

14 May 2021

Dear Members

## Meeting of the Sentencing Council – 21 May 2021

The next Council meeting will be held via Microsoft Teams, the link to join the meeting is included below. **The meeting is Friday 21 May 2021 from 9:30 to 14:30.** Members of the office will be logged in shortly before if people wanted to join early to confirm the link is working.

### The agenda items for the Council meeting are:

- |   |             |
|---|-------------|
| ▪ Agenda                                | SC(21)MAY00 |
| ▪ Minutes of meeting held on 16 April   | SC(21)APR01 |
| ▪ Action log                            | SC(21)MAY02 |
| ▪ Trade mark                            | SC(21)MAY03 |
| ▪ Terrorism                             | SC(21)MAY04 |
| ▪ What next for the Sentencing Council? | SC(21)MAY05 |
| ▪ Modern slavery                        | SC(21)MAY06 |
| ▪ Miscellaneous guideline amendments    | SC(21)MAY07 |

Members can access papers via the members' area of the website.

If you are unable to attend the meeting, we would welcome your comments in advance.

The link to join the meeting is: [Click here to join the meeting](#)

Best wishes



**Steve Wade**

Head of the Office of the Sentencing Council

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## COUNCIL MEETING AGENDA

**21 May 2021**  
**Royal Courts of Justice**  
**Queen's Building**

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|---------------|--|
| 09:30 – 09:45 | Minutes of the last meeting and matters arising - (papers 1 and 2)           |
| 09:45 – 10:30 | Trade mark - presented by Ruth Pope (paper 3)                                |
| 10:30 – 11:00 | Terrorism - presented by Vicky Hunt (paper 4)                                |
| 11:00 – 11:15 | Break  |
| 11:15 – 12:15 | What next for the Sentencing Council? - presented by Emma Marshall (paper 5) |
| 12:15 – 13:15 | Modern slavery - presented by Ollie Simpson (paper 6)                        |
| 13:15 - 13:30 | Break  |
| 13:30 – 14:30 | Miscellaneous guideline amendments - presented Ruth Pope (paper 7)           |

# Sentencing Council

## **COUNCIL MEETING AGENDA**

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## MEETING OF THE SENTENCING COUNCIL

16 APRIL 2021

### MINUTES

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Members present:

Tim Holroyde (Chairman)  
Rosina Cottage  
Rebecca Crane  
Rosa Dean  
Michael Fanning  
Diana Fawcett  
Adrian Fulford  
Juliet May  
Maura McGowan  
Alpa Parmar  
Beverley Thompson

Apologies:

Nick Ephgrave  
Max Hill  
Jo King

Representatives:

Elena Morecroft for the Lord Chief Justice (Legal and Policy Advisor to the Head of Criminal Justice)  
Phil Douglas for the Lord Chancellor (Head of Custodial Sentencing Policy)  
Hannah Von Dadelszen for the Director of Public Prosecutions

Observers:

Sarah Hannah (Criminal Appeal Office)

Members of Office in attendance:

Steve Wade  
Lisa Frost  
Emma Marshall  
Ruth Pope

## **1. MINUTES OF LAST MEETING**

1.1 The minutes from the meeting of 5 March 2021 were agreed.

## **2. MATTERS ARISING**

2.1 The Chairman informed the meeting that he and Rosa Dean had been reappointed to the Council for another three years to 2024.

2.2 The Chairman noted that the Police, Crime, Sentencing and Courts Bill, which contains a number of provisions which relate to sentencing law, was introduced to Parliament on 9 March. The Council would continue to monitor the progress of the Bill and the likely impact of provisions on the work of the Council.

## **3. DISCUSSION ON TRADE MARK – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**

3.1 The Council considered options for amending the guideline for sentencing individuals to ensure that in cases where there was a risk of serious physical harm this would be reflected in the sentence even when the value of the goods was low.

3.2 The Council agreed that the harm assessment should specify that in such cases category 3 harm or above should normally be used meaning that custody would always be in the range in such cases.

3.3 The Council also agreed to include some non-exhaustive examples in the high culpability factor of 'Sophisticated nature of offence/significant planning' to assist those who are unfamiliar with sentencing this offence. Aggravating and mitigating factors were added to reflect the fact that the level of profit or gain from the offending may vary. Amendments were agreed to step six to clarify the position around confiscation orders and forfeiture.

## **4. DISCUSSION ON ASSAULT – PRESENTED BY LISA FROST, OFFICE OF THE SENTENCING COUNCIL**

4.1 This was the final meeting to consider and finalise the revised assault and attempted murder guidelines. The Council reviewed and agreed changes made to the revised guidelines based on consultation responses along with a summary of the resource assessment of the definitive guidelines.

4.2 The Council finalised a number of factors in the common assault guideline and agreed that the aggravating factors of spitting and coughing should be qualified as deliberate and that biting should be included as an aggravating factor.

- 4.3 The Council agreed that the sentence uplift for sentencing assaults on emergency workers should be determined with reference to the full seriousness assessment and offence category identified, and that all aggravated offences should be incorporated at step three to ensure clarity of approach to sentencing aggravated offences.
- 4.4 The Council also considered evidence of racial disparity in sentencing for some assault offences and agreed that this should be highlighted in relevant guidelines.
- 4.5 The guidelines were signed off for publication in May, subject to review of the consultation response and resource assessment documents.

## **5. DISCUSSION ON WHAT NEXT FOR THE SENTENCING COUNCIL? – MISCELLANEOUS ISSUES – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**

- 5.1 The paper set out the responses to consultation questions that had not previously been considered. Many of the issues that arose had already been covered under other headings and where this was the case the Council noted that these were being taken forward.
- 5.2 On the question of whether there are other sources of funding that the Council should consider pursuing to enable it better to fulfil its statutory duties, the Council agreed with respondents that sources of non-government funding should be explored but that these could not be commercial or anything that would compromise the Council's independence.
- 5.3 The Council agreed to explore the option of adding a link in every guideline to invite feedback from users. It was noted that it would have to be made clear that the Council would not respond to questions about specific cases and that the Council's ability to act on the feedback would be resource dependent.
- 5.4 It was noted that it is not always clear how the views of respondents to consultation are taken into account. It was agreed to explore ways (for example a blog post) to do more to highlight the fact that the Council considers consultation responses seriously and in detail and that they are an integral part of the guideline development process.
- 5.5 On the issue of how the Council should assist with the use and interpretation of guidelines once published, the Council agreed to continue to liaise with Judicial College to ensure that users are prepared for the introduction of new guidelines.

**6. DISCUSSION ON WHAT NEXT FOR THE SENTENCING COUNCIL?  
- EFFECTIVENESS – PRESENTED BY EMMA MARSHALL, OFFICE  
OF THE SENTENCING COUNCIL**

- 6.1 The Council considered the next set of responses to the consultation '*What Next for the Sentencing Council?*'. This was in relation to the costs and effectiveness of sentencing and the ways in which it currently discharges its duty in these areas.
- 6.2 The Council discussed current and potential analytical work, as well as the extent to which sentencing guidelines could potentially reflect the relevant issues. Further work in this area and the resources needed for this will be considered again at a future Council meeting as part of the overall prioritisation of future work for the Council.

**7. DISCUSSION ON FIREARMS IMPORTATION– PRESENTED BY  
RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**

- 7.1 The Council considered a draft guideline for importation offences under sections 50 and 170 of the Customs and Excise Management Act 1979. It was agreed to assess culpability in two stages: type of weapon and factors relating to role, planning and expectation of financial or other advantage. This would then lead to one of four overall culpability levels. It was agreed to base the harm model on that used in the transfer and manufacture guideline. It was decided to have two sentence tables to reflect the fact that there are two different statutory maximum sentences for these offences.
- 7.2 The Council considered examples of how the draft guideline would apply to real cases and agreed sentence levels to reflect a wide range of seriousness.
- 7.3 The Council agreed to sign off the draft guideline for consultation.



SC(21)MAY02 May Action Log

**ACTION AND ACTIVITY LOG – as at 14 May 2021**

	Topic	What	Who	Actions to date	Outcome
<b>SENTENCING COUNCIL MEETING 14 April 2021</b>					
1	<b>Vision consultation</b>	Council members to email Steve with any suggestions for organisations that could be approached for funding	<b>Council members</b>	<b>ACTION ONGOING:</b> No suggestions have been received to date.	

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**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**21 May 2021**  
**SC(21)MAY03 – Trade mark**  
**Mike Fanning**  
**Ruth Pope**

## **1 ISSUE**

1.1 At the April meeting the Council agreed the unauthorised use of a trade mark guideline for individuals subject to confirming the details of the wording of some factors.

1.2 At this meeting the Council will be asked to consider the responses to the consultation, and the results of research carried out with sentencers on the guideline for organisations.

1.3 The aim is to sign off the definitive versions of the two guidelines and the resource assessment at this meeting, for publication in August, to come into force on 1 October 2021.

## **2 RECOMMENDATION**

2.1 That the Council agrees modifications to the guideline for individuals set out at 3.1 to 3.6 below

2.2 That the Council considers the responses to the consultation and the evidence from the road testing and agrees changes to the guideline for organisations set out at 3.9 to 3.21 below.

2.3 That the Council agrees to sign off the resource assessment and definitive versions of both guidelines for publication.

## **3 CONSIDERATION**

### *Individuals*

3.1 The guideline for individuals with changes to reflect the decisions made at the April meeting is at **Annex A**. The outstanding issues have been discussed with Mike Fanning and the proposed solutions are highlighted in yellow in Annex A.

3.2 In high culpability, 'the use of a website that mimics that of the trade mark owner or a legitimate trader' has been added to the examples of sophisticated nature of the offence.

3.3 An issue raised in some consultation responses was the difficulty of testing counterfeit goods to show that they represent a risk of physical harm. To avoid this becoming an issue some explanatory wording has been added, '(this may be evidenced by a failure to take steps to be satisfied that the goods are safe)'.

