

Sentencing Council

Sentencing Council meeting: 23 October 2015
Paper number: SC(15)OCT08 – MCSG
Lead Council members: Richard Williams, Jill Gramann
Lead official: Claire-Lou Manning

1 ISSUE

1.1 The Council agreed to review and revise the Magistrates’ Court Sentencing Guidelines (MCSG). Now that the review project is underway, a methodology needs to be approved. The project is only scheduled to last 12 months, yet there are 31 guidelines covering 44 offences, plus a further 13 guidelines covering a mixture of 17 either way and summary motoring offences, plus 58 road traffic (bulk process type) offences to cover.

1.2 The Council is invited to consider how to achieve this review in a way that is proportionate to the respective types of work.

1.3 The terms of reference for the project, circulated in hard copy at the September meeting, require formal approval.

2 RECOMMENDATION

2.1 That the Council:

- Agrees that the project proceeds on the basis of the methodology proposed at paragraph 3.1; and
- Approves the terms of reference, attached at **Annex C**.

3 CONSIDERATION

The legacy offence guidelines within the MCSG that require conversion into Sentencing Council format

3.1 The guidelines issued by the Sentencing Guidelines Council (“the legacy offence guidelines”) are structured in a way that provides examples of activity of

increasing seriousness to assist with the assessment of harm and culpability. This group of guidelines do not contain any step one or step two stages, and will need to be converted into the Sentencing Council's "step by step" approach. An example of what this conversion process may generate is provided at **Annex A**. The nature of the offence and the examples of activity inform the steps in the revised legacy offences guidelines.

3.2 The following timetable is proposed for the legacy offences:

- November 2015: drafts to MGSG working group. Working group members will in turn take soundings from their organisations;
- January 2016: Approval by MCSG working group;
- March 2016: Approval by the Council and sign-off for consultation;
- May – June 2016: Consultation (six weeks).

3.3 The drunk and disorderly example at **Annex A** highlights three issues:

- The problem with adherence to three categories of seriousness, in line with the SC approach to most guidelines: in some cases, three categories can create overly complex sentencing ranges, which become difficult to distinguish where the overall penalty is low (this offence carries a maximum level three fine (£1000)). It is therefore recommended that we have some flexibility of approach.
- The approach to aggravating and mitigating factors, in particular balancing the need to provide sufficient information against the need to keep the guidelines from becoming unwieldy: previously, the hard copy MCSG contained a pull out card which gave sentencers an at a glance way of accessing the standard lists of aggravating and mitigating factors, alongside the offence specific factors. The recommended solution is to draw on the standard lists and incorporate those parts that seem most pertinent to the offence in hand into steps one and two, as opposed to reproducing all of the standard lists in full. The draft example has done both, to demonstrate to Council the comparative lengths of guideline using both methods.
- The likelihood of amendments which involve more substantive changes: the project has been tasked with reviewing and revising the guidelines. It is anticipated that the organisations represented at the working group will seek

amendments to the wording of the guidelines that would require substantive, rather than formatting changes.

3.4 While consultation will be important, this project is different to the development of a definitive guideline. No amendments are envisaged to be particularly significant or sizeable; and the aggravating and mitigating factors are well established. It is therefore proposed that a light touch consultation process be applied. At this stage, a six week consultation, aimed primarily at the statutory consultees, MCSG end users and other key stakeholders is envisaged.

Question 1: Is the Council happy for the drafting to proceed in the basis of a stepped approach consistent with existing SC guidelines, but with flexibility as to numbers of categories if appropriate?

Question 2: Is the Council willing to allow the MCSG working group to assess and recommend the categories with appropriate adjustment of sentencing ranges (if required) for the MCSG legacy offences?

Question 3: Is the Council willing to delegate to the MCSG working group the drafting of any revisions to the legacy offences?

Question 4: Does this include where substantive drafting changes are proposed?

Question 5: Is the Council willing to agree in principle a light touch consultation process for the changes to the legacy offences brought about by conversion into SC format?

