

Sentencing Council meeting:
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Lead Council member:
Lead official:

27 January 2023
**SC(23)JAN04 – Miscellaneous
Amendments**
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1 ISSUE

1.1 This is the sign off meeting for the miscellaneous amendments for 2022-2023. A response document setting out the changes will be published in March and the changes will be made to the digital guidelines on 1 April 2023.

2 RECOMMENDATION

2.1 The Council is asked to consider the remaining issues arising from the consultation and agree any changes for publication.

3 CONSIDERATION

3.1 We received 24 responses to the consultation 18 from individuals and six from organisations. The majority 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.

Disqualification from driving

3.2 At the December meeting the Council agreed revised wording on disqualification in the drug driving guidance and the excess alcohol, unfit through drink or drugs (drive/attempt to drive) and fail to provide specimen for analysis (drive/attempt to drive) guidelines. The agreed wording is:

- 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 – refer to [disqualification guidance](#) and consult your legal adviser for further guidance
- [Extend disqualification](#) if imposing immediate custody

3.3 Changes to the obligatory disqualification guidance were also agreed as set out below:

1. 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 or disqualifications.

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 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.**

3.4 At the December meeting a query was raised as to whether a non-UK disqualification would be relevant under section 34(4)(b) which raises the minimum disqualification to two years. The only non-UK disqualifications that are recognised in courts in England and Wales are those from Ireland. There are also provisions for mutual recognition of disqualifications between Great Britain and Northern Ireland, the Isle of Man, Gibraltar and the Channel Islands. A British driving licence can be endorsed with a disqualification imposed in these jurisdictions and in those circumstances the disqualification would presumably be relevant under 34(4)(b). It seems that any other evidence of previous convictions or disqualifications would not be caught by the mandatory requirements to impose a longer disqualification but courts would be justified in taking them into account when deciding the length of the disqualification.

3.5 However, I have not been able to find an authoritative source for what exactly the legal implications of non-UK disqualifications or convictions are and so am unable to propose suitable wording to add to the guidance. If the Council wishes to add a note on this issue, further work could be done and the results circulated by email. If uncontroversial the note could be added this year, if not, it could be consulted on for the next round of miscellaneous amendments.

Question 1: Does the Council wish to add a note regarding non-UK disqualifications?

3.6 The Council agreed to retain the consultation versions of the discretionary and ‘totting up’ disqualification guidance.

‘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’](#)).

3.7 The only issue that remained to be resolved was raised by a judge who suggested replacing ‘he or she’ with ‘they’ and ‘his or her’ with ‘their’. This ties in with a suggestion we have had for being more consistent and inclusive in the use of personal pronouns in guidelines.

3.8 A search through guidelines and associated materials has shown that gendered pronouns are used in various circumstances. In some cases the guidelines are quoting from

legislation. For example, in the [Bladed articles and offensive weapons - possession](#) guideline it states:

*NB an offensive weapon is defined in legislation as ‘any article made or adapted for use for causing injury, or is intended by the person having it with **him** for such use’. A highly dangerous weapon is, therefore, a weapon, including a corrosive substance (such as acid), whose dangerous nature must be substantially above and beyond this. The court must determine whether the weapon is highly dangerous on the facts and circumstances of the case.

3.9 Where the guidelines are using statutory language, no change is proposed.

3.10 In other situations using ‘they’ or ‘their’ may be preferable. A selection of examples are provided below:

Wording	Where found
<ul style="list-style-type: none"> Where the investigation has been hindered and/or other(s) have suffered as a result of being wrongly blamed by the offender, this will make the offence more serious. This factor will not be engaged where an offender has simply exercised his or her right not to assist the investigation or accept responsibility for the offending. <p>When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and lack of maturity when considering the significance of such conduct.</p>	<p>Expanded explanation for aggravating factor ‘Blame wrongly placed on others’</p> <p>This is used in around 20 guidelines.</p>
<p>The order requires the offender to report to a police station within five days, may require the offender to surrender his or her passport, and may impose requirements on the offender in relation to any regulated football matches.</p>	<p>Explanatory materials on Football banning orders in MCSG</p>
<p>Where the offender’s living expenses are substantially lower than would normally be expected, it may be appropriate to adjust the amount of the fine to reflect this. This may apply, for example, where an offender does not make any financial contribution towards his or her living costs.</p> <p>...</p> <p>Where there is reason to believe that an offender’s potential earning capacity is greater than his or her current income, the court may wish to adjust the amount of the fine to reflect this</p>	<p>Explanatory materials on assessment of income in MCSG</p>

