

Sentencing Council meeting: 19th June 2014
SC(15)JUN07 Breach of an order
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1 ISSUE

1.1 The Council is asked to consider the timing and scope of the breach sentence guidelines. Currently the draft guideline is due to be signed off in October with a consultation launch in December. The definitive guideline is due for sign off in March 2016 with a publication date of May 2016. However, in light of a number of issues which have emerged during the development of the guideline, which are explained at section 3, more time is required for developing sentence ranges, conducting a robust impact assessment and exploring related matters including training. Revised dates and timescales are not yet available as these will be dependent on the progress of some of the issues highlighted in this paper.

2 RECOMMENDATION

2.1 That the Council considers the issues set out and agrees to extend the breach guideline development timescale, postponing the launch of the consultation for a minimum of 6 months.

3 CONSIDERATION

3.1 In the development of the breach guideline we have encountered significant difficulties in identifying current breach sentencing practice for Community Orders (CO's) and Suspended Sentence Orders (SSO's). This is due to a lack of available data on court disposals for these breaches, and the recent pre election period preventing research being conducted. To overcome these difficulties, a number of forums with Probation Officers and Magistrates have been held to discuss current breach sentencing practice for these orders, and identify factors which influence sentencing. A number of issues have become apparent during

these events which require further consideration, as they pose particular risks to the development of the guideline.

3.2 Three separate forums were held¹ to explore current breach sentencing practice. Forum attendees were invited to review a number of different breach scenarios, and provide feedback regarding the sentences they would recommend in the probation group, and the sentence they would impose in the magistrates' groups. Questions were devised to identify which particular factors within a breach are considered serious, and sentence practice for different types of breach.

Suspended Sentence Orders (SSO)

3.3 The first issue apparent from these events is that there is a fundamental problem with the imposition of SSO's. The legislation provides that an SSO should only be imposed where an offence is so serious that it crosses the custody threshold and that neither a fine nor a community sentence would be sufficient to mark the offending behaviour. However in practice it seems that SSOs are being imposed as a more severe alternative to a Community Order. This leads to difficulties for sentencers when considering activation following a breach, as very often the sentencer would not have intended that a term of imprisonment be served for the original offence, and is reluctant to activate the sentence. If, as suspected, there is a tendency not to activate the sentence, the original orders are unlikely to be acting as an effective deterrent, which might have resulted in volumes of breaches increasing.

3.4 In addition the legislation providing for suspended sentences requires that breach of a suspended sentence must result in activation of the sentence, unless it would be unjust to do so. The 'unjust' test relates to the level of compliance with the order prior to the breach, and case law has determined which factors may or may not deem an activation to be unjust.² However, sentencers are extending the consideration of when activation would be unjust to a consideration of an offender's personal circumstances, which the legislation did not intend. This often results in non activation, as sentencers are often reluctant to imprison offenders;

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¹ One event with probation held in London, and attended by sixteen court probation officers, and two events with magistrates, held in Luton and Kent, attended by eight and ten magistrates respectively.

² These were included in the outline of the Suspended Sentence Order guideline which was considered and agreed by the Council in January 2015.

in particular female offenders if they are carers of children, defendants who have secured employment, or cases in which there are other personal factors which imprisonment may complicate.

3.5 Due to these issues, if the Council wish to maintain the approach agreed in the outline guidelines developed which specify the factors which must be considered when sentencing for breach of an SSO, it is highly likely that the volume of sentence activations will increase, which will have resource implications for prisons.

3.6 One possible means of mitigation may be to improve training, and officials intend to discuss the issues with the Judicial College and ask that further guidance is issued to magistrates and legal advisers to address this. If the current practice of SSO's being imposed when they are not suitable could be reversed or limited, this would reduce the risk of the impact of the guideline increasing the prison population once it is brought into effect. However, even if the College is amenable to this proposal, it would take time to both devise and introduce guidance.

Consistency in Breach Sentencing

3.7 A further issue that was evident during the forum discussions was the very tailored approach Probation and Courts take to sentencing for breach of these orders. The sentencers that participated seemed to struggle to consider the breach as a separate matter to the original order and offence. They wanted to reconsider the terms of the original order and factors which may have contributed to a breach of a CO, with one magistrate stating that a breach is wedded to its original order in a way which makes it impossible to consider only the breach. Their sentencing was very offender focused, with the aim of ensuring compliance with the order. This principle is set out in the SGC guideline on Community Order breaches, and aligns with the wider programme of rehabilitation of offenders.