3.4 The harm wording relating to high risk/low value offending has been modified to read:

Where purchasers/ end users are put at **risk of death or serious physical harm** from counterfeit goods, harm should be at least category 3 even if the equivalent retail value of the goods falls below £50,000.

**Question 1: Is the Council content with the culpability and harm factors in Annex A?**

3.5 If a case fell into category 1 harm on the basis of the equivalent retail value of the goods the guideline was silent on how any significant additional harm should be taken into account. Some suggested wording has been added above the sentence table: 'For category 1 cases an upward adjustment within the category range should be made for any significant additional harm'. This reflects the approach taken in other guidelines (for example [theft](#)).

3.6 This raises the question of whether the category range for A1 is too narrow. The version consulted on had a starting point of 5 years with a range of 3 to 6 years. At the April meeting the Council rejected a proposal to increase the top of the range to 7 years. However, if there is only one year between the starting point and the top of the range, there is very little scope for the guideline to reflect any additional harm and, for example, previous convictions in an appropriate case. This could give the impression that the changes made to the guideline post consultation have concentrated disproportionately on lower level offending.

**Question 2: Does the Council agree to the addition of the wording above the sentence table? If so, should the top of the range be increased to 7 years?**

3.7 Wording for aggravating and mitigating factors relating to expectation of financial gain is proposed in line with that used in other guidelines.

3.8 At step 6 the wording relating to confiscation orders has been modified for clarity.

**Question 3: Does the Council agree to the wording of the aggravation and mitigating factors and step 6?**

*Organisations*

3.9 The consultation version of the guideline for organisations can be found [here](#). A revised version is attached at **Annex B**. This version reflects changes made to the guideline for individuals as many of the points made by respondents to the consultation about the guideline for organisations mirror those made about the guideline for individuals.

*Steps 1 and 2*

3.10 There were several comments from respondents and from sentencers in road testing to the effect that steps 1 and 2 were confusing. Magistrates often misunderstood what was meant by confiscation, thinking that it was the same as forfeiture. One judge commented that these steps seemed to be in the wrong place.

3.11 In order to explain the reason for placing these steps first, the following wording is proposed before step one:

Note The penalties in this guideline for sentencing organisations are financial. Courts are required to consider financial penalties in the following order:

- compensation (which takes priority over any other payment);
- confiscation (Crown Court only);
- fine

Therefore, in this guideline the court is required to consider compensation and confiscation before going on to determine the fine

3.12 The revised wording at step 2 for confiscation is consistent with the guideline for individuals and should help to clarify the relevance of confiscation (or lack of it) for magistrates.

## Step 2 – Confiscation

Confiscation orders under the Proceeds of Crime Act 2002 may only be made by the **Crown Court**. Confiscation must be considered by the Crown Court if either the prosecutor asks for it or the Crown Court thinks that it may be appropriate.

An offender convicted of an offence in a **magistrates' court** must be committed to the Crown Court where this is requested by the prosecution with a view to a confiscation order being considered (section 70 of the Proceeds of Crime Act 2002).

(Note: the valuation of counterfeit goods for the purposes of confiscation proceedings will not be the same as the valuation used for the purposes of assessing harm in this sentencing guideline.)

Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation).

(See Proceeds of Crime Act 2002 sections 6 and 13)

### **Question 4: Does the Council agree to the proposed changes to steps 1 and 2?**

#### *Culpability organisations*

3.13 In road testing and in the responses to consultation there was some uncertainty about how to assess the level of organisation or planning in order to distinguish between high and medium culpability. Several respondents reiterated the comments made about the culpability factors in the guideline for individuals. The addition of examples to the first high culpability factor should address those concerns and assist with the assessment.

3.14 Two respondents queried the concept of an organisation being coerced in the low culpability factor 'Involvement through coercion, intimidation or exploitation'. While this would rarely apply (it may be unlikely that a prosecution would be pursued in such circumstances), the factor balances out the equivalent high culpability factor and does apply in other guidelines (such as [corporate fraud](#)).

## Culpability

The level of culpability is determined by weighing up all the factors of the case to determine the offending organisation's **role** and the extent to which the offending was **planned** and the **sophistication** with which it was carried out.

### A – High culpability

- Organisation plays a leading role in organised, planned unlawful activity, whether acting alone or with others (indicators of organised/ planned activity **may include but are not limited to:** the use of multiple outlets or trading identities for the sale of counterfeit goods, the use of multiple accounts for receiving payment, the use of professional equipment to produce goods, the use of a website that mimics that of the trade mark owner or a legitimate trader, offending over a sustained period of time)
- Involving others through pressure or coercion (for example employees or suppliers)

### B – Medium culpability

- Organisation plays a significant role in unlawful activity organised by others
- Some degree of organisation/planning involved
- Other cases that fall between categories A or C because:
  - Factors are present in A and C which balance each other out and/or
  - The offending organisation's culpability falls between the factors as described in A and C

### C – Lesser culpability

- Organisation plays a minor, peripheral role in unlawful activity organised by others
- Involvement through coercion, intimidation or exploitation
- Little or no organisation/planning
- Limited awareness or understanding of the offence

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

### **Question 5: Does the Council agree with the proposed changes to culpability factors?**

3.15 The harm assessment in the two guidelines was identical and therefore the comments about harm factors were the same as those made for the guideline for individuals. Any changes made to the guideline for individuals will apply equally to this guideline.

#### *Aggravating and mitigating factors*

3.16 Most respondents to the consultation agreed with the proposed aggravating factors and in road testing they were generally applied consistently and as expected. In the guideline for individuals the mitigating factor 'Business otherwise legitimate' was removed and it is proposed to do the same for this guideline because it could represent either mitigation or aggravation depending upon circumstances.

3.17 An aggravating factor of 'Expectation of substantial financial gain' has been added in line with the guideline for individuals. The guideline for organisations already has a mitigating

factor 'Little or no actual gain to organisation from offending'. This is different from the wording proposed in the guideline for individuals ('Expectation of limited financial gain') to cover the situation where the offending may have resulted from a lack of training/supervision but did not benefit the organisation financially.

#### **Question 6: Should the proposed changes be made to aggravating and mitigating factors?**

##### *Sentence levels and Step 5 – Adjustment of fine*

3.18 Consultation responses were generally supportive of the proposed sentence levels, although some made comments that the sentences seemed low compared with the sentences for individuals. One respondent pointed out some apparent inconsistencies in the sentence table. In summary they suggested changing the starting point for 2C to £25,000 and changing the category range for 5A to £5,000 - £25,000. These proposed changes seem sensible.

3.19 Step 5 was supported by most respondents who commented on it and in road testing one judge commented:

'I commend Step 5 – I think it is a clear and useful section in the guideline, which is actually very clear in its effect.'

3.20 One suggestion from the Council of District Judges (Magistrates' Courts) was that step 5 should include a reminder that the sentence levels at step 4 are based on an offending organisation with an annual turnover of not more than £2 million. Some suggested wording has been added to Annex B:

**Note the fine levels above assume that the offending organisation has an annual turnover of not more than £2 million. In cases where turnover is higher, adjustment may need to be made including outside the offence range.**

3.21 Overall, in road testing the guideline for organisations was appreciated, especially in the absence of a guideline at present. One magistrate summarised their views as follows:

'What the guideline probably did was make me focus in a more structured way on the harm and culpability elements, so it's a higher amount than I initially started with, but I think rightly so. I don't feel that I've been corralled into imposing a penalty that I think is too high.'

#### **Question 7: Does the Council agree to amend the sentence levels as suggested?**

#### **Question 8: Does the Council agree to add the proposed wording to step 5?**

## **4 IMPACT AND RISKS**

4.1 A revised resource assessment for the definitive guidelines is attached at Annex C. Overall, the resource impact of the guidelines in terms of prison and probation places is

expected to be small although the changes agreed to the harm model will result in higher sentences in some cases.

## **5 EQUALITIES**

5.1 As noted in the consultation document there are very little data recorded on the ethnicity of offenders but the impression gained from reading transcripts of sentencing remarks is that a significant proportion may be from a minority ethnic background. There is no evidence one way or the other about sentencing disparity between different demographic groups and so no information on that point can be included in the guidelines. The introduction of guidelines for this offence for use in all courts should improve consistency and ensure proportionate sentencing. The guidelines will include the standard reference to the ETBB to remind sentencers of the guidance on fair treatment for different groups.

**Question 9: Is the Council content to sign off the definitive versions of the guidelines and the resource assessment for publication?**



# Sentencing Council

**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**21 May 2021**  
**SC(21)MAY04 – Terrorism**  
**Maura McGowan**  
**Vicky Hunt**  
**0207 0715786**

## **1 ISSUE**

1.1 In March 2020 the Council paused all work on the terrorism project as a result of a new Bill that was about to be introduced which would make amendments to the terrorism offences covered by our guidelines. That Bill, the Counter – Terrorism and Sentencing Bill, has now completed its passage through parliament and received Royal Assent on 29 April. This paper, therefore, provides a reminder of the work that has so far been completed, summarises the relevant content of the new Act and how that will impact our guidelines, and asks the Council questions about what steps to take next.

## **2 RECOMMENDATION**

2.1 It is recommended that the Council consider this paper and make a decision on the next steps.

## **3 CONSIDERATION**

### ***The Original Guidelines***

3.1 In March 2018 the Council published the first package of terrorism guidelines. They came into force in April 2018 and covered the following offences:

- [Preparation of Terrorist Acts \(Terrorism Act 2006, section 5\)](#)
- [Explosive Substances \(Terrorism Only\) \(Explosive Substances Act 1883, section 2 and section 3\)](#)
- [Encouragement of Terrorism \(Terrorism Act 2006, sections 1 and 2\)](#)
- [Proscribed Organisations – Membership \(Terrorism Act 2000, section 11\)](#)
- [Proscribed Organisations – Support \(Terrorism Act 2000, section 12\)](#)
- [Funding Terrorism \(Terrorism Act 2000, sections 15 - 18\)](#)
- [Failure to Disclose Information about Acts \(Terrorism Act 2000, section 38B\)](#)
- [Possession for Terrorist Purposes \(Terrorism Act 2000, section 57\)](#)
- [Collection of Terrorist Information \(Terrorism Act 2000, section 58\)](#)

## ***New Legislation***

3.2 On 12 February 2019, less than a year after the new guidelines came into effect, the Counter Terrorism and Border Security Act 2019 received Royal Assent. This Act made significant changes to terrorist legislation some of which impacted the guidelines listed above. The Council therefore sought to amend the relevant guidelines to ensure that they took account of the new legislation.

