

**Miscellaneous amendments
to sentencing guidelines**
Response to consultation

March 2023

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Foreword



To ensure that guidelines are kept up-to-date the Council holds an annual consultation on miscellaneous amendments and this was the second of these consultations.

We rely on guideline users to alert us to issues that arise with guidelines and then to respond to the consultation on how we intend to resolve those issues. We are grateful to all those who do either or both of these things.

This particular consultation also covered proposed changes to guidelines to take account of recent changes to legislation.

Many of the matters consulted on are somewhat technical and the expertise of respondents has assisted in ensuring that the changes made are clear and accurate.

On behalf of the Sentencing Council I would like to thank all those who responded to this consultation. The responses have led us to make changes to the proposals, the full details of which are set out in this document.

Lord Justice William Davis
Chairman, Sentencing Council

Introduction

Background

The Sentencing Council has built up a large body of sentencing guidelines and accompanying materials that are in use in courts throughout England and Wales. Over time guidelines require updating because users have pointed out issues (often using the feedback function on all guidelines) or case law or new legislation may render aspects of guidelines out of date. The Council therefore holds an annual consultation on miscellaneous amendments to guidelines and the explanatory materials that accompany them. This was the second of these annual consultations in which the Council seeks the views of guideline users to proposals to make amendments to existing guidelines.

The [consultation](https://www.sentencingcouncil.org.uk) is available on the Council's website: www.sentencingcouncil.org.uk.

The changes consulted on relate to guidelines used in magistrates' courts and the Crown Court and can be summarised as follows:

1. Matters relevant primarily to magistrates' courts:
 - Clarifying the wording relating to disqualification from driving in the following:
 - Drug driving guidance
 - Excess alcohol guideline
 - Unfit through drink or drugs (drive/ attempt to drive) guideline
 - Fail to provide specimen for analysis (drive/attempt to drive) guideline
 - Amending the wording in the explanatory materials on:
 - Discretionary disqualification
 - 'Totting up' disqualification
 - Obligatory disqualification
 - Football banning orders
2. Matters relevant to magistrates' courts and the Crown Court
 - Amending the guidelines for criminal damage to take account of the legislative change relating to memorials.
 - Amending the wording regarding minimum sentences in the following guidelines:
 - Bladed articles and offensive weapons – possession
 - Bladed articles and offensive weapons – threats
 - Bladed articles and offensive weapons (possession and threats) – children and young people
 - Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it to another
 - Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug
 - Domestic burglary
 - Aggravated burglary (Crown Court only)
3. Matters relevant solely to the Crown Court
 - Adding wording to the Unlawful act manslaughter guideline relating to the required life sentence for an offence committed against an emergency worker

Summary of responses

There were 24 responses to the consultation. Some of the responses were from groups or organisations, and some from individuals.

Breakdown of respondents

Type of respondent	Number of responses
Judges	5
Legal professional	3
Magistrates	9
Member of the public/ unknown	5
Prosecutors	1
Government	1

Overview

The majority of responses were supportive of the proposals and some made helpful suggestions for changes. The more critical responses tended to focus on issues that were outside the scope of the consultation.

Details of the responses to each issue are detailed below.

Disqualification from driving

The wording on obligatory disqualification in guidelines

The issue

The Council consulted on making changes to the wording relating to disqualification with the aim of clarifying the relevant dates (i.e. the date of the commission of the offence, date of conviction or date of the imposition of a disqualification) for each provision.

This applied to:

- the drug driving guidance
- the [excess alcohol guideline](#)
- the [unfit through drink or drugs \(drive/ attempt to drive\) guideline](#)
- the [fail to provide specimen for analysis \(drive/attempt to drive\) guideline](#)

The wording consulted on was (proposed additions shown in red):

- Must endorse and disqualify for at least 12 months
- Must disqualify for at least 2 years if offender has had two or more disqualifications for periods of 56 days or more **imposed** in the 3 years **preceding the commission of the current offence** – refer to [disqualification guidance](#) and consult your legal adviser for further guidance
- Must disqualify for at least 3 years if offender has been **convicted** of a relevant offence in **the 10 years preceding the commission of the current offence** – consult your legal adviser for further guidance
- [Extend disqualification](#) if imposing immediate custody

All those who responded to this question broadly agreed with the proposed changes. One magistrate suggested that ‘relevant offence’ (in the third bullet point) should contain a link to further information. The applicable information is in the ‘obligatory disqualification guidance’ which is linked to from the second bullet point. The Council has therefore added the same link to the third bullet point so it reads:

- Must disqualify for at least 3 years if offender has been **convicted** of a relevant offence in the 10 years preceding the **commission** of the current offence – refer to [disqualification guidance](#) and consult your legal adviser for further guidance

Obligatory disqualification in the explanatory materials

The issue

The explanatory materials to the magistrates’ courts sentencing guidelines (MCSG) contain more detailed information on obligatory disqualification (and is hyperlinked from the various offence guidelines referred to above). The Council considered that this guidance should be amended for two reasons. Firstly, to provide more clarity on the

relevant dates for each provision (as referred to above) and secondly, to reflect legislative changes brought in by the Police, Crime, Sentencing and Courts Act 2022 (PCSC Act).