<p>Confiscation A confiscation order may be made by the Crown Court in circumstances in which the offender has obtained a financial benefit as a result of, or in connection with, his criminal conduct.</p>	<p>Offences with a Terrorism connection-Guidance Additional guidance – dropdown</p>
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3.11 In other situations it may be preferable to revise the wording to avoid the need for a pronoun at all. Some suggested examples are:

Wording	Where found
<ul style="list-style-type: none"> • Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation) or transgender identity (or presumed transgender identity) • Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability) 	<p>In around 20 sexual offences guidelines</p>
<p>The assessment of psychological harm experienced by the victim beyond this is for the sentencer. Whilst the court may be assisted by expert evidence, such evidence is not necessary for a finding of psychological harm, including severe psychological harm. A sentencer may assess that such harm has been suffered on the basis of evidence from the victim, including evidence contained in a Victim Personal Statement (VPS), or on his or her observation of the victim whilst giving evidence.</p>	<p>In an expanded explanation for the harm factor ‘Severe psychological or physical harm’ in 11 sexual offences guidelines</p>
<p>Victim forced to commit criminal offences (whether or not he/she would be able to raise a defence if charged with those offences), where not taken into account at step 1.</p>	<p>Aggravating factor in the Slavery, servitude and forced or compulsory labour/ Human trafficking guideline</p>

3.12 In the first and third example it might be preferable to replace ‘his or her’ with ‘the victim’s’ and in the second example with ‘the sentencer’s’.

3.13 The suggested changes would not alter the meaning of guidelines and so could be made without consultation. The changes would be logged and notified to publishers in accordance with our [minor revisions policy](#). Reference to the changes could also be made in the response to consultation to the miscellaneous amendments.

Question 2: Does the Council wish to avoid gendered pronouns in guidelines and associated materials?

Question 3: If so, should gendered pronouns be retained where they reflect statutory language?

Question 4: In other cases does the Council agree with the approach outlined at 3.10 and 3.12 above?

Question 5: Should any changes be made without consultation?

Minimum sentences

3.14 At the December meeting the Council agreed to some changes suggested by respondents to the wording on exceptional circumstances across the affected 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

3.15 It was pointed out to us in December that the wording on the website did not reflect the statutory wording for all the offences. Specifically, in the domestic burglary guideline it said ‘the court is of the opinion that there are exceptional circumstances that relate to the offence or to the offender’ where it should say ‘the court is of the opinion that there are exceptional circumstances that relate to **any of the offences** or to the offender’ (emphasis added). This error has been corrected on the website and care will be taken to ensure that the revised versions reflect the statutory wording in all cases.

3.16 There were a few additional comments from respondents on the proposed wording in specific guidelines. A magistrate commented on the [Bladed articles and offensive weapons \(possession and threats\) - children and young people guideline](#). He asked: ‘Has consideration been given, in the exceptional circumstances section, to the young person under controlling or cohesive (sic) behaviour from adults or gang-related pressures?’

3.17 The guideline (both currently and in the proposed version) contains a list of matters to have regard to when considering the welfare of the child in deciding whether to impose the minimum term:

- 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.

3.18 The mitigating factors in the guideline include ‘Participated in offence due to bullying, peer pressure, coercion or manipulation’. It could, therefore, be argued that this type of situation is covered by factors in the guideline.

3.19 A barrister responding to the consultation 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 wording we consulted on was:

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

3.20 This wording is used across all the guidelines that currently have the ‘exceptional circumstances’ test and is taken from case law relating to firearms (R v Rehman [2005] EWCA Crim 2056) which in turn reflects human rights case law under article 5 of the ECHR. No other respondents questioned the use of the term and no change is proposed.

3.21 An individual 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.

3.22 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.

3.23 The 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 may feel that particularly for children and young people the passage of time is a very relevant consideration.

3.24 More generally, it should be 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.

3.25 The point about exceptional circumstances having been found once leading to a presumption that the same circumstances are not exceptional for a subsequent conviction is valid. However, the Council may feel that this is implicit in the wording agreed in December for exceptional circumstances in the adult guidelines:

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 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

Question 6: Is the Council satisfied with the wording relating to the previous offence(s)?

4 EQUALITIES

4.1 No significant issues relating to equality or diversity were identified by respondents.

5 IMPACT AND RISKS

5.1 The consultation stated:

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.

5.2 The 'brief discussion' in relation to each proposal was either a statement that the proposals would not affect sentence levels or that the proposals were necessitated by legislative changes. The revisions agreed to the proposals post-consultation have not altered the anticipated impact of the proposals.

5.3 The response document will include a similar note.

Question 7: Is the Council content to sign off the changes for publication in March and to come into effect in April?

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