

Sentencing Council meeting:
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SC(22)MAY04 – Miscellaneous
Amendments

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1 ISSUE

1.1 The Sentencing Council has an annual programme of consulting on miscellaneous changes to guidelines and this provides a good opportunity to amend, update or improve existing guidelines or supporting material.

1.2 The suggestions for changes come from a variety of sources including feedback via our website, emails for sentencers and other guideline users, issues that have arisen in the development of guidelines and changes to legislation.

1.3 In preparation for this year's consultation, views and suggestions were canvassed from the MCSG working group and these are reflected in this paper.

1.4 This is the first of three meetings to discuss the miscellaneous amendments prior to consultation in September. The responses to the consultation will be discussed in December and January to enable any changes agreed upon to be made on 1 April 2023.

2 RECOMMENDATION

2.1 The Council is asked to consider what if any action should be taken in relation to the diverse matters set out in the paper and whether these should be consulted on as part of the miscellaneous amendments consultation.

3 CONSIDERATION

Changes to the Imposition guideline

3.1 There have been a number of suggestions for changes to the Imposition guideline. Some are very straightforward and several of these are included in the list of changes proposed in response to the Police, Crime, Sentencing and Courts Act 2022 at 3.20 below. Others relate to the interaction between probation and the courts and some envisage an expansion of the guideline to cover overarching issues that are not covered elsewhere.

3.2 It seems likely that the scope of the issues under consideration would merit separate consideration (as opposed to including them in the miscellaneous amendments) but it may be possible to incorporate some of them in this project or to run a separate consultation on

the Imposition guideline at the same time. We are speaking to the probation service and are considering the initial findings from an evaluation of the Imposition guideline and will bring proposals to the June Council meeting.

The wording on discretionary bans in the totting guidance

3.3 In 2020 the Council consulted on changes to the guidance on ‘totting up’ disqualifications. The [revised guidance](#) includes the following paragraph:

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 should ordinarily prioritise the “totting” disqualification ahead of a discretionary disqualification.

3.4 A concern has been raised that courts are too often imposing discretionary disqualifications where 12 or more points have been imposed and, to discourage this, the wording above should be the same as that in the discretionary disqualification guidance, which says:

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’](#)).

3.5 The MSCG working group discussed this and the general view was that the wording in the totting guidance should be consistent with that used in the disqualification guidance. It was suggested that the key point about imposing penalty points ahead of a disqualification should be in bold.

3.6 The issue that needs to be addressed is that of a short disqualification (less than 56 days) being imposed that avoids a longer period that would result from totting-up (at least 6 months). It may be preferable to amend both pieces of guidance. Suggested revised wording is:

Discretionary disqualification:

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’](#)).

Totting up:

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.

Question 1: Does the Council agree to consult on the suggested change to the wording on discretionary disqualification and totting up guidance?

The wording on obligatory disqualification in guidelines.

3.7 We received a query from a solicitor regarding the following wording in the [drug driving guidance](#): ‘Must disqualify for at least 3 years if offender has been convicted of a relevant offence in preceding 10 years – consult your legal adviser for further guidance’.

3.8 She had been told by a legal adviser this was being interpreted as 10 years preceding the conviction for, rather than the commission of the offence.

3.9 Similar wording is used in the [excess alcohol guideline](#):

- 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 in preceding 3 years – 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 preceding 10 years – consult your legal adviser for further guidance
- [Extend disqualification](#) if imposing immediate custody

3.10 The ‘disqualification guidance’ includes the following information:

An offender must be disqualified for at least three years if he or she is convicted of one of the following offences **and** has within the 10 years preceding the commission of the offence been convicted of any of these offences (RTOA 1988, s.34(3))

3.11 The working group felt that it would be helpful for the guidelines to spell out that it is the date of the commission of the offence that is significant. Therefore, it is proposed that the wording in both the excess alcohol guideline and the drug drive guidance (as well as the draft guideline) be changed to:

- 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 in the 3 years preceding the commission of the 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 offence – consult your legal adviser for further guidance
- [Extend disqualification](#) if imposing immediate custody

3.12 As this change merely clarifies the existing legal position, the Council may feel that it does not need to be consulted on and can be made immediately.

Question 2: Does the Council wish to make the proposed changes to the wording on obligatory disqualification in guidelines and, if so, should these be subject to consultation?