The changes brought in by the PCSC Act mean that the position regarding obligatory disqualification is slightly more complicated than before and that different considerations now apply to causing death by careless driving when under the influence of drink or drugs. The guidance consulted on therefore applies only to those offences which carry a 12 month minimum obligatory disqualification (proposed additions shown in red):

Obligatory disqualification

Note: The following guidance applies to offences with a 12 month minimum disqualification.

Some offences carry obligatory disqualification for a minimum of 12 months (Road Traffic Offenders Act (“RTOA”) 1988, s.34). The minimum period is automatically increased where there have been certain previous convictions and disqualifications.

An offender must be disqualified for at least two years if **a disqualification** of at least 56 days **has been imposed on them** in the three years preceding the commission of the offence (RTOA 1988, s.34(4)(b)). The following disqualifications are to be disregarded for the purposes of this provision:

- interim disqualification;
- disqualification where vehicle used for the purpose of crime;
- disqualification for stealing or taking a vehicle or going equipped to steal or take a vehicle.

An offender must be disqualified for at least three years if he or she is convicted of one of the following offences:

- **driving or attempting to drive while unfit;**
- **driving or attempting to drive with excess alcohol;**
- **driving or attempting to drive with concentration of specified controlled drug above specified limit;**
- **failing to provide a specimen (drive/attempting to drive).**

and has within the 10 years preceding the commission of the offence been convicted of any of **those offences or causing death by careless driving when under the influence of drink or drugs** (RTOA 1988, s.34(3)):

The individual offence guidelines indicate whether disqualification is mandatory for the offence and the applicable minimum period. **Consult your legal adviser for further guidance.**

Responses were generally supportive of the proposals with a few suggestions for changes. A judge suggested changing ‘and’ to ‘or’ as highlighted below:

Some offences carry obligatory disqualification for a minimum of 12 months (Road Traffic Offenders Act (“RTOA”) 1988, s.34). The minimum period is automatically increased where there have been certain previous convictions **or** disqualifications.

HM Council of District Judges (Magistrates' Courts) pointed out an error in the proposed wording. It should read (revised wording highlighted):

An offender must be disqualified for at least two years if **more than one** disqualification of at least 56 days has been imposed on them in the three years preceding the commission of the offence (RTOA 1988, s.34(4)(b)).

The Council agreed with both of these changes.

The West London Magistrates' Bench suggested that it would be helpful to give the statutory reference for the types of disqualification to be disregarded. The Council considered that while this might be helpful, the level of detail required to make it comprehensive and accurate could overcomplicate the guidance and has therefore not made the suggested change.

Discretionary and 'totting up' disqualification in the explanatory materials

The issue

In 2020 the Council consulted on changes to the guidance on 'totting up' disqualifications with the intention of reducing the occurrences of offenders who have accumulated 12 or more points avoiding disqualification. However, since those changes, it has been suggested by some magistrates and legal advisers that courts are too often imposing short discretionary disqualifications (of less than 56 days) where 12 or more points have been imposed. This avoids a longer period of disqualification that would result from totting-up (at least 6 months).

The suggestion was that the wording in the totting up guidance should be the same as that in the discretionary disqualification guidance.

It was also pointed out that there is sometimes confusion as to which points count towards a totting up disqualification and that it would be helpful for the guidance to set that out more clearly.

The proposed wording (changes shown in red)

'Totting-up' guidance:

Incurring 12 or more penalty points means a minimum period of disqualification must be imposed (a 'totting up disqualification') – s.35 Road Traffic Offenders Act (RTOA) 1988. **Points are not to be taken into account for offences committed more than three years before the commission of the current offence – s.29 RTOA 1988.**

[...]

The court should first consider the circumstances of the offence, and determine whether the offence should attract a [discretionary period of disqualification](#). But the court must note the statutory obligation to disqualify those repeat offenders who would, were penalty points imposed, be liable to the mandatory "totting" disqualification and, **unless the court is of the view that the offence should be marked by a period of discretionary disqualification in**

excess of the minimum totting up disqualification period, **the court should impose penalty points rather than discretionary disqualification** so that the minimum totting up disqualification period applies.

Discretionary disqualification guidance:

In some cases in which the court is considering discretionary disqualification, the offender may already have sufficient penalty points on his or her licence that he or she would be liable to a 'totting up' disqualification if further points were imposed. In these circumstances, **unless the court is of the view that the offence should be marked by a period of discretionary disqualification in excess of the minimum totting up disqualification period**, the court should impose penalty points rather than discretionary disqualification so that the minimum totting up disqualification period applies ([see 'totting up'](#)).

Several respondents welcomed these changes. One individual suggested adding in guidance on the approach to be taken to new drivers, to discourage the practice of imposing a short disqualification rather than six points so that the offender does not have to retake the driving test, but as this would be new content that had not been consulted on the Council decided to leave this for consideration at a later date.