## ***Consultation***

3.3 In October 2019 the Council published a consultation paper seeking views on amendments to some of the guidelines to reflect the new legislation. The changes were as follows:

- Changes to the culpability factors within the Proscribed Organisations – Support (Terrorism Act 2000, section 12) guideline to provide for a new offence (section 12A), of expressing an opinion or belief supportive of a proscribed organisation, reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.
- Minor changes to the wording in the culpability factors of the Collection of Terrorist Information (Terrorism Act 2000, section 58) to account for changes in legislation which ensure that offenders who stream terrorist material (as opposed to downloading or physically being in possession of it) would be captured by the offence.

3.4 In addition, changes were proposed to the sentence levels within the following guidelines to reflect an increase to the statutory maximum sentences:

- Collection of Terrorist Information (Terrorism Act 2000, section 58). From 10 years to 15 years.
- Encouragement of Terrorism (Terrorism Act 2006, sections 1 and 2). From 7 years to 15 years.
- Failure to Disclose Information About Acts of Terrorism (Terrorism Act 2000, section 38B). From 5 years to 10 years.

3.5 Finally, an additional aggravating and mitigating factor was added to the funding guideline, not as a result of a change in legislation but as a result of case law. The new factors were aimed at addressing the extent to which an offender knew or suspected that the funds would or may be used for terrorist purposes.

3.6 The Terrorism (revised guidelines) consultation closed on 3 December 2019. 13 responses were received. The Council considered the issues from consultation in December 2019 and again in March 2020, agreeing to the final package of revised guidelines.

## **Further Legislation**

3.7 During the work to revise the guidelines it became known that there was, once again, a piece of terrorism legislation in the pipeline that would impact the guidelines. In March 2020, after agreeing the revised package of guidelines the Council chose to pause the publication of those guidelines to await the outcome of this new legislation.

3.8 In May 2020 the Counter – Terrorism and Sentencing Bill was introduced. At the end of April, the Bill received Royal Assent and became an Act. The main provisions of this Act which impact our guidelines are:

- A new definition of a ‘serious terrorism offence’ for the purposes of sentencing an offender to a serious terrorism sentence (see below), or an extended sentence (which has no possibility of early release and a licence period of up to 10 years). The ‘serious terrorism offence’ only applies to certain offences which are set out in a schedule. It includes some terrorist offences and some other serious offences where they have a terrorist connection. Included in the schedule are the guideline offences; Preparation of Terrorist Acts (Terrorism Act 2006, section 5), and Explosive Substances Offences (Explosive Substances Act 1883, sections 2 and 3).

The new ‘serious terrorism sentence’ comprises a period of imprisonment (or detention in a young offender institution for those aged 18-21) for a minimum period of 14 years, and an extension period to be served on licence (between 7 and 25 years).

The sentence applies where ‘the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further serious terrorism offences or other specified offences, the court does not impose a sentence of custody for life, and the risk of multiple deaths condition is met’. [NB where a life sentence *is* imposed the Act requires that the minimum term must be at least 14 years unless the exceptional circumstances provisions set out below apply].

The court must impose a serious terrorism sentence unless the court is of the opinion that there are exceptional circumstances which relate to the offence or to the offender and justify not doing so. **This provision comes into force on the 29 June 2021.**

- An increase in the statutory maximum sentence for the guideline offences of membership of a proscribed organisation (from 10 years to 14 years), and support of a proscribed organisation (from 10 years to 14 years). **This provision comes into force on the 29 June 2021.**
- The list of offences which attract special custodial sentences for offenders of particular concern (SOPC) has been extended. A SOPC is a sentence that must be imposed for certain offences, where the court does not impose an extended sentence or a life sentence. The sentence which must be imposed is comprised of the appropriate custodial term plus a further period of 1 year during which the

offender is subject to licence (the total of both parts must not exceed the statutory maximum sentence).

The newly extended list applies to a much wider range of offences including two further guideline offences; failure to disclose information (Terrorism Act 2000, s38B) and funding terrorism (Terrorism Act 2000, ss15-18). **This provision came into force on 30 April 2020.**

- In addition, the SOPC provisions would apply to *any* non-terrorist offence which carries a statutory maximum sentence of more than two years and is deemed to have a 'terrorist connection'. [NB These changes bring a wide number of offences into the SOPC regime, removing the possibility of them being eligible for a standard determinate sentence.] **This provision comes into force on 29 June 2020.**
- *Any* offence (with a statutory maximum sentence of more than two years) can now be deemed by the court to have a 'terrorist connection' and that fact must then be treated as a statutory aggravating factor. **This provision comes into force on 29 June 2020.**
- The introduction of SOPC for under 18s committing relevant terrorism offences. This essentially replaces DTOs and standard determinate sentences for terrorism offences. The Council has never produced a terrorism youth guideline so this is not of direct relevance, but it is a significant development and would be relevant should the Council wish to consider a youth terrorism guideline in the future. **This provision came into force on 30 April 2020.**

### **Next Steps**

3.9 The extension to the list of offences which attract the SOPC provisions has already come into force meaning that both the Failure to disclose information and Funding guidelines need to be updated. The Council may consider that this change could be made immediately. It is not a change which we would need to consult on as it is a specific change in legislation that must be complied with and all that is needed in the guideline is a factual statement to say that these provisions now apply.

3.10 All of our other terrorism guidelines already contain such information as they all already come within the SOPC regime. The information on those guidelines simply includes the following box of text on the front page of the guideline:

This is an offence listed in [Schedule 13](#) for the purposes of sections [265](#) and [278](#) (required special sentence for certain offenders of particular concern) of the Sentencing Code.

3.11 Then within the steps at the end of the guideline the following information is included:

### Step 5 – Required special sentence for certain offenders of particular concern

Where the court does not impose a sentence of imprisonment for life or an extended sentence, but does impose a period of imprisonment, the term of the sentence must be equal to the aggregate of the appropriate custodial term and a further period of 1 year for which the offender is to be subject to a licence (sections [265](#) and [278](#) of the Sentencing Code).

3.12 For the Failure to Disclose and Funding guidelines the information on the first page would need to say, ‘Note for convictions on or after 30th April 2021...’.

#### **Question 1: Is the Council content for us to make such changes to the Failure to Disclose Information and Funding guidelines?**

#### ***Publication of the 2019 revised guidelines***

3.13 The 2019 revised guidelines have yet to be published and so have been outstanding for a considerable time. This means that the following terrorism guidelines are out of date and have been since February 2019 when the Counter Terrorism and Border Security Act 2019 came into force:

- Proscribed Organisations – Support (Terrorism Act 2000, section 12)
- Collection of Terrorist Information (Terrorism Act 2000, section 58)
- Encouragement of Terrorism (Terrorism Act 2006, sections 1 and 2)
- Failure to Disclose Information about Acts (Terrorism Act 2000, section 38B)

3.14 The Council is invited to consider the following options for the publication of those 2019 guidelines:

#### Option 1

3.15 Publish them as soon as possible alongside a consultation response document. Looking at our work plan and taking into consideration the other forthcoming publications, the best date would be mid-July.

3.16 This step would protect the reputation of the Council from criticism over the lengthy delay. It is also worth remembering that when the Council published the first package of guidelines it did so in just over one year, an accelerated timetable, on the basis that they were very important and that the Courts should not be without guidelines. This prolonged period of delay does not seem to fit with that original rationale to rush through the

publication. Whilst the new legislation was outstanding there was a clear reason for delay but that has now arguably fallen away.

3.17 The only concern around publishing the 2019 revisions straight away is that the Proscribed Organisations- Support (Terrorism Act 2000, section 12) guideline which was revised in 2019 will need to be revised again because of the 2021 legislation. The 2021 legislation impacts on the following guidelines:

- Preparation of Terrorist Acts (Terrorism Act 2006, section 5)
- Explosive Substances (Terrorism Only) (Explosive Substances Act 1883, section 2 and section 3)
- Proscribed Organisations – Membership (Terrorism Act 2000, section 11)
- **Proscribed Organisations – Support (Terrorism Act 2000, section 12)**
- Funding Terrorism (Terrorism Act 2000, sections 15 – 18)
- Failure to Disclose Information about Acts (Terrorism Act 2000, section 38B)

3.18 The 2021 changes to the Proscribed Organisations - Support guideline will require changes to the sentence levels to reflect a change to the statutory maximum sentence. Clearly this is a significant change and it may cause confusion to publish the 2019 version now and then a further guideline in the future. If the Council, choose to publish the 2019 consultation guidelines before concluding the amendments for the 2021 revisions it may be necessary to exclude this guideline from the 2019 package.

### Option 2

3.19 The Council could publish the 2019 revised guidelines (and consultation response document) at the same time as publishing the consultation for the 2021 revised guidelines. This would probably be in the Autumn. This option gives the Council time to consider the new 2021 legislation and the implications that it has for the full package of guidelines before publishing the 2019 revisions. The Council did pause the publication in order to consider the content of the legislation.

3.20 However, the communications team advise that publishing definitive guidelines and draft consultation guidelines at the same time could lead to some confusing messaging. It would also mean extending what has already been a significant delay in the publication of the 2019 revision package.