Default relevant weekly income amounts

3.13 The explanatory materials contain [guidance on how fine levels](#) should be fixed with reference to the fine bands in guidelines. So, for example, the starting point for a Band B fine is expressed as 100% of relevant of weekly income. Relevant weekly income (RWI) is normally the actual weekly income of the offender but in two circumstances the guidance gives an assumed figure for the RWI:

- a) where an offender is in receipt of state benefits or on low income (RWI £120)
- b) where an offender fails to provide reliable information as to means (RWI £440)

These default RWI figures were last updated in September 2015 when the digital MCSG was launched.

3.14 The Council last considered updating the RWI figures in 2019, but felt that although income levels may have increased since the figures were set, disposable income may not have done so. The working group was of the view that the default amount when an offender fails to provide reliable information should be reviewed and probably increased, but the figure for those on low income/benefits should not be increased because their spending power will not have increased. The situation since the working group met (in February) may now be even more difficult for those on low incomes.

3.15 The explanation for the RWI of £440 on the Council's website is:

No reliable information

Where an offender has failed to provide information, or the court is not satisfied that it has been given sufficient reliable information, it is entitled to make such determination as it thinks fit regarding the financial circumstances of the offender ([Sentencing Code, s.126](#)). Any determination should be clearly stated on the court records for use in any subsequent variation or enforcement proceedings. In such cases, a record should also be made of the applicable fine band and the court's assessment of the position of the offence within that band based on the seriousness of the offence.

Where there is no information on which a determination can be made, the court should proceed on the basis of an **assumed relevant weekly income of £440**. This is derived from national median pre-tax earnings*; a gross figure is used as, in the absence of financial information from the offender, it is not possible to calculate appropriate deductions.

Where there is some information that tends to suggest a significantly lower or higher income than the recommended £440 default sum, the court should make a determination based on that information.

A court is empowered to remit a fine in whole or part if the offender subsequently provides information as to means ([Sentencing Code, s.127](#)). The assessment of offence seriousness and, therefore, the appropriate fine band and the position of the offence within that band are not affected by the provision of this information.

*(This figure is a projected estimate based upon the 2012-13 Survey of Personal Incomes using economic assumptions consistent with the Office for Budget Responsibility's March 2015 economic and fiscal outlook. The latest actual figure available is for 2012-13, when median pre-tax income was £404 per week details can be found in an [HMRC report](#). (This link goes to an external website. It will not work if you are offline.))

3.16 Clearly it is no longer accurate to say the figure currently in use is based on the latest information. Using the most up-to-date figures on personal incomes the estimated median pre-tax income per week is around **£500**.

3.17 The explanation given on the website for the RWI of £120 for those on benefits is:

While a precise calculation is neither possible nor desirable, it is considered that an amount that is approximately half-way between the base rate for jobseeker's allowance and the net weekly income of an adult earning the minimum wage for 30 hours per week represents a starting point that is both realistic and appropriate; this is currently £120. The calculation is based on a 30 hour working week in recognition of the fact that many of those on minimum wage do not work a full 37 hour week and that lower minimum wage rates apply to younger people.

With effect from 1 October 2014, the minimum wage is £6.50 per hour for an adult aged 21 or over. Based on a 30 hour week, this equates to approximately £189 after deductions for tax and national insurance. To ensure equivalence of approach, the level of jobseeker's allowance for a single person aged 18 to 24 has been used for the purpose of calculating the mid point; this is currently £57.90. The figure will be updated in due course in accordance with any changes to benefit and minimum wage levels.

3.18 If the Council were minded to update the RWI based on the same formula using current data, this would give a new low income figure of **£170** (this is due mainly to an increase in the national minimum wage for 21-22 year olds to £9.18). Using the national minimum wage for 18-20 year olds would give an RWI of **£130**. However, the Council may feel that in the current financial climate, this would not be a good time to increase the RWI for those on benefits/ low income.

3.19 Whether or not the Council wishes to review the default RWI figures, the explanations for the calculation will need to be reviewed.

Question 3: Does the Council wish to revise the default RWI figures, and if so in what way? How should the RWI be explained on the website?