A judge suggested replacing 'he or she' with 'they' and 'his or her' with 'their'. The Council agreed that it would be preferable to use gender neutral pronouns and decided to make similar changes elsewhere in guidelines and supporting materials. These changes (which will not alter the substance of the meaning) will be logged on the [minor revisions log](#) when made.

A magistrate (whose original suggestion had led to the changes consulted on) suggested that it would be clearer if the wording focussed on the need to prefer points over discretionary disqualification which she suggested gets lost in the explanation consulted on. She suggested combining the wording to read:

In some cases in which the court is considering discretionary disqualification, the offender may already have sufficient penalty points on his or her licence that he or she would be liable to a 'totting up' disqualification if further points were imposed. In these circumstances, the court should impose penalty points rather than discretionary disqualification so that the minimum totting up disqualification period applies (see 'totting up'). The court should first consider the circumstances of the offence, and determine whether the offence should attract a discretionary period of disqualification. Unless the court is of the view that the offence should be marked by a period of discretionary disqualification in excess of the minimum totting up disqualification period, the court should impose penalty points rather than discretionary disqualification so that the minimum totting up disqualification period applies.

The proposal would (as the magistrate accepted) make the explanation lengthy and the Council considered that this may make it less effective. Bearing in mind the level of support from other respondents, the Council decided to retain the wording consulted on with the minor change to pronouns.

Impact

The changes will not affect sentence levels. The only impact they may have is on the imposition of disqualification from driving.

Football banning orders

The issue

There is some [guidance on football banning orders](#) in the ancillary orders section of the explanatory materials to the magistrates' courts sentencing guidelines.

Schedule 1 to the Football Spectators Act 1989 lists the offences and circumstances that require a football banning order. This schedule has been amended by [Section 190](#) of the PCSC Act. The guidance provides a list of the more commonly encountered 'relevant offences' (but does not replicate Schedule 1 in full) and this required updating. The proposal wording was (additions shown in red):

- public order offences – Public Order Act 1986, **Parts 3 and 3A, and s.4, 4A or 5** – committed: (a) during a period relevant to a football match (see below) at any premises while the offender was at, or was entering or leaving or trying to enter or leave, the premises; (b) on a journey to or from a football match and the court makes a declaration that the offence related to football matches; or (c) during a period relevant to a football match (see below) and the court makes a declaration that the offence related to that match;
- any offence under section 31 of the Crime and Disorder Act 1998 (racially or religiously aggravated public order offences) where the court makes a declaration that the offence related to a football match, to a football organisation or to a person whom the accused knew or believed to have a prescribed connection with a football organisation,
- any offence under section 1 of the Malicious Communications Act 1988 (offence of sending any letter, electronic communication or article with intent to cause distress or anxiety) where the court has stated that the offence is aggravated by hostility of any of the types mentioned in section 66(1) of the Sentencing Code (racial hostility etc), and where the court makes a declaration that the offence related to a football match, to a football organisation or to a person whom the accused knew or believed to have a prescribed connection with a football organisation,
- any offence under section 127(1) of the Communications Act 2003 (improper use of public telecommunications network) where the court has stated that the offence is aggravated by hostility of any of the types mentioned in section 66(1) of the Sentencing Code (racial hostility etc), and where the court makes a declaration that the offence related to a football match, to a football organisation or to a person whom the accused knew or believed to have a prescribed connection with a football organisation.

The proposed changes were merely designed to reflect legislative changes and are not expected to affect sentence levels. As such the Council considered making them without consultation, but concluded that it would be helpful to consult to ensure that the information is set out in a way that is helpful to guideline users. All of those who commented agreed with the proposals and so the Council will make the proposed changes.

Criminal damage

The issue

[Section 50](#) of the PCSC Act inserts subsections (11A) to (11D) of section 22, and amends Schedule 2 to, the Magistrates' Courts Act 1980. This has the effect of excluding criminal damage to memorials from offences which are to be tried summarily even though the value involved is not more than £5,000 (for offences committed on or after 28 June 2022). The definition of a memorial in the legislation is very wide and can include a bunch of flowers. Criminal damage which is to be tried summarily has a maximum sentence of 3 months' custody and/or a £2,500 fine whereas the either way offence has a maximum of 10 years.

There are two sentencing guidelines for criminal damage:

- [Criminal damage \(other than by fire\) value not exceeding £5,000/ Racially or religiously aggravated criminal damage](#)
This guideline states that the maximum for the basic offence is 3 months' custody
- [Criminal damage \(other than by fire\) value exceeding £5,000/ Racially or religiously aggravated criminal damage](#)

The Council consulted on proposed amendments to the guidelines to direct courts to the appropriate guideline when sentencing cases where the value does not exceed £5,000 but the case may be tried in the Crown Court and/or the maximum penalty for the offence is not limited to three months' imprisonment because it relates to a memorial (changes shown in red):

Criminal damage (other than by fire) value exceeding £5,000/ Racially or religiously aggravated criminal damage

Crime and Disorder Act 1998, s.30, Criminal Damage Act 1971, s.1(1)

Effective from: 01 October 2019

Criminal damage (other than by fire) value exceeding £5,000, Criminal Damage Act 1971, s.1(1)

Triable either way

Maximum: 10 years' custody

Offence range: Discharge – 4 years' custody

Note: Where an offence of criminal damage:

a) is **added** to the indictment at the Crown Court (**having not been charged before**)

or

b) it is an offence committed by destroying or damaging a memorial as defined by s22(11A) - (11D) of the Magistrates' Courts Act 1980 committed on or after 28 June 2022

the statutory maximum sentence is 10 years' custody regardless of the value of the damage. In such cases where the value does not exceed £5,000 regard should also be had to the not exceeding £5,000 guideline.