Requests from the working group for new or substantially amended guidelines

3.5 The MCSG working group has identified three distinct areas where they want the project to focus attention. This work is in addition to the re-formatting of legacy offences. The group has high expectations about the scale and scope of the project and it is clear that it will not be possible to deliver all of the changes they would like to see, partly due to the volume and complexity of work, but also due to the nature of some of the offence groups identified as priorities. It would therefore be helpful to have a steer from the Council as to the approach to take, in order to manage expectations. These are:

- the harassment group of offences, including developing a guideline to cover s33 Criminal Justice and Courts Act 2015;
- offences relevant to the misuse of level crossings; and

- “rogue landlords”.

Harassment type offences

3.6 The MCSG provides several guidelines on harassment type offences. Some are likely to be covered by the work on the forthcoming Public Order guideline. The guidelines for offences of harassment under the Protection of Harassment Act 1997 (PHA 1997) (both s2 non-violent and s4 violence/fear of violence harassment) will form part of the review work to convert guidelines into Sentencing Council format. In addition to work to update the existing guidelines, in particular to reflect the increase in the use of social media to commit offences, there is the distinct issue of offences under s33 Criminal Justice and Courts Act 2015: disclosing private sexual photographs and films with intent to cause distress (so called “revenge porn”). Given that this is a new offence, there is not any statistical data available on it yet, but initial soundings have indicated that the offence is being charged. This offence carries up to two years imprisonment, and is a sensitive offence firmly in the public eye at present. Any guideline for this offence would therefore need to be developed in the usual way. Given the time this would take, and the fact that this is not just an offence for the magistrates’ court, development of such a guideline is beyond the scope of the MCSG review project. I would however recommend that the working group considers the development of a guidance note addressing when community, custody and custody in excess of the powers of the magistrates’ court thresholds are likely to have been crossed, to be added to the Explanatory Materials accompanying the MCSG.

3.7 There are also the relatively new offences under ss 2A and 4A PHA 1997; harassment in the form of stalking. Section 2A is a summary only offence, so it is recommended that we could include this in the MCSG, albeit it would be as a new guideline. Pending any development of such, sentencers are likely to be able to find assistance in the existing guidelines for ss2 and 4. Section 4A is an either way offence, and carries up to five years. No data has been collated on these offences yet. It may be the case that in due course scoping work on any future public order or other harassment type offence guidelines would identify if there is a need for a distinct guidelines for these offences. However, it seems unlikely, given the nature of the offence under s4A, that such a guideline would be within the remit of the MCSG. A similar note in the explanatory materials on thresholds for the s4A offence may assist.

Question 6: Does the Council agree that any new guidelines on harassment type offences, in particular “revenge porn” and s4A PHA 1997 is outside the scope of this project, but that guidance is produced (if needed) for offences not already within the MCSG for inclusion in the Explanatory Materials?

Level Crossings

3.8 The mischief that has prompted concern in this area is where drivers in particular “jump” the lights at railway level crossings. This is a difficult area to assist sentencers with given that there are several offences that could be applied to the mischief. This may in turn have led to some feeling amongst some stakeholders in this area that these offences are “under” sentenced (in particular, the Office of the Rail Regulator (as then was) wrote to the Council in 2010 expressing this view), which, if it arises from charging decisions, is not a matter the Council can address. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced additional offences to assist in this area. Given the disparate nature of the offences that could engage in this area, I do not propose that a guideline be developed. What may be of far greater practical assistance would the inclusion of a specific aggravating factor to be highlighted in the existing guidelines for offences such as failing to comply with a traffic signal, careless/inconsiderate driving, and dangerous driving.

Question 7: Does the Council agree not to proceed with the development of a definitive guideline in respect of level crossing offences at this point in time, and instead incorporate a specific aggravating factor in the relevant guidelines?

Rogue Landlords

3.9 The Council will be aware that there are numerous different mischiefs covered by this heading, ranging from planning breaches (the so called “beds in sheds” cases), to not having, or not complying with the conditions of an House of Multiple Occupation (HMO) licence. Not only does this mean that several different offences are contemplated by those prosecuting in this area, but also these are difficult multi-agency cases. Figures reflecting some of the (numerous) offences possible under the Housing Act 2004 being sentenced in the magistrates’ courts appear at **Annex B** Figures received from the Chartered Institute of Environmental Health would suggest that there were just under 700 prosecutions for offences under the Housing Act alone last year. Birmingham MC has advised the working group that

it sees sufficient of this work to create an entire court list of it. The anecdotal evidence collected from the working group is that it is affecting all court areas, rural and urban, and, given that the risks are in the gravest cases occupiers being exposed to lethal conditions, a real source of concern to sentencers.