### Option 3

3.21 The Council could keep the 2019 guidelines on hold and just publish one full package of revised guidelines (incorporating both the 2019 and 2021 revisions) once the 2021 revisions have been made and consulted on. This is likely to take some time, at the most optimistic they could be published in May 2022.

**Question 2: Which option does the Council prefer for the publication of the 2019 revisions?**

**Question 3: If either option 1 or 2 is selected, does the Council want to exclude the Support (s12 Terrorism Act 2000) guideline from the package?**

#### **4 IMPACT AND RISKS**

As discussed above, there are impacts and risks associated with the decision to publish the 2019 guidelines immediately or delay. The main concern is that four of the guidelines have been out of date for over two years. The Council is therefore at risk of being criticised if they are not published shortly. However, the Council will also need to consider the complications of publishing multiple packages of revised guidelines.

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**Sentencing Council meeting:**  
**Paper number:**

**21 May 2021**  
**SC(21)MAY05 – Prioritisation of ‘Vision’  
actions**  
**Emma Marshall**

**Lead official:**

## **1 ISSUE**

1.1 Prioritisation of the actions agreed in Council meetings to discuss responses to the ‘*What Next for the Sentencing Council?*’ (‘Vision’) consultation in relation to current and future workplan priorities.

## **2 RECOMMENDATION**

2.1 That the Council considers the relative prioritisation of actions set out in this paper along with the proposed timescales for the work. This will feed into the consultation response document that is scheduled for publication in early September.

## **3 CONSIDERATION**

3.1 The Council has been considering the responses to the Vision consultation in meetings since November 2020. The areas discussed include responses in relation to future guideline areas, prioritisation of guidelines, communication and public confidence, analytical work, the role of the Council, and work in the area of effectiveness of sentencing. As result of these discussions, a number of actions have been agreed.

3.2 The agreed actions need to be considered alongside all other work that the Council is currently undertaking or has scheduled (the Council’s ‘core’ work). Given the resources available to the Council (particularly in terms of staffing resources, but also financial resources to commission external work), it will not be possible to progress all actions – at least not in the short or medium term – and decisions will therefore need to be made regarding the relative importance between different areas of work.

3.3 This paper sets out the Vision actions and proposes a categorisation based on relative priority as suggested in the previous Council meetings: Group 1 actions cover high

priority actions or those requiring relatively immediate action; Group 2 covers more medium priority actions, as well as those that can be conducted on a more ongoing basis so do not require immediate scheduling or a need to stop work on other areas in order to accommodate them. Other areas within this group can be considered on a case-by-case basis and scheduled when there is available capacity. Group 3 actions then cover those that were agreed in previous meetings to be lower priority or that did not require further action. The paper also recommends broad timings for starting work on the basis that in order to address most of the main suggestions arising from the consultation, work will need to be staged. It also outlines some of the actions that are already underway and that therefore do not need to be discussed at this stage, as well as some potential further areas to consider for the future.

### *The Council's core work*

3.4 A large proportion of the Council's work is what we have identified as core work. This covers the whole range of work that is necessary for developing the guidelines that are already included in the workplan and for ensuring the smooth operation of the Council and Office. For the policy team, this includes guideline development and revision (from initial scoping through to implementation), responding to policy enquiries, and working with other teams in the office as necessary. It also includes some actions that were raised in the consultation but that had already been initiated by the Council (e.g. considering sentencing data on different demographic groups as part of guideline development and adding wording into guidelines to flag these issues if necessary).

3.5 For the communication team it covers work on the website and digital guidelines, press work, social media work, proof reading consultation documents, and responding to enquiries. For the analytical team, it covers work on resource assessments and statistical bulletins, provision of data to policy leads for guideline development, road testing exercises, scheduled evaluations<sup>1</sup>, and scheduled publication of data<sup>2</sup>. It also covers specific data collections in courts to obtain the information needed for guideline development and evaluation. Members of the team also cover the budget work for the Office and Council.

3.6 All teams also have to set aside resource to feed into activities such as work on the Annual Report, Business Plan and corporate activities. We also need to retain flexibility to respond to work that arises outside of the workplan (for example, if there was to be the need

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<sup>1</sup> Analysis of data on breach offences and on bladed articles and offensive weapons offences is already underway. A small-scale evaluation of the Imposition guideline is already scheduled for 2021 and will be needed to feed into the breach evaluation.

<sup>2</sup> Work to clean, quality assure and publish our data on drugs offences is already underway.

for a new digital tool for magistrates and or when changes to legislation impacts on the workplan).

3.7 A large proportion of each team's work is therefore allocated to this core, 'business as usual', work. However, because policy officials are more directly deployed on guideline development work and revision, we estimate that a slightly higher proportion of their work is directed towards this. In contrast, whilst the Communication team and Analysis and Research team have a large proportion of core work, they also have some more standalone, project based, work. Some of these require a relatively large amount of resources - for example, developing a new You Be the Judge tool, developing materials for schools, previous redevelopment of the website, undertaking specific research projects on cumulative impacts, judicial attitudes, consistency etc (note that policy colleagues would also feed into all of this work, but would not necessarily lead on it).

3.8 An estimated 90% of the policy team's time is taken up with core work; for the communication team the proportion is 80% and for the analytical team, 75-80%. This means that the scope at present to take on additional work arising from the Vision consultation is limited.

3.9 The prioritisation and timing of work set out below is predicated on retaining these levels of core work in order to continue to develop guidelines at the current pace as set out in the workplan (and to undertake all the additional functions needed to ensure the Council and Office function effectively). If we retain this resource input into our core work, then it will only be possible to also cover the higher priority (Group 1) actions below in the more immediate future. If, however, the Council feels that there are some actions in Group 2 or Group 3 that need to be prioritised more highly, then we would need to reconsider the balance of core work against this additional work. In practice, this is likely to mean slowing down the pace of guideline development (potentially working on slightly fewer guidelines at same time or lengthening the time we take to produce them to free up more time for officials) or revisiting our approaches to some work/ exploring whether we can do anything differently.

3.10 Once the Council has been able to consider the proposals in this paper, we will ask for confirmation that it does wish to retain the current proportions of input into core work and is happy with the grouping of Vision actions and associated timings. If adjustments need to be made, then we will come back with more detail on this and a revised timescale for actions at a subsequent meeting.

*Group 1 actions arising from the Vision consultation*

3.11 There were a number of areas arising from the Vision discussions that it was agreed should be taken forward as high priority. Some of these are already underway and will be the subject of future Council discussions:

- Conducting further work in the area of equality and diversity: a Council working group has been set up and we are currently procuring work on equality and diversity in the work of the Sentencing Council. We also now routinely analyse and publish more data in this area which is considered as part of guideline development.
- The need to undertake a small exploratory study to look at the totality guideline. This has now been completed and the findings will be fed back to the Council in due course.
- Consideration of the need to broaden out the scope of the Council's target audience, in particular to reach offenders and people under probation supervision: the Communication team is currently working on this and initial ideas have been discussed with the Equality and Diversity working group. This review also encompasses the action to include on our mailing lists Local Criminal Justice Boards and to use this as an avenue for seeking more local and regional views on consultations<sup>3</sup>.
- To extend our reach into schools, working in partnership with other organisations such as Young Citizens and the Magistrates' Association. The Council has previously identified school-age children and young adults as priority audiences, and respondents to the Vision consultation were keen to see the Council do more work in partnership with other organisations to extend our reach, in particular to children and young people.
- A review of the criteria on which guidelines should be developed/ revised and the need to make more explicit reference to calls from interested parties in the policy for making minor changes; it was agreed that we should also consider the mechanism by which parties are able to feed back. This work is currently being taken forward and is likely to be brought back to the June Council meeting for consideration.

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<sup>3</sup> Note that there was also a discussion around the need to reach out to victims more. The Council felt that victims are already integral to the work of the Council, although victim groups will be considered as part of the review of our audiences.

- To undertake an annual consultation on cross-cutting and minor revisions to guidelines. This work is underway and will be discussed in a separate paper at this meeting.
- To consider at the scoping stage of guidelines whether there is any external expertise that should be drawn upon. This has often happened in the past and policy officials will ensure that the Council considers it at the initial stages of every guideline in future.

3.12 For the remaining high priority areas (presented in the table below), we will need to find specific additional resource as these have not yet started. Due to the fact that a lot of this work will largely fall to the analytical team (which is currently understaffed and will experience some changeover of staff in the next year), we have proposed broad start dates that will allow us to stage the work and resource it over time rather than immediately.

3.13 All of the broad dates do, however, involve starting this work before September 2022 and most involve completion of the work by this date. We think that it is important that we can demonstrate that the Council is responding to the key points from the consultation and that we should therefore specify that high priority actions will all be started (and most completed) within a year of publication of the consultation response document.

3.14 It should be noted that these proposals are necessarily provisional at this stage: for some areas, we cannot precisely estimate the resources required until we have started it, and in some cases the work involved will be dictated by decisions taken at an earlier stage. For example, the resource needed for future data collections will be dependent on both the outcome of our discussions with HMCTS on the Common Platform – which are still ongoing – and decisions made as part of our work scoping out a new approach to data collection. Likewise, decisions on whether the Council needs to schedule in development of a full guideline on female offenders will be informed by the findings of an evaluation of the expanded explanations. For this reason, we will need to revisit priorities and resourcing at regular intervals.