Racially or religiously aggravated criminal damage, Crime and Disorder Act 1998, s.30

Triable either way

Maximum: 14 years' custody

Criminal damage (other than by fire) value not exceeding £5,000/ Racially or religiously aggravated criminal damage

Crime and Disorder Act 1998, s.30, Criminal Damage Act 1971, s.1(1)

Effective from: 01 October 2019

Criminal damage (other than by fire) value not exceeding £5,000, Criminal Damage Act 1971, s.1 (1)

Triable only summarily (except as noted below)

Maximum: Level 4 fine and/or 3 months' custody

Offence range: Discharge – 3 months' custody

Note: Where an offence of criminal damage:

a) is **added** to the indictment at the Crown Court (**having not been charged before**)

or

b) it is an offence committed by destroying or damaging a memorial as defined by s22(11A) - (11D) of the Magistrates' Courts Act 1980 committed on or after 28 June 2022

the statutory maximum sentence is 10 years' custody regardless of the value of the damage. In such cases where the value does not exceed £5,000, the exceeding £5,000 guideline should be used but regard should also be had to this guideline.

Racially or religiously aggravated criminal damage, Crime and Disorder Act 1998, s.30

Triable either way

Maximum: 14 years' custody

Most respondents who commented agreed with the proposals. Of those who expressed different views, these related to matters outside of the scope of the consultation (one had broader issues with the legislation and two commented on sentencing for criminal damage more generally). One magistrate said that he did not find the drafting particularly clear but was unable to suggest an alternative.

The Council therefore decided to make the proposed changes.

Impact

The changes are not designed or expected to affect sentence levels.

Minimum sentences

The issue

[Section 124](#) of the PCSC Act changes the threshold for passing a sentence below the minimum term for repeat offenders for certain offences from ‘unjust in all the circumstances’ to ‘exceptional circumstances’ for offences committed on or after 28 June 2022. The guidelines affected are:

- Bladed articles and offensive weapons – possession
- Bladed articles and offensive weapons – threats
- Bladed articles and offensive weapons (possession and threats) – children and young people
- Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it to another
- Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug
- Domestic burglary
- Aggravated burglary (Crown Court only)

With the exception of the Domestic burglary and Aggravated burglary guidelines, the relevant guidelines had an existing step 3 (step 5 in the Bladed articles and offensive weapons – children and young people guideline) that sets out the requirements for the minimum term and the test for ‘unjust in all the circumstances’. The Council considered that any changes to step 3 will need to accommodate both tests (at least in the short term).

Bladed articles/ offensive weapons – guidelines for sentencing adults

In order to accommodate both tests the Council proposed having the two different tests as dropdowns within step 3. This is illustrated below in a revised version of the possession of a bladed article/offensive weapon guideline (additions shown in red):

Step 3 – Minimum Terms – second or further relevant offence

When sentencing the offences of:

- possession of an offensive weapon in a public place;
- possession of an article with a blade/point in a public place;
- possession of an offensive weapon on school premises; and
- possession of an article with blade/point on school premises

a court must impose a sentence of at least 6 months’ imprisonment where this is a second or further relevant offence **unless:**

- (If the offence was committed on or after 28 June 2022) **the court is of the opinion that there are exceptional circumstances which relate to any of the offences or to the offender, and justify not doing so; or.**

- **(If the offence was committed before 28 June 2022) the court is of the opinion that there are particular circumstances relating to the offence, the previous offence or the offender which make it unjust to do so in all the circumstances.**

A 'relevant offence' includes those offences listed above and the following offences:

- threatening with an offensive weapon in a public place;
- threatening with an article with a blade/point in a public place;
- threatening with an article with a blade/point on school premises; and
- threatening with an offensive weapon on school premises.

Exceptional circumstances (offence committed on or after 28 June 2022)

v

In considering whether there are exceptional circumstances that would justify not imposing the minimum term the court must have regard to:

- the particular circumstances which relate to any of the offences **and**
- the particular circumstances of the offender.

either of which may give rise to exceptional circumstances.

Where the issue of exceptional circumstances has been raised the court should give a clear explanation as to why those circumstances have or have not been found.

Principles

The circumstances must truly be exceptional. Circumstances are exceptional if the imposition of the minimum term would result in an arbitrary and disproportionate sentence.

It is important that courts adhere to the statutory requirement and do not too readily accept exceptional circumstances.

The court should look at all of the circumstances of the case taken together. A single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances. The seriousness of the previous offence(s) and the period of time that has elapsed between offences will be a relevant consideration.