3.10 The Immigration Bill appears to be incorporating part of the mischief in this area. I would not therefore advocate allocating resources to developing a definitive guideline in this area until the legislative position is clearer. However, given the rate of growth of prosecutions in this area, it may be prudent to consider a short guidance document to cover the most common offences of planning breach, failure to have an HMO licence and failure to comply with the terms of such, to assist sentencers.

Question 8: Does the Council agree not to proceed with the development of a definitive guideline in respect of rogue landlords at this point in time?

Question 9: Does the Council agree that the MCSG review project should assess developing a guidance note in respect of rogue landlord offences?

4 IMPACT AND RISKS

4.1 The MCSG review project has generated considerable interest amongst (in particular) key MC stakeholders. There is considerable appetite to see as much achieved as is practicable, within the time constraints. Any decision to publish revised guidelines significantly beyond the expected delivery date or to fail to commence or plan work on any new guidelines would have to be very carefully explained to stakeholders, in particular end users of the MCSG (e.g. judiciary, courts service, Justices' Clerks' Society, prosecutors and the defence community). The timetable proposed at paragraph 3.2 would enable consultation May 2016 - June 2016. This compliments the current work plan and allows for a significant portion of the work (the conversion of the legacy offences) to be completed within the life of the project, which is scheduled to end in September 2016.

4.2 Slippage from this timetable would result in the bulk of the project not being delivered within the life of the project, which would affect the Office's ability to deliver it at all within a reasonable timescale. It is possible that feedback during the development stage may necessitate a longer consultation period, or a longer period post-consultation.

4.3 It is possible that the introduction of a stepped approach to the legacy offences could have the unintended effect of changing sentencing practice. This could be as a result of providing more options for the assessment of harm. It is difficult to predict what the combined effect if any of the removal of the former approach and the introduction of the stepped approach will have, but a cautious pessimistic scenario would be that some sentences will increase. This risk however is likely to be temporised by the limited statutory maxima for many of these offences, making a cost impact, in terms of any significant increase use of secure estate unlikely, but it is too early in the process to assess impact on community sentences. For offences with sentencing options outside of the MC range, a more precise approach to the assessment of seriousness may assist with allocation, which may go some way to offset any rises in community orders.

Question 10: Is the Council content to proceed notwithstanding the risks identified?

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SC(15)OCT08 MCSG - Annex A (Conversion example)

Drunk and disorderly in a public place

Criminal Justice Act 1967, s.91
Effective from: 04 August 2008

Triable only summarily:
Maximum: Level 3 fine

[User guide for this offence](#)

Offence seriousness (culpability and harm)

A. Identify the appropriate starting point

Starting points based on first time offender pleading not guilty

<i>Examples of nature of activity</i>	<i>Starting point</i>	<i>Range</i>
<i>Shouting, causing disturbance for some minutes</i>	<i>Band A fine</i>	<i>Conditional discharge to Band B fine</i>
<i>Substantial disturbance caused</i>	<i>Band B fine</i>	<i>Band A fine to band C fine</i>

The above is how this guideline looks now. It uses examples of activity because it is a legacy guideline. Below is an attempt to convert these assessments of seriousness, into standard SC guideline format.

Step One

Determining the offence category

The court should determine culpability and harm caused or intended, by reference **only** to the factors below, which comprise the principal factual elements of the offence. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting before making an overall assessment and determining the appropriate offence category.