High priority vision actions	Proposed timing	Comments
Scope out future data collection methodologies and approaches	Summer/autumn 2021	We will need to complete this in 2021 to feed into the discussions on the Common Platform
Seek permission to collect case identifiers as part of future data collections	Summer 2021	We are starting to plan the next data collection and so will need to start work on this imminently
Review approach to resource assessments and evaluations, to include how to ensure the impact of different groups can be incorporated	From autumn 2021	It will be important to start this as soon as possible, but it is likely to be an ongoing piece of work in 2022 whereby we make a series of enhancements to our work as necessary. This will also take account of the views of some respondents that the Council's measures of 'success' need reconsideration (i.e. can we analyse our data in different ways to look at the concept of 'impact' from different perspectives?)
Undertake an evaluation of the expanded explanations; as part of the consideration of the findings from this, consider if separate guidance/ a guideline is needed for either female offenders or young adults	To start in spring 2022	Given other commitments in the analytical team, it will not be possible to start this in 2021. However, we will endeavour to start this as soon as possible in spring 2022
Produce a digest of research on effectiveness of sentencing and publish this on the website	Autumn 2021-September 2022	Publication of the digest by September 2022, and thereafter every two years
Provide information in the consultation response document/ website on the difficulty with publishing information on the costs of sentencing	By September 2021	A decision was made that information on costs should not be published. However, as this was called for as part of the consultation, it was agreed that information should be provided on why the Council is not taking this forward
Consider the wording and position of references to the Equal Treatment Bench Book in guidelines	Summer/autumn 2021	This will be covered as part of the research project to look at equality and diversity in the Council's work; this is a priority project and which we are currently procuring
Explore and seek further sources of funding	Ongoing	We will start considering this from the summer onwards, but given that different organisations have different funding cycles, it will be an ongoing piece of work
The Council should arrange periodic sessions with the Justice Select Committee and offer briefing sessions to MPs if required	Periodic, as required	This also links with agreed work to review the Council's parliamentary engagement strategy as part of

		developing the next Confidence and Communication strategy
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**Question 1: Is the Council content that the above actions are high priority areas?**

**Question 2: Is the Council content that Group 1 actions should be those that we should start within one year of publication of the consultation response document, if not before? As a result, is the Council content with the proposed indicative timings above?**

*Group 2 actions arising from the Vision consultation and potential other future work*

Vision actions

3.15 The next set of priorities cover those actions from the consultation that were considered to be less important or urgent than others and so have been categorised as medium priority. These are considered alongside some areas of work that do not appear on the current workplan but that we anticipate will need to be included in the future. Many of these areas relate to analytical work that will be needed, in particular evaluations of current guidelines that we have not yet had the capacity to undertake.

3.16 The medium priority vision actions are set out below. Some relate to work that can be conducted on a more ongoing basis so do not require immediate scheduling or a need to stop work on other areas in order to accommodate them. Others we propose considering on a case-by-case basis and scheduling the work in for a time when there is capacity (this may mean slightly shifting items on the workplan to be able to resource it).

Medium priority vision actions	Proposed timing	Comments
Invest time into enhancing links with external organisations and academics and considering opportunities for future collaborative work	Ongoing	We already spend time on this but will continue to seek out further opportunities. Some of this may be facilitated by taking forward the high priority action around seeking further sources of funding
Work more in partnership with other organisations to take advantage of their audience reach and existing networks	Ongoing	We already spend time on this but will continue to seek out further opportunities

Undertake work to include a more simplified, accessible, introduction into consultation documents	Ongoing	Discussions are already underway on what these summaries might look like and how they can be achieved within the production process. Recommendations will be made to the Council shortly.
Where data permits, undertake in-depth analysis on sentencing outcomes for different ethnicities and sexes (as was done with drugs supply offences)	As needed	This is intensive and time-consuming work so could only be scheduled if we have capacity at the time. However, there will only be a limited number of offences for which this type of work could be conducted as we would need to have sufficient volumes of data in order to conduct meaningful analysis
Explore with stakeholders the potential reasons for any findings from analysis with groups with protected characteristics; this may include convening a workshop on equality and diversity issues	As needed	The need for this will fall out of whether we undertake any analysis, in particular analysis of the kind outlined above. We will discuss with the Equality and Diversity working group the need for a workshop in the future
Undertake qualitative work with victims, offenders and other relevant groups	As needed	We will consider this as part of the scoping work for developing a guideline. If resources are limited, but the work is needed, we will consider the options for conducting a smaller scale piece of work
Conduct extended work on public confidence	As needed	The nature and scale of this work will be discussed with the Confidence and Communication subgroup and scheduled in as resources permit

3.17 There are also three areas of work that despite being categorised as more medium priority, we feel should be picked up within the first year after publication of the consultation document.

3.18 The first is work to consider amending the Imposition guideline to more explicitly flag issues relating to the effectiveness of sentencing. The need for the Council to undertake more work in this area was flagged by a number of consultation respondents. The main issues were discussed at the last Council meeting where it was agreed that we should in the future publish a digest on research on effectiveness on sentencing (which will be taken forward as a high priority area and published every two years). The Council also considered policy related changes in this area which included the suggestion that an additional step be inserted into guidelines to remind sentencers to consider their final sentence in the round in terms of relative effectiveness. The Council did not wish to take this suggestion forward, but instead asked that consideration be given to amending the Imposition guideline to more explicitly flag these issues. The exact timing of this work will be dependent on any imminent



legislative changes which may necessitate other changes to the Imposition guideline, but we propose that work on this is commenced in 2022.

3.19 Related to this, there was the suggestion that we could undertake research with offenders to understand more fully which elements of their sentence may have influenced their rehabilitation. This could either be conducted in relation to specific guidelines in development or as a larger stand-alone piece of work. It should, however, be noted that interview research with offenders can be more complex and time-consuming than that with sentencers or members of the public, primarily because accessing this group can be problematic (both in terms of gaining approval to access them and in terms of securing a sufficient response rate for those who are serving sentences in the community). As a result of this, whilst we do not suggest that we commit to specific research in this area at the moment, we do suggest that as part of the digest research work on effectiveness, we scope out the possibilities in this area and discuss the value of these with the Analysis and Research subgroup.

3.20 Finally, we agreed in the March Council meeting to scope out work on the analysis and publication of local area data. It was felt that this was important as it was raised in some consultation responses and is the one statutory duty that the Council has not addressed thus far. We therefore suggest that we slightly raise the priority of this and commit to scoping this out (as opposed to actually publishing data in this area) by September 2022.

***Question 3: Does the Council agree that we should take forward the Group 2 actions above on an ongoing basis or as needed, adjusting the scheduling as relevant at the time?***

***Question 4: Does the Council agree that despite being medium priority, there are three areas of work (in relation to potentially amending the Imposition guideline, scoping out work with offenders on effectiveness and scoping out work on local area data) that we should start work on by September 2022?***

#### Other potential future work

3.21 The work that does not arise from vision responses, but we will need to schedule in at some point in the future include:

- Evaluations of seven current guidelines that have been in force from 2018 and long enough to “bed down” in practice<sup>4</sup> (note that there will be more than seven over time as the Council continues to develop new guidelines).

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<sup>4</sup> This covers evaluations of guidelines for manslaughter, domestic abuse, child cruelty, mental health, public order, arson and criminal damage and intimidatory offences.

- Publication of data collected as part of earlier data collections (in particular we had scheduled in work on publication of data on robbery offences for later in 2021).
- Further work on consistency, in particular on a methodology for this (this complex area is the subject of a Council report which will be published in June; in that report we flag the need for more work in this area).
- Re-running some of the public confidence survey questions that were covered as part of the previous ComRes research to provide a measure of any changes over time.
- Consideration of how best to present our statistical work, both to the Council and externally on the website.

3.22 Given the core work we are already committed to, along with the high priority actions outlined above, it will not be possible to take forward the above work immediately. We would therefore propose the following, some of which we have already discussed at previous Council meetings (the exact timing of these will also be subject to office staffing resources at the time):

- That we deprioritise some of the evaluation work in order to focus on our core work and the more immediate actions for the analytical team of scoping out new data collections, procuring research work and working on a publishable digest of research on effectiveness in sentencing. We will, however, prioritise an evaluation of expanded explanations as this is high priority, and attempt to schedule in work on evaluations of both the manslaughter and intimidatory guidelines at some point in 2022 (the rationale being that an evaluation of manslaughter will be largely transcript led and so a relatively small piece of work, and that as we have asked magistrates to collect data for us on some intimidatory offences, it is important that we are able to publicly feedback the findings from this as soon as possible).
- That we aim to prepare and publish the robbery data within the first six months of 2022; thereafter we will only publish data alongside the publication of an evaluation report. This means that we will build up a backlog of unpublished data but in the March Council meeting it was agreed that this work should not be prioritised over other analytical work.
- That we continue to look into furthering our work in the area of consistency in sentencing (given that this is a statutory duty for the Council), but that we pick this up in 2022, as resources permit.

- That we agree to re-run the public confidence questions but that we consider further the best timing for this.
- That we make no firm agreements at this stage on how best to present our statistical work in the future and that we consider this further in discussion with the Analysis and Research subgroup later this year (some of this will also depend on our ability to hire in resource for this – for example, a fixed term digital officer who could help develop tools for this type of data).

3.23 If the Council does not agree with some of the above timings/ prioritisation, we would need to either drop or slow down some of the higher priority work, explore ways in which we could more quickly increase the resources of the Council, or slow down the pace of current guideline development work. If any of these were felt to be an option, we would need to consider the overall workplan again and return with suggestions of which areas or guidelines to deprioritise.

***Question 5: Does the Council agree with the prioritisation and scheduling of the future (non vision) work as set out above in paragraph 3.22?***

*Group 3 actions: Low priority vision actions and work requiring no further action*

3.24 There were a number of recommendations that came through in Vision responses that the Council considered were more low priority:

- The need to be clearer that we cannot provide sentencing remark transcripts to external parties. It was agreed that we would explain the reasons for this on the website and provide information on accessing transcripts.
- The need to be clearer about how the Council takes account of consultation responses, possibly by way of a blog post on the website or a video.
- More analysis of the impact of multiple offences on sentencing outcomes and a review of the data and potential methodologies for this.

3.25 If the Council still feels these are low priority actions, we will note them and revisit them when we look again at priorities.