3.8 However it does appear that sentencers are extending this rehabilitative focus to breach of SSOs, where there was significant reluctance to activate sentences. In one of the forums, one experienced magistrate acknowledged that his behaviour had shifted from defaulting to activation for a breach, to trying to avoid activation if possible, which he attributed to the greater focus on non custodial sentences. This removes the focus of the sentence from the breach itself, and sentencers had concerns that breach guidance may limit their

discretion and ability to deal with a breach while still having regard to these offender-specific factors. This is a complex issue to navigate in developing guidance for breach, as if the Council does not wish to deter sentencers from having regard to rehabilitation of offenders as a primary consideration when breach sentencing, a tailored sentencing approach will limit the extent to which sentences for breach can be developed to promote consistency and to act as a deterrent.

3.9 A further option to consider would be to extend the scope of the guideline to cover the imposition of the original sentences, as well as breaches of such orders. While this would address the problem of inappropriate use of orders, it would require a significant extension to the time required to develop the guideline.

Data on current sentencing practice

3.10 Due to a lack of data regarding current breach sentencing practice, resource assessments for this guideline are complex, may take longer than officials had expected and are likely to be based on very broad assumptions. The Analysis and Research team are currently working on identifying the relevant data for the resource assessment and the type of assumptions that would feed into it. We are aware that MOJ does hold some data regarding these sentences but because of serious concerns regarding data quality, MOJ colleagues are currently unable to share any findings with us. In addition, they had originally planned to review the quality of the data this summer, but are considering if this will still be feasible considering resourcing issues they are currently facing and other higher priority work they are engaged in. Even if they are able to find some resource this summer, MOJ does not expect to be able to share any findings until later in the year. The work on the resource assessment could go ahead in the meantime using modelling techniques, but there is a risk that if the MOJ data become available at a later stage and conflicts with the assumptions made in the model being developed, the Council may have based its decisions in the guideline development stages on inaccurate information.

3.11 A further consideration for the resource assessment of the impact of any guideline relates to the recent introduction of Community Rehabilitation Companies (CRC's) in managing Community Orders. The Council will be aware that as part of the MOJ Transforming Rehabilitation programme, CRC's have now

been established to manage these orders on a payment by results basis. Officials understand that there have been difficulties in effective communication systems being established between CRC's and the National Probation Service which is thought to be inhibiting the escalation of breach cases. While no data is available, this would support early anecdotal indications that since the commencement of these contracts, new breach proceedings have significantly reduced. If this is accurate and the trend continues, the volumes of breaches the Courts are sentencing will reduce, and this could distort any resource assessment which is conducted at the policy development stage.

3.12 We also understand that MOJ are currently in the early stages of developing options for the implementation of the manifesto commitment of the new Government for swift and sure justice. This is a US-inspired idea of immediate consequences for those who breach orders. While we do not know how the new CRC contracts would limit any options that could be developed, any significant change to breach practice would have very significant ramifications for the guideline, or could render it ineffective. Officials will be in contact with MOJ policy leads for this project to identify any potential conflict with the guideline.

Question One: Does the Council agree that the consultation should be postponed and the overall timetable extended, in light of the challenges outlined above?

Question Two: Is the Council content for officials to continue to work on developing a guideline covering breaches of COs and SSOs, in particular to undertake further work to resolve the uncertainties relating to i) training; ii) data; iii) CRCs; and iv) new Government policy?

Question Three: Are there any other issues which Council members think may have an impact on this guideline, which should be taken into account at this stage?

4 IMPACT

4.1 The landscape regarding breach of these orders is complex and currently in a state of flux given the newly established Community Rehabilitation Companies and new Government priorities. The development of the guideline will require careful consideration of the wider issues highlighted within this paper. It is

thought that until further evidence of the issues outlined above is available to enable the Council to make informed decisions, it would be undesirable to develop sentence ranges for these orders. This does not prevent the development of sentence ranges for other breach orders to be covered in the guideline, and this work will continue.

5 RISK

5.1 There are a number of risks at this stage in continuing to develop sentence ranges for breach of Community Orders and Suspended Sentence Orders due to the issues outlined. In particular, without a clear indication of what (if any) robust data may be available from MoJ until later in the year, it will be problematic to provide an accurate picture of the resource implications for the guidance. This means that the Council could make decisions that lead to the guideline having an impact which is undesirable and may result in an increase in pressure on prisons.

5.2 A risk to the guideline also exists due to the potential for the MOJ to develop a policy on the manifesto commitment referred to at paragraph 3.12. It will be important that any potential conflict is identified to ensure an ineffective guideline is not developed.

5.3 Officials will work to minimise the risk of delay to the publication of a definitive breach guideline, although some delay may be unavoidable due to impact of the issues set out in this paper on the guideline development.