of whom a community order made by the Crown Court is in force is convicted of an offence by a magistrates' court, the magistrates' court may commit the offender in custody or release him on bail until he can be brought before the Crown Court.
- (2) Where the magistrates' court deals with an offender's case under subparagraph (1), it must send to the Crown Court such particulars of the case as may be desirable.

This gives a magistrates' court the power to commit the offender to the Crown Court (and the Crown Court then has the power under paragraph 23 to revoke the order and/or re-sentence the original offence(s)) but it does not confer a power to commit the new offence to the Crown Court. Therefore, a magistrates' court can only commit the new offence if there is a separate power to do so, otherwise it must sentence the new offence and may commit the offender to the Crown Court. This position has been confirmed by the Court of Appeal in R v De Brito [2013] EWCA Crim 1134.

So, for example, if the new offence is an either way offence such as theft, it can be committed to the Crown Court for sentence, but if it is a summary only offence such as a low level criminal damage, there is no power to do so.

**Offender convicted of an offence while serving a community order – the proposed change.**

In order to ensure that the *Breach* and *Totality* guidelines are legally correct the Council proposes changing the wording to read as follows:

Where an offender, in respect of whom a community order made by the Crown Court is in force, is convicted by a magistrates' court, the 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. Only where there is a power to do so, the magistrates' court may also commit the new offence to the Crown Court for sentence.

***Question 6: Do you agree with the proposed change to the Breach of a community order guideline and the Totality guideline regarding committal to the Crown Court? If not, please provide any alternative suggestions.***

# MCSG - explanatory materials

## ‘Victim’ surcharge

The explanatory materials contain [guidance](#) on the application of the surcharge:

Home > Explanatory Materials > Fines and Financial Orders > [Victim surcharge](#)

## Victim surcharge

Show all parts of this guide 

When sentencing for offences committed on or after 1 October 2012 a magistrates’ court must order the Victim Surcharge in the following ways (Criminal Justice Act 2003, s.161A; CJA 2003 (Surcharge) Order 2012; CJA 2003 (Surcharge) (Amendment) Order 2016) and CJA 2003 (Surcharge) (Amendment) Order 2019.

The JCS suggested that the guidance could be amended to make it clearer that costs cannot be awarded if the surcharge is reduced due to lack of means, by adding the following to the opening paragraph:

This is a mandatory requirement set out in section 161A of the Criminal Justice Act 2003. Courts can reduce the amount of the surcharge (if necessary to nil) if – and only if – an offender cannot pay both the surcharge and one or more of the following orders: compensation order, unlawful profit order, slavery and trafficking reparation order. If a defendant can afford to make payment in addition to one or more of those orders, the court **must** impose a surcharge, rather than another financial order such as costs.

The Council agrees with this suggestion and also proposes to amend slightly the current wording on the [Prosecution Costs](#) page of the explanatory materials for the same reason:

Where the court wishes to impose costs in addition to a fine, compensation and/or the victim surcharge but the offender has insufficient resources to pay the total amount, the order of priority is:

1. compensation;
2. victim surcharge;
3. fine;
4. costs.

The proposed wording is:

Where the court wishes to impose costs in addition to a fine, compensation and/or the surcharge but the offender has insufficient resources to pay the total amount, the court **must** apply the following order of priority:

1. compensation;
2. surcharge;
3. fine;
4. costs.

In addition, the Council proposes to change all references to ‘the victim surcharge’ in the explanatory materials and the fines calculator to ‘the surcharge’. This is in line with the wording used in legislation and avoids giving the false impression that the surcharge goes to the victim of the offence.

**Question 7: Do you agree with the proposed changes to the references to the surcharge in the explanatory materials? If not, please provide any alternative suggestions.**

## High income offenders

Fines are generally calculated with reference to an offender’s income – typically 50%, 100% or 150% of the offender’s weekly income. The explanatory materials contain guidance on matters to be taken into account in setting fines and other financial orders.

Home > Explanatory Materials > Fines and Financial Orders > Approach to the assessment of fines > 4. Assessment of financial circumstances

## 4. Assessment of financial circumstances

Show all parts of this guide

While the initial consideration for the assessment of a fine is the offender’s relevant weekly income, the court is required to take account of the offender’s financial circumstances including assets more broadly. Guidance on important parts of this assessment is set out below.

The current guidance contains the following (at the foot of the [assessment of financial circumstances](#) page):

### High income offenders

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 Council considered whether there was any justification for a high income offender paying a smaller proportion of their income as a fine than any other offender and concluded that there was no such justification. The Council therefore proposes replacing the above guidance with the following:

### High income offenders

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

**Question 8: Do you agree with the proposed change to the guidance on fines for high income offenders in the explanatory materials? If not, please provide any alternative suggestions.**

## Exceptional hardship in ‘Totting up’ disqualifications

The existing [guidance](#) reads as follows:

### 3. ‘Totting up’ disqualification

[Show all parts of this guide](#)



Disqualification for a minimum of six months must be ordered if an offender incurs 12 penalty points or more within a three-year period (Road Traffic Offenders Act (“RTOA”) 1988, s.35). The minimum period may be automatically increased if the offender has been disqualified within the preceding three years. Totting up disqualifications, unlike other disqualifications, erase all penalty points.