3.26 The recommendations from the consultation that the Council has flagged for no further action are:

Vision actions requiring no action	Comments
Seek wider public views as part of consultations	Members of the public are already able to respond to consultations and we do at times conduct research with the public. We are also currently reviewing the reach of our consultations with audiences that we do not routinely hear from. It was agreed that no further work to extend our reach to the general public is needed.
Review the way in which the Council addresses its duties in relation to sentencing and non-sentencing factors as part of the annual report	Although a small number of respondents flagged the need for this, there are difficulties with the data in this area and it is hard to isolate the impact of the guidelines specifically over and above other aspects of the criminal justice system that may also have an impact (e.g. remand decisions, parole decisions etc). The work is also time consuming. The Council therefore agreed that the current approach is a proportionate approach and should be retained.
Undertake a survey to establish what future guidelines/ guidance might be necessary	Given that the consultation itself asked questions about this, that the Council already has a full workplan, and it is also reviewing the criteria for developing/ revising guidelines, it was agreed that there would be no value in seeking further views in this area.
Undertake more work in the areas of promoting consistency in sentencing, the impact of sentencing decisions on victims and promoting public confidence in the criminal justice system	The Council discussed responses to the question that was asked in the consultation. Specific areas are already being actioned (e.g. in relation to public confidence and consistency) and so it was felt that no further work was needed at this stage.
Information should be published on the costs of sentencing	The Council agreed that this would not be appropriate as the cost of a sentence is not a consideration that is taken into account when deciding on a suitable sentence. Publication of data in this area could also be misleading without suitable context. It was agreed that this information should not be published but that we would provide information on the reasons behind this decision as part of the consultation response document.
Guidelines need to embed more information on the considerations in relation to effectiveness in sentencing. An additional step could be added into guidelines to remind sentencers to consider their sentence in the round in terms of relative effectiveness	The Council did not agree to take this forward but instead proposed that the Imposition guideline should be reviewed and text added into that to more explicitly flag these issues.
The Council should produce guidelines in plain English and alternative formats	The Council did not want to take forward this action as it felt it would not be appropriate and it would be too resource intensive. Instead it proposed that a more simplified, accessible, introduction should be added into all consultation documents which is being actioned.
The Council should become more proactively involved in public and	Some respondents called for this. However, the Council did not think this was appropriate given its role and remit

parliamentary debates on sentencing	and there was the risk of being drawn into individual cases or political debates. However, it did agree that there should be periodic appearances at the Justice Select Committee and that we should offer briefing sessions for MPs if required.
The Council should extend their use of Twitter and other social media	The Council considered that our existing approach to Twitter is the correct. To use the channel to engage more with other users would be a higher-risk strategy and could lead us to being drawn into discussing specific cases, government sentencing policy, political issues etc. It would also be very resource intensive for the Office. We will, however, continue to consider the potential of other social media channels to reach our audiences.

**Question 6: Is the Council content that the above areas (outlined in paragraph 3.24) should remain as low priority areas?**

**Question 7: Is the Council content that the above areas (outlined in paragraph 3.26) should be areas for no further action?**

*Future work*

3.27 Beyond autumn/ winter 2022, the timings for work are less firm. We will need to regularly review workloads and capacity and adjust timescales accordingly. It should also be noted that work that will take place between now and the end of 2022 will also to some extent dictate our capacity in the longer term. For example, if the scoping of future data collections suggests that we should return to a census approach, and if we cannot extract all the data we need from the Common Platform, the resources needed to implement and analyse future collections will be far greater. Likewise, if the evaluation of the expanded explanations suggests that more guidance is needed on female offenders or young adults (areas flagged by Vision respondents), then we may need to schedule in specific guideline work in these areas, which may take resources away from elsewhere. Any cuts in budget or staff vacancies will also have an impact on resources. In addition, we have two members of staff in the analytical team on fixed term contracts; if we cannot replace this resource within the team then we will need to slow down some of our work.

*Summary*

3.28 This paper has outlined a number of areas of additional work, some of which are of high enough priority to warrant reprioritising other aspects of the workplan in order to accommodate them. However, there are some actions (those covered in groups 2 and 3) that we will not be able to take forward immediately or that we will need to consider on a

case-by-case basis. This is based on us retaining the current staffing input into the Council's core work (estimated to be 90% of the Policy team's time, 80% of the Communication team's time, and 75-80% of the Analysis and Research team's time). If, however, the Council wishes to take forward some of the actions in these groups more quickly, then we will need to reconsider the overall workplan and adjust the input into the core work.

***Question 8 : Is the Council content to retain the estimated input into core work and to schedule in further work in relation to this?***

3.29 It will also be important to build in reviews of the workplan to ensure that we can revisit priorities on a regular basis. We suggest that we formally review this with the Council twice a year.

***Question 9: Is the Council content to review workplan priorities twice a year?***

#### **4 IMPACT AND RISKS**

4.1 Although we have prioritised the actions arising from the vision consultation, the additional work on top of our core work still poses potential capacity issues. This will be particularly problematic if we lose any members of staff or experience any budget cuts. A regular review of the workplan will help to mitigate this and build in any necessary revisions.

4.2 It will be important to ensure that we provide a full and justified explanation in the consultation response document for all the decisions that have been made. If not, this may attract criticism that the Council has not fully taken account of the views put forward and is not being responsive to recommendations. This could undermine confidence in the Council and the decisions it takes.

**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**21 May 2021**  
**SC(21)MAY06 – Modern Slavery**  
**Rosina Cottage**  
**Ollie Simpson**  
**07900 395719**

## **1 ISSUE**

1.1 Considering responses to the consultation on new Modern Slavery guidelines, which ran between October 2020 and January 2021.

1.2 We received 28 responses, 15 of which were from magistrates plus a response from the Magistrates' Association; we also received responses from the Home Office and Ministry of Justice, the Justice Select Committee and the All-Party Parliamentary Group for Human Trafficking and Modern Slavery. The full list of respondents is at **Annex B**. In addition, during the consultation period we conducted road testing with 16 Crown Court judges whose views on the guidelines have been fed into the consideration below.

1.3 We held two working group meetings in April to discuss the findings of the consultation and road testing, and I thank working group members for their invaluable contribution to the proposals set out here. If we can agree any changes to the draft guidelines at this meeting and June's, the definitive guidelines can be published at the end of July to come into force on 1 October.

1.4 The draft section 1/section 2 guideline consulted on with the amendments proposed in this paper is at **Annex A**.

## **2 RECOMMENDATION**

2.1 That the Council makes the amendments to the draft guideline as set out below and in **Annex A**, in particular that:

- the guideline should reflect the particular seriousness of sexual exploitation in category 2 harm;
- we retain four categories of harm, but move "Exposure of victim(s) to high risk of death" to the highest category; and
- all but one of the sentencing levels for category C culpability cases be lowered.

## CONSIDERATION

2.2 All respondents agreed with our approach of combining sections 1 and 2 of the Modern Slavery Act 2015 into one guideline, with a brief guideline for committing an offence with intent to commit a modern slavery offence. One respondent did, however, believe that a separate bespoke guideline for breach of a Slavery and Harm Prevention Order (SHPO) should be made, rather than relying on comparable breach offences (and another response appears to agree with this).

2.3 The major practical issue with drawing up a bespoke breach guideline would be the need to go out for consultation again, even if it was a limited one. This would delay publication of the guidelines on sections 1 and 2 which are now anticipated. Given the low volumes for the breach offence (six from 2017 to 2019) I believe our initial argument for not preparing a standalone guideline but directing sentencers to analogous breach guidelines can stand. This can be reviewed if there is evidence of a problem.

### *Culpability factors*

2.4 For both culpability and harm factors several respondents and road testers asked about the difference in gradation between levels, so for example in our proposed culpability table: “substantial” (Category A) vs “significant” (Category B) financial advantage. Another response asked whether the different levels of threat presented here were too subjective.

2.5 There will always be an element of subjectivity with regard to these terms. Currently, in sexual trafficking and prostitution guidelines the highest culpability refers to expectation of “significant” financial or other gain, but it is not mentioned in other categories. Bribery mentions “substantial” financial gain at Culpability A, while the latest drugs guidelines follow the formula “substantial” (Category A), “significant” (Category B) and “Limited, if any” (Category C). These respondents made similar points in relation to the assessment of harm. On balance I do not believe a change is necessary to either harm or culpability descriptors.

2.6 Two respondents (both magistrates) asked whether threats made to families should place an offender in Culpability A. In practice, if the threats made to families were very serious in terms of physical or sexual violence, a sentencer could consider these as higher culpability. From transcripts I have not seen any examples of this. Our prime intention is to capture the worst cases where victims are intimidated by violence into remaining in slavery or servitude to the offender, but it is easy to imagine a victim being intimidated into submission if they knew their family was being threatened.

2.7 For complete avoidance of doubt the working group agreed we should add something in Category A, similar to the factor “Other threats towards victim(s) or their families” in Category B. One option is to add this to the existing factors - So “Use or threat of



a substantial degree of physical violence” would become “Use or threat of a substantial degree of physical violence **towards victim(s) or their families**”, and “Use or threat of a substantial degree of sexual violence or abuse” would become “Use or threat of a substantial degree of sexual violence or abuse **towards victim(s) or their families**”. However, that would be different to the formulation at Category B which lists “other threats” separately. Another option would be to say “Other similar threats towards victim(s) or their families” at Category A, referring back to the substantial use or threat of violence just listed.

**Question 1: Do you agree to have a Culpability A factor to reflect threats made towards victims’ families? If so, which of the above options would you prefer?**

#### *Harm factors*

2.8 The majority of respondents were broadly content with the harm table, but a few respondents (all magistrates) suggested that it should be constructed of three categories, rather than the four we have proposed. Our approach (in broad terms) took the previous levels from the s59A Sexual Offences Act 2003 sexual exploitation guideline and added a higher level to capture the most serious cases. This reflected the parliamentary intention that the increase in maximum penalty from 14 years to life imprisonment should capture the most serious cases.

2.9 Simply amalgamating the top two harm categories would lead to a very broad sentencing range. It is likely that a large number of offenders could be categorised as A1 or B1 and face sentences of over 10 years (using our current sentencing levels).