Category 1 Greater harm and higher culpability

Category 2 Greater harm and lower culpability or lesser harm and higher culpability

Category 3 **Neither** greater harm **nor** higher culpability

Factors indicating greater harm:

- Substantial disturbance caused
- Offence committed at school, hospital or other place where vulnerable persons may be present
- Offence committed on public transport
- Victim providing public service
- Offence ties up disproportionate police/emergency service/local authority resource - **new**

Factors indicating greater culpability:

Statutory aggravating factors:

- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
- Offence motivated by, or demonstrating, hostility to the victim based on the victim's disability (or presumed disability)

Other aggravating factors:

- Lengthy incident
- Group action
- Disregard of earlier warning regarding conduct - **new**
- Offence during currency of related controls e.g. street drinking controls - **new**
- Swearing and/or abusive language - **new**

Step Two

Starting point and category range

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of

culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Category 1 Band B fine Range: Band B fine to Band C fine

Category 2 Band A 75% Range: Band A fine to Band B fine

Category 3 Band A fine Range: Discharge to Band A fine

[NOTE – having 3 categories is new, and arguably splitting hairs for this offence given the maximum available penalty. But it set out the structure.]

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail

Other aggravating factors include:

- Location of the offence (if not incorporated above)
- Timing of the offence (if not incorporated above)
- Offence committed against those working in the public sector or providing a service to the public (if not incorporated above)
- Presence of others including, especially children or vulnerable people
- Failure to comply with current court orders
- Offence committed whilst on licence
- Established evidence of community impact

Factors reducing seriousness or reflecting personal mitigation

- Isolated incident
- No previous convictions **or** no relevant/recent convictions
- Good character and/or exemplary conduct
- Remorse
- Determination and/or demonstration of steps taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Lapse of time since the offence where this is not the fault of the offender
- Mental disorder or learning disability, where **not** linked to the commission of the offence
- Sole or primary carer for dependent relatives

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Housing Act (2004) offences

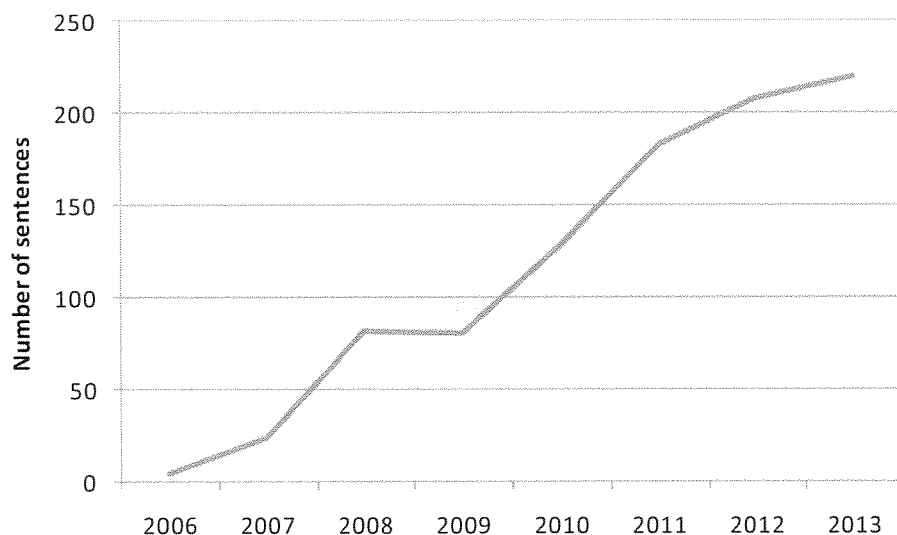
Summary offences

This section includes the following offences:

- Fail to comply with a housing improvement notice (s.30)
- Fail to comply with a housing prohibition order (s.32)
- Licence holder / person restricted by licence of multi occupation house fail to comply with licence conditions (s.72(3) & (7))
- Fail to comply with a housing management order (s.131)
- Disclose document / information contained in a home condition report (s.165)
- Obstruct officer of a housing enforcement authority (s.167)
- Fail to comply with regulations in respect of management of housing in multiple occupation (s.234)
- Aid / abet a failure to comply with regulations in respect of management of housing in multiple occupation (s.234)
- Fail to comply with the requirements of a housing notice under section 235 (s.236(1) & (3))
- Knowingly supply false / misleading information to a housing authority (s.238(1) & (3))
- Knowingly supply false / misleading information to another knowing it will be given to a housing authority (s.238(2) & (3))

In 2013, 220 adult offenders were sentenced for these offences. All offenders were sentenced in magistrates' courts, and the majority of offenders (95 per cent) received a fine. The number of offenders sentenced for these offences has generally been increasing since 2006 (see Figure 1).