The period of a totting up disqualification may be reduced or avoided for exceptional hardship or other mitigating circumstances if the court thinks fit to do so. No account is to be taken of hardship that is not exceptional hardship or circumstances alleged to make the offence not serious. Any circumstances taken into account in the preceding three years to reduce or avoid a totting disqualification must be disregarded (RTOA 1988, s.35).

**Consult your legal adviser for further guidance on minimum periods and exceptional hardship applications.**

The Council is aware of public concern that offenders who have incurred 12 penalty points or more are not always disqualified from driving. There are legitimate reasons why this might happen – the law allows for such a disqualification to be avoided or reduced for reasons of exceptional hardship. Reports from sentencers and other court users suggest that 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 Council agreed with these suggestions and proposes the following as a replacement for the existing guidance:

Guideline users should be aware that the [Equal Treatment Bench Book](#) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

#### ‘Totting up’ disqualification

Disqualification for a minimum period must be ordered if an offender incurs 12 or more penalty points within a three-year period - s.35 Road Traffic Offenders Act (RTOA) 1988.

The minimum period is:

- **six months** if no previous disqualification is to be taken into account
- **one year** if one “relevant period of disqualification” is to be taken into account
- **two years** if more than one “relevant period of disqualification” is to be taken into account.

A “relevant period of disqualification” is one which is:

- not less than **56 days**; and
- **imposed** within the three years immediately preceding the **date on which the current offence** (or most recent of the current offences) **was committed**.

Totting up disqualifications, unlike other disqualifications, erase all penalty points.

The court should:

- decide whether to impose a [discretionary disqualification](#) for the offence but
- do so having regard to the offender’s driving record and
- in the light of that record, consider if the more appropriate disqualification should be that which would follow under totting up.

If so, the court **must** order the offender to be disqualified for not less than the minimum period **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. (s.35(1) RTOA 1988)

The fact that the current offence is relatively trivial is not something to which the Court can have regard in deciding whether there are grounds to reduce or avoid a totting up disqualification. (s.35(4)(a) RTOA 1988)

Where the court has ruled out [special reasons](#) not to endorse or disqualify for the offence, it cannot have regard to the hardship of imposing a totting up disqualification unless **exceptional hardship** would follow.

**Note**, where an offender has, within the three years prior to conviction for the current offence successfully argued that exceptional hardship would be suffered, that argument cannot be relied upon in the current case.

When considering whether there are grounds to reduce or avoid a totting up disqualification the court should have regard to the following:

- The test is not inconvenience, or hardship, but **exceptional** hardship for which the court must have evidence – which may include the offender’s sworn evidence;
- Some hardship is likely to occur in many if not most orders of disqualification;
- Courts should be cautious before accepting assertions of exceptional hardship without evidence that alternatives (including alternative means of transport) for avoiding exceptional hardship are not viable;
- Loss of employment will not in itself necessarily amount to exceptional hardship; whether or not it does will depend on the circumstances of the offender and the consequences of that loss of employment on the offender and/or others. Useful information can be found in the [Equal Treatment Bench Book](#) (see in particular Chapter 11);
- The more severe the hardship suffered by the offender and/or others as a result of the disqualification, the more likely it is to be exceptional.

**Consult your legal adviser for further guidance on minimum periods and exceptional hardship applications.**



***Question 9: Do you agree with the proposed changes to the guidance on totting up disqualifications and exceptional hardship in the explanatory materials? If not, please provide any alternative suggestions.***

## **Equal Treatment Bench Book (ETBB)**

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 guidelines.

In response to an earlier consultation on the *General* guideline and expanded explanations, the Council decided to include a link to the [Equal Treatment Bench Book](#) (ETBB) at the top of all sentencing guidelines. 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.

Guideline users should be aware that the [Equal Treatment Bench Book](#) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

The Council considers that these issues of fairness are also relevant to the exercise of the court's discretion when considering the matters covered by the explanatory materials to the MCSG. The Council therefore proposes to add the same wording to any page of the explanatory materials that involves the exercise of judicial discretion.

***Question 10: Do you agree to adding a reference to the Equal Treatment Bench Book to relevant pages in the explanatory materials? If not, please provide any alternative suggestions.***

## **General observations**

We would also like to hear any other views you have on the proposals that you have not had the opportunity to raise in response to earlier questions.

***Question 11: Are there any other comments you wish to make on the proposals?***