2.10 The West London Magistrates Bench asked how “Exposure of victim(s) to high risk of death” could be anything but Category 1, a point raised by Council members ahead of consultation. I propose to leave four categories, but add “Exposure to high risk of death” to Category 1 to mark those cases out as amongst the worst.

**Question 2: do you agree to maintain four levels of harm? If so, do you agree that “Exposure of victim(s) to high risk of death” should be included in the highest category?**

2.11 At least one road tester considered sexual exploitation to be a particularly culpable offence compared to other forms of modern slavery, arguably on a par with rape. Related to this, the Magistrates Association thought that there should be a specific harm factor of sexual harm.

2.12 The working group considered this in some depth. On the one hand, it has been a guiding principle that we do not elevate certain forms of exploitation over others, and Parliament has not legislated in this way. On the other hand, sexual exploitation is a

particularly heinous form of slavery and it is likely that the courts are going to seek to reflect that harm in sentencing.

2.13 The working group concluded that we should reflect the serious nature of sexual exploitation in some way in the guideline, and the most appropriate place to do this would be under harm. The section 59A guideline has the harm factors “Victim(s) forced or coerced to participate in unsafe/degrading sexual activity”, “Victim(s) forced/coerced into prostitution”, and “Victim(s) tricked/deceived as to purpose of visit”. Amalgamating these, we considered adding the following as a harm category 2 factor:

- “Victim(s) tricked or coerced into serious sexual activity”

“Serious” is intended to distinguish between sexual harassment which might take place incidentally to (say) domestic servitude and more commercial sexual activity, whether full prostitution or otherwise. We believe the phrase is well understood, but are aware that there may be better alternatives.

**Question 3: do you want to add “victim(s) tricked or coerced into serious sexual activity” added as a harm category 2 factor?**

2.14 Both the Home Office and the Ministry of Justice wanted the Council to consider the fuller harms caused by modern slavery, directing us to the 2018 Home Office report ‘The Economic and Social Costs of Modern Slavery’ (available at <https://www.gov.uk/government/publications/the-economic-and-social-costs-of-modern-slavery>).

2.15 The report assesses the “unit cost” of modern slavery (i.e. the harm caused to an individual, measured in monetary terms) as being £328,720. Aside from the costs to healthcare and criminal justice, and otherwise lost output, the bulk of this cost for modern slavery victims is in physical and emotional costs, arrived at by considering the annual quality of life reduction of the harms typically caused to victims, noting their likelihood and duration, and calculating these as a proportion of the “value of a year of life at full health” (estimated at £70,000 in 2018 prices). The same methodology finds only the unit cost of homicide (£3.2 million) to be higher than modern slavery, with the next costliest being rape (£39,360).

2.16 Following discussion in the working group, we consider that we do take into account the broader harms of modern slavery in setting relatively high sentencing levels, even for lower culpability offenders. We can therefore use the consultation response document to highlight those broader costs and be clear that our sentencing levels reflect that.

2.17 The Home Office also asked whether “duration of time” should be counted in step one under harm, rather than as an aggravating factor as we initially proposed. This question was also raised in road testing. This is similar to the difficulties in assessing harm caused to different numbers of people – we already say before the harm table “If the offence involved multiple victims, sentencers may consider moving up a harm category or moving up substantially within a category range.” We could therefore add “...involved multiple victims, **or took place over a long period of time**, sentencers may....” although we would have to consider whether to keep it as an aggravating factor as well.

**Question 4: do you want to include duration alongside multiple victims in the harm table?**

2.18 The Justice Select Committee suggested that the use of the word “loss” does not adequately capture the nuances of the financial harm caused to a victim of modern slavery and that a phrase other than “loss” may work better. This appears to be getting at the fact that victims may not have had money to lose, and the exploitation of their labour for very little gain is not captured by the word “loss”. One road tester asked whether the guideline sufficiently covered “bonded labour” where living conditions are acceptable but all earnings are taken by the offender. I believe this aspect of harm is covered here, but I propose that we amend “financial loss” in the harm table to “financial loss/disadvantage”.

**Question 5: do you want to amend the wording around “financial loss” to “financial loss/disadvantage”?**

*Sentencing levels*

2.19 Overall, respondents to the consultation thought that the sentencing levels were right. Reflecting this, although judges in road testing sometimes gave quite different sentences before using the guideline compared to after, they generally viewed the sentences arrived at using the guideline as about right, with some exceptions.

2.20 Two respondents questioned whether a community order could ever be appropriate for a modern slavery offence, even at the lower end of seriousness. However, contrary to this the Howard League questioned whether at the lower end of culpability the sentencing levels were too high.

2.21 Two of the scenarios we road tested involved lower culpability offenders alongside leading figures: one a handyman involved in a forced labour case, and one a submissive partner in a domestic servitude case who had showed some sympathy for the victim. For the handyman, roadtesters generally gave a slightly higher sentence with the guideline than

without: some were content, others were concerned that their sentences (generally around four years' custody) were too high given the offender's culpability.

2.22 For the submissive partner, some road testers felt that although she played a more minor role she nonetheless knew what was going on, imposing a sentence deliberately beyond the possibility of suspension. Others placed more emphasis on coercion and other mitigating features and deliberately pushed sentences below two years' imprisonment in order to suspend (which was the case for three of the six road testers). Although views were mixed, then, overall some contortions were required to arrive at a "fair" sentence to reflect low culpability. Partly this is down to the ruthless logic of assigning the same level of harm between a group of offenders, even where roles are different.

2.23 The Howard League also asked us to consider the implications for child offenders: they suggest a child sentenced as Category 3 would receive a sentence of two to three years' custody (presumably based on the overarching guideline for Sentencing Children and Young People saying "*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*"). I doubt this would be the case: four years is the starting point for adult 3C offenders and the Sentencing Children and Young People guideline is clear that the half to two-thirds calculation is not to be applied mechanistically.

2.24 Nonetheless, there is a point about people who have been coerced, may be vulnerable, and/or have little idea about the operation nonetheless receiving lengthy custodial sentences. It is very hard to conceive of a very high harm low culpability offender in this area but we need to provide for the possibility. I would therefore propose a reduction in at least some of the Category C starting points, but keep the upper limit of ranges relatively high above those starting point to allow for cases where an offender, despite being low culpability, did involve themselves knowingly in a harmful slavery operation.

2.25 For comparison here are the current section 59A Trafficking for Sexual Exploitation sentencing levels:

Harm	Culpability		
	A	B	C
Category 1	<b>Starting Point</b> 8 years' custody <b>Category Range</b> 6 - 12 years' custody	<b>Starting Point</b> 6 years' custody <b>Category Range</b> 4 - 8 years' custody	<b>Starting Point</b> 18 months' custody <b>Category Range</b> 26 weeks' - 2 years' custody

<b>Category 2</b>	<b>Starting Point</b> 6 years' custody <b>Category Range</b> 4 - 8 years' custody	<b>Starting Point</b> 4 years' custody <b>Category Range</b> 2 - 6 years' custody	<b>Starting Point</b> 26 weeks' custody <b>Category Range</b> High level community order - 18 months' custody
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2.26 The starting point and range for our proposed Category 4C is identical to that of the lowest category of the current section 59A guideline, and I would propose to keep this the same (starting point: 26 weeks; range: high level community order to 18 months). Our draft categories 2C and 3C, however, are significantly higher than the section 59A category 2C (six and four year starting points with an overall range of three years to eight years, compared to an 18 month starting point and a range of 26 weeks to two years). And obviously the proposed 1C range is far above that. I suggest reducing the Culpability C levels as follows to bring them slightly more with the current s59A levels:

Harm	Culpability		
	A	B	C
<b>Category 1</b>	<b>Starting Point</b> 14 years' custody <b>Category Range</b> 10 - 18 years' custody	<b>Starting Point</b> 12 years' custody <b>Category Range</b> 9 - 14 years' custody	<b>Starting Point</b> 9 years' custody <b>Category Range</b> 8 years' custody 7 - 11 years' custody 6 - 10 years' custody
<b>Category 2</b>	<b>Starting Point</b> 10 years' custody <b>Category Range</b> 8 - 12 years' custody	<b>Starting Point</b> 8 years' custody <b>Category Range</b> 6 - 10 years' custody	<b>Starting Point</b> 6 years' custody <b>Category Range</b> 4 years' custody 5 - 8 years' custody 3 - 7 years' custody
<b>Category 3</b>	<b>Starting Point</b> 8 years' custody <b>Category Range</b> 6 - 10 years' custody	<b>Starting Point</b> 6 years' custody <b>Category Range</b> 5 - 8 years' custody	<b>Starting Point</b> 4 years' custody <b>Category Range</b> 2 years' custody 3 - 6 years' custody 1 - 4 years' custody
<b>Category 4</b>	<b>Starting Point</b> 5 years' custody	<b>Starting Point</b> 3 years' custody	<b>Starting Point</b> 26 weeks' custody

	<b>Category Range</b> 4 - 7 years' custody	<b>Category Range</b> 1 - 5 years' custody	<b>Category Range</b> High level Community Order – 18 months' custody
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**Question 6: do you agree that we should reduce the lower culpability starting points and ranges as proposed?**

*Aggravating and mitigating factors*

2.27 A recurring theme in responses was the question of victims under 18. Two magistrates from the Central Kent Bench suggested this should be reflected in high culpability, although other respondents considered that it should be an aggravating factor. In either case it would be particularly pertinent in county lines cases (noting that the West Kent Magistrates Bench wished to see a greater emphasis in the guideline on this sort of offending). The current section 59A sexual trafficking guideline includes “Victim(s) under 18” as a Category 1 Culpability factor.

2.28 Of almost 30 transcripts we have analysed, four involved child victims: three involved transporting underage girls for sex (none on a commercial basis), and one was a county lines case. In all cases the offenders were themselves very young. This is likely to be true in many county lines cases where the offenders may also have been the victims of exploitation. I am therefore reluctant to make this a step one factor. However, we could amend the existing aggravating factor “Deliberate targeting of particularly vulnerable victims” (which arguably already covers child victims) to “Deliberate targeting of victim who is particularly vulnerable (due to age or other reason)”.