The mere presence of one or more of the following should not *in itself* be regarded as exceptional:

- One or more lower culpability factors
- One or more mitigating factors
- A plea of guilty

Where exceptional circumstances are found

If there are exceptional circumstances that justify not imposing the statutory minimum sentence then the court must impose either a shorter custodial sentence than the statutory minimum provides or an alternative sentence.

Unjust in all of the circumstances (offence committed before 28 June 2022) v

In considering whether a statutory minimum sentence would be 'unjust in all of the circumstances' the court must have regard to the particular circumstances of the offence and the offender. If the circumstances of the offence, the previous offence or the offender make it unjust to impose the statutory minimum sentence then the court **must impose either a shorter custodial sentence than the statutory minimum provides or an alternative sentence.**

The offence

Having reached this stage of the guideline the court should have made a provisional assessment of the seriousness of the current offence. In addition, the court must consider the seriousness of the previous offence(s) and the period of time that has elapsed between offences. Where the seriousness of the combined offences is such that it falls far below the custody threshold, or where there has been a significant period of time between the offences, the court may consider it unjust to impose the statutory minimum sentence.

The offender

The court should consider the following factors to determine whether it would be unjust to impose the statutory minimum sentence;

- any strong personal mitigation;
- whether there is a realistic prospect of rehabilitation;
- whether custody will result in significant impact on others.

The comments made by respondents were often the same for each of the guidelines and the Council therefore considered these suggestions across all relevant guidelines.

A judge suggested some further exposition of the term exceptional. Another judge suggested changing the wording slightly. These suggestions are illustrated below:

Principles

The circumstances must truly be exceptional. Circumstances are exceptional if the imposition of the minimum term would result in an arbitrary and disproportionate sentence.

It is important that courts adhere to the statutory requirement and do not too readily accept **that the exceptional circumstances are exceptional. A factor is unlikely to be regarded as exceptional if it would apply to a significant number of cases.**

The court should look at all of the circumstances of the case taken together. A single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances. The seriousness of the previous offence(s) and the period of time that has elapsed between offences will be a relevant consideration.

The mere presence of one or more of the following should not **in itself** be regarded as exceptional:

- One or more lower culpability factors
- One or more mitigating factors
- A plea of guilty

The Council agreed to adopt these helpful suggestions across all relevant guidelines.

The Criminal Sub-Committee of HM Council of Circuit Judges suggested adding in a section similar to that proposed in the unlawful act manslaughter guideline:

Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see Criminal Practice Directions VII: Sentencing B.

The Council considered that a reference to resolving factual disputes with a Newton hearing could apply whether the test is 'exceptional circumstances' or 'unjust in all the circumstances' so could be included in the general text above the drop down boxes but would sit more logically in the dropdown sections and so decided to make the following additions:

Exceptional circumstances (offence committed on or after 28 June 2022)

In considering whether there are exceptional circumstances that would justify not imposing the minimum term the court must have regard to:

- the particular circumstances which relate to any of the offences **and**
- the particular circumstances of the offender.

either of which may give rise to exceptional circumstances.

Where the issue of exceptional circumstances has been raised the court should give a clear explanation as to why those circumstances have or have not been found.

Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see Criminal Practice Directions VII: Sentencing B.

...

Unjust in all of the circumstances (offence committed before 28 June 2022)

In considering whether a statutory minimum sentence would be 'unjust in all of the circumstances' the court must have regard to the particular circumstances of the offence and the offender.

Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see Criminal Practice Directions VII: Sentencing B.

If the circumstances of the offence, the previous offence or the offender make it unjust to impose the statutory minimum sentence then the court **must impose either a shorter custodial sentence than the statutory minimum provides or an alternative sentence.**

The Crown Prosecution Service (CPS) suggested adding a reference to the Totality guideline as this 'may require sentencers to consider imposing a higher overall sentence than the minimum term'. They also suggested (for the six month minimum terms) noting that suspending a minimum term, though lawful, will rarely be appropriate as in the majority of cases suspension would undermine the punitive and deterrent effect of the minimum sentencing provisions, to reflect the judgment in R v Uddin [2022] EWCA Crim 751.

The Council concluded that a reference to totality is not necessary as part of the minimum term step as totality is considered at step 6 in the guidelines. The Council had considered

consulting on adding a reference to the availability of suspended sentences for the weapons and bladed article offences but had concluded that if there were to be any such reference it should be in the Imposition of community and custodial sentences guideline which is being considered for revision.

A respondent queried the use of the word 'arbitrary' in the test for exceptional circumstances saying, 'The sentence is not arbitrary if it is in accordance with the law and Wednesbury reasonable'. The Council noted that the term is taken from case law relating to firearms (R v Rehman [2005] EWCA Crim 2056) and is used across all guidelines where there is a minimum term and therefore decided that it should be retained.

Bladed articles/ offensive weapons – guideline for sentencing children

For step 5 of the children and young people possession/threats guideline the Council proposed (changes in red):

Step 5 – Statutory minimum sentencing provisions

The following provisions apply to those young people who were aged 16 or over **on the date of the offence**.