Changes required by forthcoming legislation

3.20 The Police, Crime, Sentencing and Courts Act 2022 received Royal Assent on 28 April and most of the provisions relevant to sentencing will come into effect two months from then. Unfortunately, at time of writing, the Act has not yet been published. The following provisions have been identified as relevant to guidelines along with the proposed approach to making any changes:

Legislative change	Guideline change
Doubling the maximum penalty for assaulting an emergency worker	Guideline will be updated when the change comes in by altering the maximum only. No requirement to consult.
Introduce mandatory life sentences for unlawful act manslaughter of an emergency worker acting in the exercise of their function	Add a note to the guideline. No requirement to consult?
Change in the threshold for passing a sentence below the minimum term for repeat offenders for certain offences. (Change from unjust in all the circumstances to exceptional circumstances)	The wording in the relevant guidelines will be updated. No requirement to consult?
The change in release point from halfway to two-thirds will be reflected in the provisions to provide for an appropriate extension period as part of a discretionary driving disqualification.	This has come into effect on RA. Guidance on this is being considered as part of the motoring paper. Depending on decisions made – the guidance could be included more widely?
Changes to the adult out of court disposals (OOC) framework	Explanatory materials will need to be updated. No requirement to consult.
Changes to maximum curfew hours	Update information in the Imposition guideline. No requirement to consult.
Abolishing Senior Attendance Centres	Remove reference to this in the Imposition guideline. No requirement to consult.
Criminal damage to memorials: a memorial damaged where the value of damage does not exceed £5,000 will no longer only be triable summarily, but can be tried either way	Note will need to be added to the Criminal damage guidelines to clarify. No requirement to consult?
Detention and Training Orders: removal of fixed lengths; courts will now have the power to impose a DTO of any length as long as it is at least 4 months and no longer than 24 months	Update Children and Young People guideline. No requirement to consult.
DTOs: amendments to ensure that time on remand or bail (subject to a qualifying curfew condition and an electronic monitoring condition) is counted as time served	Update Children and Young People guideline. No requirement to consult.
Abolition of reparation orders	Update Children and Young People guideline. No requirement to consult.

Assaults on those providing a public service: creation of statutory aggravating factor relating to certain offences that are committed against those providing a public service, performing a public duty or providing services to the public	Update relevant guidelines by adding a statutory aggravating factor. No requirement to consult
SHPOs: enabling courts to impose positive requirements etc	Update explanatory materials to the MCSG. The Council has already agreed wording to go into all sexual offences guidelines which will be published shortly. No requirement to consult
Football Banning Orders: amendments to list of relevant offences and requirement on court to make an order on conviction etc	Update explanatory materials No requirement to consult Query whether reference to Football banning orders should be added to any offence guidelines?

3.21 Changes in the PCSC Act relating to motoring offences and sexual offences are being dealt with in the new and revised guidelines. If the Council agrees that the majority of changes outlined above can be made without consultation, it may be appropriate to publish a news item and list of the changes on our website to alert users to the changes when they are made. Alternatively, the Council may wish to consult on some of these matters to draw attention to the fact that the guidelines are being updated to seek views on the exact wording. Any updates to the guidelines will need to make it clear if the changes apply only to offences committed on or after the in force date – in some cases there will be two regimes in place for a while.

Question 4: Does the Council agree with the proposed approach to the legislative changes?

Potential double counting in summary driving offences guidelines

3.22 Feedback from a user has identified two instances where factors in guidelines could result in double counting:

- [Speeding](#): the suggestion is that 20mph zones are usually, if not exclusively, located near schools. Should there be a warning to avoid double counting for the purposes of the 'location e.g. near school' aggravating feature?
- [Fail to stop/report road accident](#): Regarding the factor: 'Offence committed in circumstances where a request for a sample of breath, blood or urine would have been made had the offender stopped' the suggestion is that if there has been an accident, a request for a sample would always be requested by the police.

3.23 The working group did not agree with the assertion that 20mph zones are nearly always located by schools and did not recommend any change to that guideline. The group felt that the suggestion regarding fail to stop/report had more merit and that it was possible

that this factor could lead to almost all cases going into high culpability. Enquiries will be made with the police on this point.

Question 5: Does the Council agree that no change is required to the aggravating factor in the speeding guideline?

Question 6: Does the Council agree that the possibility of double counting in the fail to stop/ report guideline should be investigated?

Fine level for use of a mobile phone

3.24 A suggestion has been received that the fine band starting point for [Use of mobile telephone](#) should be changed to Band B to reflect the doubling of the fixed penalty notice fine and penalty points introduced in March 2017. The counter argument is that the maximum penalty for this offence remains a level 3 fine (£1,000). Most other offences with that maximum have a starting point of Band A.

3.25 The working group did not think that the starting point should be increased as Parliament had not increased the maximum fine.

Question 7: Does the Council agree not to change the starting point for use of a mobile phone?

The mitigating factor of Age and/or lack of maturity

3.26 This mitigating factor appears in most guidelines and is accompanied by an expanded explanation setting out that age and/or lack of maturity can affect both the offender's responsibility for the offence and the effect of the sentence on the offender.