Figure 1: Number of adult offenders sentenced for specified summary offences, 2006-2013



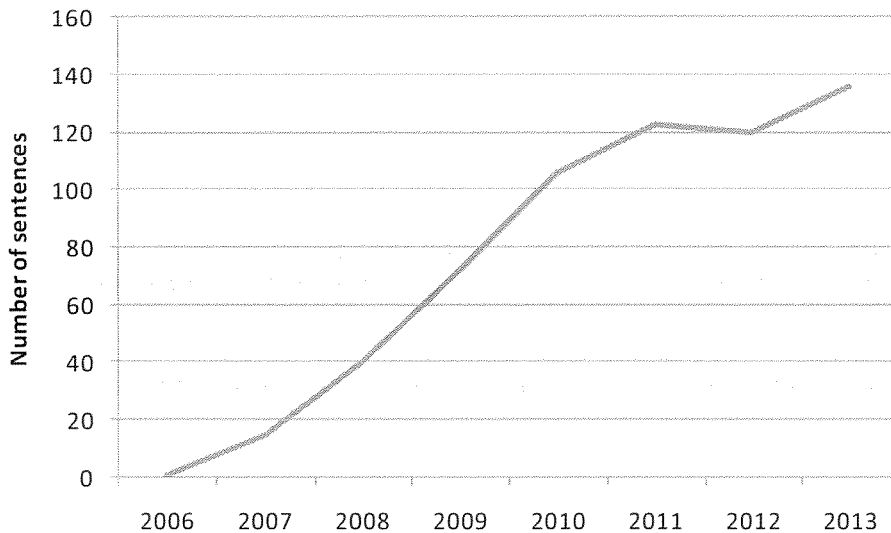
Summary offences connected with housing licences

This section includes the following offences:

- Controller / manager of house in multiple occupation act without a section 6(1) licence (72(1) & (6))
- Controller / manager of licensed multi occupation house knowingly permit unlicensed occupation (72(2) & (6))
- Controller / manager of residential accommodation required to be licensed under Part 3 of the Act (95(1) & (5))
- Licence holder / person fail to comply restriction of s. 90(6) licence condition (95(2) & (6))

In 2013, approximately 140 adult offenders were sentenced for these offences and the majority (96 per cent) were sentenced in magistrates' courts. The most common sentence outcome for these offences is a fine. In 2013 fines comprised 93 per cent of all sentence outcomes. Since 2006 the number of offenders sentenced for these offences has generally been increasing (see Figure 2).

Figure 2: Number of adult offenders sentenced for specified offences, 2006-2013



Other housing offences

This section includes the following offences:

- Fail to comply with a housing overcrowding order (s.139)
- Obstruct a relevant person in performance of anything required by Parts 1 to 4 of the Housing Act 2004 (s.241)

Over the last ten years, 10 adult offenders have been sentenced for these offences. All of these offenders received a fine.

Magistrates' Court Sentencing Guidelines Working Group

TERMS OF REFERENCE

Composition of the Working Group

1. The working group is composed of representatives of organisations with an interest in the MCSG and is chaired by a representative of the Sentencing Council.

Objectives

2. To assist in the development and revision of offences in the MCSG that are not currently on the workplan of the Sentencing Council .
2. To make recommendations to the Sentencing Council regarding:
 - a. the approach to revising the MCSG;
 - b. the content of a revised MCSG including guidelines, overarching principles and explanatory material;
 - c. the overall format of a revised MCSG; and
 - d. the future distribution of guidelines and updates to magistrates, district judges, justices' clerks and legal advisers.

Scope

3. The working group will consider the content and format of a revised MCSG including the number of guidelines and the extent of the specific guidance contained therein.
4. The Sentencing Council has agreed a model for guidelines which will be replicated in the revised MCSG. Therefore, the format of individual guidelines is outside the scope of the working group.

5. The working group will make recommendations to Council as to which offences to cover and the content of any new or revised guideline which are exclusive to the MCSG
6. The working group will make recommendations to Council regarding offences which should be considered for inclusion in the Council's work plan or are dealt with a MCSG exclusive guidelines.

Timescales

7. The working group will meet as often as necessary to complete its recommendations. Frequency of meetings will be agreed at the meeting of the working group 24.09.15, and can be varied according to business need.