Threatening with Bladed Articles or Offensive Weapons

When sentencing these offences a court must impose a sentence of at least 4 months Detention and Training Order **unless**:

- (If the offence was committed on or after 28 June 2022) **the court is of the opinion that there are exceptional circumstances which relate to the offence or to the young person, and justify not doing so; or**
- (If the offence was committed before 28 June 2022) **the court is of the opinion that there are particular circumstances relating to the offence or the young person which make it unjust to do so in all the circumstances.**

Possession of Bladed Articles or Offensive Weapons

When sentencing the offences of:

- possession of an offensive weapon in a public place;
- possession of an article with a blade/point in a public place;
- possession of an offensive weapon on school premises; and
- possession of an article with blade/point on school premises

a court must impose a sentence of at least 4 months' Detention and Training Order where this is a second or further relevant offence unless

- (If the offence was committed on or after 28 June 2022) **the court is of the opinion that there are exceptional circumstances which relate to any of the offences or to the young person, and justify not doing so; or**
- (If the offence was committed before 28 June 2022) **the court is of the opinion that there are particular circumstances relating to the offence, the previous offence or the young person which make it unjust to do so in all the circumstances.**

A 'relevant offence' includes those offences listed above and the following offences:

- threatening with an offensive weapon in a public place;

- threatening with an article with a blade/point in a public place;
- threatening with an article with a blade/point on school premises; and
- threatening with an offensive weapon on school premises.

Exceptional circumstances (offence committed on or after 28 June 2022)

v

In considering whether there are exceptional circumstances that would justify not imposing the minimum term the court must have regard to:

- the particular circumstances which relate to any of the offences **and**
- the particular circumstances of the offender.

either of which may give rise to exceptional circumstances.

Where the issue of exceptional circumstances has been raised the court should give a clear explanation as to why those circumstances have or have not been found.

Circumstances are exceptional if the imposition of the minimum term would result in an arbitrary and disproportionate sentence for that young person.

The offence

Having reached this stage of the guideline the court should have made a provisional assessment of the seriousness of the offence. Where the court has determined that the offence seriousness falls far below the custody threshold the court may consider that this gives rise to exceptional circumstances that justify not imposing the statutory minimum sentence. Where the court is considering a statutory minimum sentence as a result of a second or further relevant offence, consideration should be given to the seriousness of the previous offence(s) and the period of time that has elapsed between offending. Where the seriousness of the combined offences is such that it falls far below the custody threshold, or where there has been a significant period of time between the offences, the court may consider that this gives rise to exceptional circumstances that justify not imposing the statutory minimum sentence.

The young person

The statutory obligation to have regard to the welfare of a young person includes the obligation to secure proper provision for education and training, to remove the young person from undesirable surroundings where appropriate, and the need to choose the best option for the young person taking account of the circumstances of the offence. **In having regard to the welfare of the young person, a court should ensure that it considers:**

- any mental health problems or learning difficulties/disabilities;
- any experiences of brain injury or traumatic life experience (including exposure to drug and alcohol abuse) and the developmental impact this may have had;
- any speech and language difficulties and the effect this may have on the ability of the young person (or any accompanying adult) to communicate with the court, to understand the sanction imposed or to fulfil the obligations resulting from that sanction;
- the vulnerability of young people to self harm, particularly within a custodial environment; and
- the effect on young people of experiences of loss and neglect and/or abuse.

In certain cases the concerns about the welfare of the young person may be so significant that the court considers that this gives rise to exceptional circumstances that justify not imposing the statutory minimum sentence.

Where exceptional circumstances are found

If there are exceptional circumstances that justify not imposing the statutory minimum sentence then the court must impose an alternative sentence.

Unjust in all of the circumstances (offence committed before 28 June 2022) ✓

In considering whether a statutory minimum sentence would be 'unjust in all of the circumstances' the court must have regard to the particular circumstances of the offence, any relevant previous offence and the young person. If the circumstances make it unjust to impose the statutory minimum sentence then the court **must impose an alternative sentence**.

The offence

Having reached this stage of the guideline the court should have made a provisional assessment of the seriousness of the offence. Where the court has determined that the offence seriousness falls far below the custody threshold the court may consider it unjust to impose the statutory minimum sentence. Where the court is considering a statutory minimum sentence as a result of a second or further relevant offence, consideration should be given to the seriousness of the previous offence(s) and the period of time that has elapsed between offending. Where the seriousness of the combined offences is such that it falls far below the custody threshold, or where there has been a significant period of time between the offences, the court may consider it unjust to impose the statutory minimum sentence.

The young person

The statutory obligation to have regard to the welfare of a young person includes the obligation to secure proper provision for education and training, to remove the young person from undesirable surroundings where appropriate, and the need to choose the best option for the young person taking account of the circumstances of the offence. **In having regard to the welfare of the young person, a court should ensure that it considers:**

- any mental health problems or learning difficulties/disabilities;
- any experiences of brain injury or traumatic life experience (including exposure to drug and alcohol abuse) and the developmental impact this may have had;
- any speech and language difficulties and the effect this may have on the ability of the young person (or any accompanying adult) to communicate with the court, to understand the sanction imposed or to fulfil the obligations resulting from that sanction;
- the vulnerability of young people to self harm, particularly within a custodial environment; and
- the effect on young people of experiences of loss and neglect and/or abuse.