3.27 In about half of the guidelines in which the factor appears it is qualified by the words 'where it affects the responsibility of the offender'.

3.28 There does not appear to be any reason why the wording of the factor varies between guidelines (the expanded explanation is standard across all of them).

3.29 For consistency and to ensure that the factor is taken into account in all relevant cases, the proposal is to remove the words 'where it affects the responsibility of the offender'.

Question 8: Does the Council agree to standardise the mitigating factor relating to age/lack of maturity? If so, does the Council agree that this does not need to be consulted on?

Breach of post sentence supervision

3.30 It has been suggested that the [guideline](#) should include a reference as to when the unpaid work requirement of the supervision default order should be completed by. The guideline currently says:

i. A supervision default order must include either:

an unpaid work requirement of between 20 hours – 60 hours

OR

a curfew requirement for between 2 – 16 hours for a minimum of 20 days and no longer than the end of the post sentence supervision period.

ii. The maximum fine which can be imposed is £1,000.

3.31 Paragraph 3(4)(b) of schedule 19A to the Criminal Justice Act 2003 states that in relation to Sch. 9 of the Sentencing Act 2020: "Paragraph 1(1) of Schedule 9 applies— (a) as if the reference to the responsible officer were to the supervisor, and (b) as if, in paragraph (b), for "during a period of 12 months" there were substituted "before the end of the supervision period." This indicates that the unpaid work should be completed by the end of the supervision period.

3.32 This could be achieved by adding the words in red below:

i. A supervision default order must include either:

an unpaid work requirement of between 20 hours – 60 hours **to be completed before the end of the post sentence supervision period**

OR

a curfew requirement for between 2 – 16 hours for a minimum of 20 days and no longer than the end of the post sentence supervision period.

ii. The maximum fine which can be imposed is £1,000.

Question 9: Does the Council agree to add the proposed wording to the Breach of post sentence supervision guideline? If so, should the change be consulted on?

Guilty plea guideline

3.33 Section F of the [guilty plea guideline](#) includes information on exceptions to the usual reductions for offences with minimum terms. At present it does not include any reference to the minimum sentence which applies to serious terrorism sentences. This could either be accommodated by an additional paragraph (F6) or by expanding the existing F5 (proposed additions in red):

F5. Minimum sentences under sections **268C, 282C**, 312, 313, 314 and 315 of the Sentencing Code for persons aged 18 or over

In circumstances where:

- **an appropriate custodial sentence of at least 14 years falls to be imposed (under section 268C or 282C of the Sentencing Code) on a person aged 18 or over who has been convicted of a serious terrorism offence (as defined in section 306(2) of the Sentencing Code)**

- an appropriate custodial sentence of at least six months falls to be imposed (under section [312](#) or [315](#) of the Sentencing Code) on a person aged 18 or over who has been convicted under sections 1 or 1A of the Prevention of Crime Act 1953; or sections 139, 139AA or 139A of the Criminal Justice Act 1988 (certain possession of knives or offensive weapon offences) **or**
- an appropriate custodial sentence falls to be imposed under [section 313](#) (third class A drug trafficking offence) or [section 314](#) (third domestic burglary) of the Sentencing Code

the court may impose any sentence in accordance with this guideline which is not less than **80 per cent** of the **appropriate** custodial period.⁵

⁵ In accordance with [s.73\(2A\), \(3\) and \(4\) of the Sentencing Code](#).

Question 10: Does the Council agree to add the proposed wording to guilty plea guideline? If so, should the change be consulted on?

4 EQUALITIES

4.1 The issue of setting the default RWI figure has implications for fairness in setting fine amounts and it may have a disproportionate effect on certain groups with protected characteristics. The wording of the factor relating to age and lack of maturity also has implications for equality and fairness.

4.2 Depending on the decisions the Council makes, these issues can be addressed in the consultation.

Question 11: Are there any issues relating to equality or diversity that can or should be addressed by this consultation?

5 IMPACT AND RISKS

5.1 The impact of majority of the proposals in this paper will be relatively minor. The most significant changes are those necessitated by legislative changes. Any change to the default relevant weekly income figure is likely to have a wide impact although the precise implications will be difficult to measure (not least because not all fines that are imposed are paid in full). There may also be reputational risks if the Council were to be seen to be insensitive to the financial constraints on those on low incomes.

5.2 Further consideration will be given to the impact of the changes once the Council has decided which ones to proceed with.