In certain cases the concerns about the welfare of the young person may be so significant that the court considers it unjust to impose the statutory minimum sentence.

Most respondents who commented agreed with these proposals. One member of the public expressed the view 'that the Sentencing Council's whole attitude to young offenders

is based on your institutional culture of leniency' and felt that community sentences for these offences put the public at risk.

A magistrate queried whether there should be reference to the young person being under the controlling or coercive behaviour from adults or gangs when considering exceptional circumstances. The Council looked carefully at both the factors in the minimum term step and those in the mitigation step of the guideline and was satisfied that the issue was covered by the guideline.

Another respondent questioned the reference to 'a significant period of time between the offences' in the Bladed articles and offensive weapons (possession and threats) - children and young people guideline saying:

'Where there has been a significant period of time between the offences' is not an exceptional circumstance within the meaning of the legislation in my view. Furthermore, a 'significant period of time' is not specific enough and may lead to serious inconsistencies in sentencing. As this guideline applies to offenders aged 16 or 17 only (spanning just 2 years), it is difficult to see how an 'exceptionally significant period of time' could arise in such cases anyway.

It should be removed from the guideline, particularly in the context of offences that cause high levels of harm and concern among young people and adults alike.

Where exceptional circumstances are found in relation to the young person, if a further offence is committed, the presumption should be that the previous exceptional circumstance is no longer exceptional and the minimum sentence should be imposed, wording should be added to this effect.

The respondent repeated the point in relation to adult guidelines saying:

Again, what period of time between the offences would be so exceptional as to justify not imposing the minimum sentence? Again it should not usually be relevant as a consideration. Perhaps the guideline should give an idea as to what period of time may constitute exceptional circumstances, or remove it from the guideline. If parliament had intended for there to be a maximum period of time after which the minimum sentence for a further offence shouldn't apply, it would have legislated to that effect.

The Council noted that point made about the guideline for children and young people spanning just two years is slightly misconceived. While the minimum term provisions only apply to those aged 16 and over, the previous conviction could predate the offender's sixteenth birthday. The Council felt that, particularly for children and young people, the passage of time is a very relevant consideration. More generally, the Council noted that the proposed wording does not say that a gap between offences will amount to exceptional circumstances – it says that it will be a relevant consideration along with the seriousness of the previous offence.

The Council agreed that if exceptional circumstances have been found once this would lead to a presumption that the same circumstances are not exceptional for a subsequent conviction, but was satisfied that this was implicit in the wording of the guidelines.

Minimum sentence of 7 years for third class A drug trafficking offence

For the Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it to another guideline, the Council had proposed changes to step 3 similar to those for the bladed articles and offensive weapons guidelines. Similar comments were received in response and the Council therefore agreed to make the same changes to the version consulted on as those set out on pages 15 and 16 above.

Minimum sentence of 3 years for third domestic burglary

The Domestic burglary and Aggravated burglary guidelines did not have a separate step to consider the minimum term and the Council consulted on introducing a new step 3 consistent with that in the guidelines above. Again, similar comments were received in response and the Council therefore agreed to make the same changes to the proposals as those set out on pages 15 and 16 above.

Impact

The changes to the minimum term steps in guidelines were necessitated by changes to legislation and any effect on sentence levels would therefore be attributable to the legislation.

Required life sentence for manslaughter of an emergency worker

The issue

[Section 3](#) of the PCSC Act inserts a new section 258A (re 16 and 17 year old offenders), section 274A (re 18-20 year old offenders) and section 285A (re offenders aged 21 and older) in the Sentencing Code. The effect of this is that, for unlawful act manslaughter where the victim is an emergency worker acting in that capacity, the court must impose a life sentence unless there are exceptional circumstances.

While this provision will only apply very rarely, the Council considered that it would be helpful to sentencers to add a step to the Unlawful act manslaughter guideline.

The proposed wording

The Council consulted on adding the following to the header of the guideline (immediately before the text on the type of manslaughter):

For offences committed on or after 28 June 2022, if the offence was committed against an emergency worker acting in the exercise of functions as such a worker, the court must impose a life sentence unless the court is of the opinion that there are exceptional circumstances which (a) relate to the offence or the offender, and (b) justify not doing so (sections 274A and 285A of the Sentencing Code). See step 3

Changing the statutory aggravating factor at step 2, to:

Offence was committed against an emergency worker acting in the exercise of functions as such a worker. NOTE: For offences committed on or after 28 June 2022, if the offence was committed against an emergency worker acting in the exercise of functions as such a worker, the court must impose a life sentence unless the court is of the opinion that there are exceptional circumstances which (a) relate to the offence or the offender, and (b) justify not doing so (sections 274A and 285A of the Sentencing Code). See step 3

Adding a new step 3 to the guideline (and renumbering the subsequent steps):

Step 3 – Required sentence and exceptional circumstances

The following paragraphs apply to adult offenders – there is a separate dropdown section for those aged under 18 at the date of conviction below

Required sentence

1. Where the offence was committed against an emergency worker acting in the exercise of functions as such a worker, the court **must** impose a life sentence **unless** the court is of the opinion that there are exceptional circumstances which (a)

relate to the offence or the offender, and (b) justify not doing so (sections 274A and 285A of the Sentencing Code).

Applicability

2. The required sentence provisions apply when a person is convicted of unlawful act manslaughter committed on or after 28 June 2022, the offender was aged 16 or over at the offence date and the offence was committed against an emergency worker acting in the exercise of functions as such a worker.
3. The circumstances in which an offence is to be taken as committed against a person acting in the exercise of their functions as an emergency worker include circumstances where the offence takes place at a time when the person is not at work but is carrying out functions which, if done in work time, would have been in the exercise of their functions as an emergency worker.
4. An emergency worker has the meaning given by [section 68](#) of the Sentencing Code.
5. Where the required sentence provisions apply a guilty plea reduction applies in the normal way (see step 5 – Reduction for guilty pleas).
6. Where the required sentence provisions apply and a life sentence is imposed, the notional determinate sentence should be used as the basis for the setting of a minimum term to be served.
7. Where the required sentence provisions apply, this should be stated expressly.

Exceptional circumstances

8. In considering whether there are exceptional circumstances that would justify not imposing the statutory minimum sentence, the court must have regard to:
 - the particular circumstances of the offence **and**
 - the particular circumstances of the offender

either of which may give rise to exceptional circumstances.

9. Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see [Criminal Practice Directions](#) VII: Sentencing B.
10. Where the issue of exceptional circumstances has been raised the court should give a clear explanation as to why those circumstances have or have not been found.

Principles

11. Circumstances are exceptional if the imposition of the required sentence would result in an arbitrary and disproportionate sentence.
12. The court should look at all of the circumstances of the case taken together, including circumstances personal to the offender. A single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances.

<u>Where exceptional circumstances are found</u>	
13. If there are exceptional circumstances that justify not imposing the required sentence then the court should impose the sentence arrived at by normal application of this guideline.	
Sentencing offenders aged under 18 at the date of conviction	
	v
<ol style="list-style-type: none"> 1. Where the offender is aged 16 or 17 at the date of conviction, the required sentence provisions apply only if the offender is aged 16 or over when the offence was committed and the offence was committed against an emergency worker acting in the exercise of functions as such a worker (section 258A of the Sentencing Code). 2. Subject to the required sentence provisions, where the offender is aged under 18 at the date of conviction the court should determine the sentence in accordance with the Sentencing Children and Young People guideline, particularly paragraphs 6.42-6.49 on custodial sentences. 3. This guidance states at paragraph 6.46: “When considering the relevant adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age.” 4. The considerations above on exceptional circumstances relating to the offence or offender apply equally when sentencing offenders aged 16 or 17 at the date of the conviction. 	

All who responded agreed with the proposals apart from one person who wanted more whole life orders. The Council therefore decided to make the changes consulted on.

Impact

The proposals are necessitated by changes to legislation and any effect on sentence levels would therefore be attributable to the legislation. As noted above, this provision will only apply very rarely and so little impact is anticipated.

Equalities and impact

Equalities

Most of the matters consulted on were for relatively minor or technical changes which are unlikely to have any bearing on equality issues or are changes that are necessitated by legislation. Of the 14 respondents who replied to a question in the consultation paper asking if there were any equality issues relating to the proposals only one identified any issues and these related to matters outside the scope of this consultation.

Impact

The Council anticipates that any impact on prison and probation resources from the majority of the changes proposed in this consultation will be minor. Where changes may be more substantial, these impacts would be attributable to the legislative changes and not to the guidelines. In view of the nature of the consultation, a separate resource assessment has not been produced but a brief discussion on impact has been included in relation to each proposal.

Conclusion and next steps

As a result of the consultation the Council will make the changes set out in the sections above. The amended versions of the guidelines will be published on the Council's website (<https://www.sentencingcouncil.org.uk>) on 1 April 2023 and come into force on publication.

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, it has not been possible to do this (without causing unnecessary confusion by having two versions of the same guideline 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 consultation included a general question inviting comment on the proposals. Some respondents used this to make suggestions for future changes to guidelines. The Council welcomes these and will consider them along with other matters that have come to its attention as part of the next annual miscellaneous amendments consultation which is expected to take place in the autumn of 2023.

Consultation respondents

Brian Watt JP
Criminal Sub-Committee of HM Council of Circuit Judges
Crown Prosecution Service
David King JP
Derek Stocker JP
Dr Lillian Hobbs JP
Gary Knight JP
HHJ Anne Arnold
HHJ Unsworth KC
HM Council of District Judges (Magistrates' Courts)
Individual
Individual
Individual
Individual
Justices' Legal Advisers and Court Officers' Service
Karen Hammond DJ(MC)
Katharine Long JP
Lauren Hemsley
Louise Bryant JP
Ministry of Justice
Neil Corre
Paul Heywood JP
Rachel O'Hara JP
West London Magistrates' Bench