**Question 7: do you want to amend this aggravating factor to “Deliberate targeting of victim who is particularly vulnerable (due to age or other reason)”?**

2.29 One magistrate respondent from the West London Bench said:

*“Some of the aggravating factors are almost inherent in the nature of the offence - victims will usually be isolated and prevented from obtaining assistance; equally the victims will almost certainly be venerable [sic] - this tends to be the nature of these offences. therefore, these factors will almost certainly be present and should be included as a given and only there [sic] absence should be considered as a mitigation.”*

2.30 There is a case that some of the aggravating factors may result in a large proportion of these offences being increased from the starting point. The Home Office suggested that some of the aggravating factors such as “duration of harm” or “deliberate isolation” or

“targeting of particularly vulnerable victims” could move to step one, and I already propose to mention duration under the preamble to the harm table (see para 2.17 above).

2.31 Reflecting on these points, whilst most of our proposed aggravating factors are reasonable, it would be possible to delete the words in A2 as follows:

- ~~Deliberate isolation of the victim, including steps taken to prevent the victim reporting the offence or obtaining assistance (above that which is inherent in the offence)~~

making this factor more specifically about preventing victims obtaining help. Degradation, the targeting of vulnerability, removal of ID documents and restraint of the victim remain as other aggravating factors.

**Question 8: do you want to amend the wording of this aggravating factor as proposed?**

*Further steps*

2.32 We consulted on proposed wording in relation to slavery and trafficking reparation orders, under the ancillary orders step. Most respondents to the consultation were content with and welcomed the proposed wording.

2.33 One respondent pointed out that, although rare, these cases may be sentenced in the magistrates court so suggested that the wording: *“In every eligible case, the court must consider whether to make a slavery and trafficking reparation order, and if one is not made the judge must give reasons”* be amended to refer to “presiding justices”. However, I suggest a simpler amendment to cater for this highly unlikely event would be:

*“In every eligible case, the court must consider whether to make a slavery and trafficking reparation order, and must give reasons if one is not made”.*

**Question 9: do you agree to amend the wording on reparation orders in this way?**

### **3 EQUALITIES**

3.1 The consultation asked:

- Do you consider that any of the factors in the draft guidelines, or the ways in which they are expressed could risk being interpreted in ways which could lead to discrimination against particular groups?
- Are there any other equality and diversity issues the guidelines should consider?

Most respondents had no comments on these questions. A few made points beyond the scope of guidelines (for example, whether the Modern Slavery Act 2015 was the best way of prosecuting young county lines offenders, and enshrining survivors’ rights in law, and the

suitability of the court layout for disabled defendants and witnesses). One respondent wanted us to consider forced marriage, but this appears to be a separate issue.

3.2 One magistrate respondent asked us to consider specific categories of people as victims. I doubt we could go as far as listing these groups in (say) an aggravating factor, but we already have “Deliberate targeting of particularly vulnerable victims” and are considering adding something about age to this. We are also considering how best to reflect the seriousness of sexual exploitation, which is likely to affect female victims predominantly. I think this point is therefore covered.

3.3 The Howard League said this in response to the first question:

*“The proposed guideline does not appear to include any particular warnings about the need to avoid bias, such as that at paragraph 1.18 of the children’s guideline or paragraph five of the mental health guideline. A general warning will support practitioners to draw the risk of discrimination to the court’s attention where appropriate.*

*While convictions are currently too low to draw firm conclusions about bias in sentencing, if more prosecutions for county lines exploitation are brought under the Modern Slavery Act, there is a risk of sentences under the Modern Slavery Act importing racial bias that exists in the use gang intelligence and drug sentencing. The Sentencing Council should take steps to prevent this.*

*The guideline should caution against the risk that intelligence concerning gang membership will be given undue weight given the known risk of bias.”*

This is clearly a matter that the Council is dedicating increasing attention to. However, the Howard League are correct that conviction/sentencing rates are too low for this offending to draw firm conclusions about sentencing trends with regard to different demographics of offenders. A general warning along the lines they suggest may be an idea, but one that the Council would have to consider across the board for guidelines. In any case, the guideline will start with a reference and link to the Equal Treatment Bench Book, as all definitive guidelines do now.

3.4 I do not propose at this stage adding any warning like this in the absence of evidence of any discrepancies. Equally, the guideline does not mention gang membership, rather referring to “Large-scale, sophisticated and/or commercial operation” as an aggravating factor. Rather this sort of consideration can be picked up as part of the Equality and Diversity working group’s broader work.

**Question 10: do you agree not to make any specific amendments in light of responses to the questions on equality and diversity?**



#### **4 IMPACT AND RISKS**

4.1 We will present a revised resource assessment to Council next month ahead of finalising the guideline, setting out the expected impacts of the guideline as revised in light of consultation responses.

4.2 There is the potential to misinterpret any elevation of sexual exploitation above other forms of exploitation, although the revised harm table should still allow for sentencers to reflect the serious harms caused by (for example) domestic servitude or manual labour.

4.3 Some groups may be concerned about the decrease in sentencing levels for low culpability offenders. We can explain the reasoning behind this in the consultation response document, making the point that sentencing levels for this category are still higher than under the existing section 59A guideline.

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**Sentencing Council meeting:**  
**Paper number:**

**21 May 2021**  
**SC(21)MAY07 – Miscellaneous guideline  
amendments**

**Lead Council member:**  
**Lead official:**

**TBC**  
**Ruth Pope**

## **1 ISSUE**

1.1 The Council agreed at the January meeting that it would be useful to have an annual consultation on overarching issues and miscellaneous minor updates to guidelines.

1.2 This paper sets out the current issues that could be addressed by such a consultation. In addition, the Council will be asked to consider how this review and consultation process should be managed this year and in the future. This is the first of two meetings to discuss this; a follow-up paper will be presented at the July meeting.

## **2 RECOMMENDATION**

2.1 That the Council agrees whether to propose the changes outlined at 3.1 (a) to (f) below and consult on them.

2.2 That the Council considers whether changes can be made to guidelines to take account of recent legislative changes as part of this consultation or whether these should be a separate project.

2.3 That the Council agrees a timetable for this and future miscellaneous consultations.

## **3 CONSIDERATION**

3.1 In summary the matters that have been brought to our attention or have come to our notice are:

- (a) [Breach of SHPO](#): Should a note be added to step 6 of the guideline to make clear that it is not open to the court to vary the SHPO or make a fresh order of its own motion for breach?
- (b) Should the ancillary orders step in all relevant guidelines be amended to read: 'In all cases, the court should consider whether to make compensation and/or other ancillary orders. The court must give reasons if it decides not to order compensation ([Sentencing Code, s.55](#))'?
- (c) [Speeding](#): Should the reference to disqualifying for 7-56 days be changed to 7-55 days to avoid the need to reapply for a licence?

- (d) Drink-driving calculator: Should the calculator reflect the [guidance in the explanatory materials](#) that the reduction should be one week per month or should the guidance be changed so the reduction is 25 per cent (the maximum permitted by law)?
- (e) Racially or religiously aggravated offences: Should the uplift for racial/ religious aggravation be a separate step (as has been done in the new assault guidelines) in -
- [criminal damage \(under £5,000\)](#) and [criminal damage \(over £5,000\)](#)
  - [s4, s4A](#) and [s5](#) Public Order Act offences
  - [harassment/ stalking](#) and [harassment/ stalking \(with fear of violence\)](#)?
- (f) Should the expanded explanation for the mitigating factor 'Involved through coercion, intimidation or exploitation' be revised?
- (g) Recent legislation: Two pieces of legislation that relate to existing sentencing guidelines have recently been given royal assent: the [Domestic Abuse Act 2021](#) and the [Animal Welfare \(Sentencing\) Act 2021](#).

*Breach of a sexual harm prevention order*

3.2 In [McLoughlin \[2021\] EWCA Crim 165](#) the judge at first instance had purported to vary a sexual harm prevention order (SHPO) when dealing with a breach of that order. The CACD noted:

[26] There was no power in the judge to make a fresh sexual harm prevention order upon the convictions sustained by [the appellant]. The offences of which he was convicted are not listed in the relevant Schedules of the Sexual Offences Act 2003. [27] For an existing sexual harm prevention order to be amended an application has to be made to the appropriate court for an order. The people who can make such an application are strictly defined within the Sexual Offences Act 2003. For our purposes, the relevant person is the Chief Officer of Police for the area in which the defendant resides. No such application was made. The judge, for what we can see were entirely understandable reasons given the way in which the trial had developed, in effect made the amendments on his own motion. He had no power to do so.

3.3 The [breach of SHPO guideline](#) does not suggest that such a power exists but the Council may consider it helpful to include a note for the avoidance of doubt. The proposal is to amend step 6 of the guideline to read (additional wording highlighted):

## Step 6 – Ancillary orders

In all cases the court should consider whether to make compensation and/or ancillary orders.

- [Ancillary orders – Magistrates' Court](#)
- [Ancillary orders – Crown Court Compendium](#)

**Note:** when dealing with a breach of a sexual harm prevention order, it is not open to the court of its own motion to vary the order or to make a fresh order.

### Question 1: Should the breach of SHPO guideline be amended as proposed?

#### *Compensation*

3.4 An article in the New Law Journal (171 NLJ 7927, p19) referred to the provisions regarding making compensation orders consolidated (with minor amendments) into the Sentencing Code. The author noted that sentencing guidelines do not include a specific reference to the duty to give reasons if a compensation order is available but is not made.

3.5 The proposal is to use the following wording in at the ancillary orders step of all relevant guidelines (additional wording highlighted):

In all cases, the court should consider whether to make [compensation](#) and/or other ancillary orders. **The court must give reasons if it decides not to order compensation ([Sentencing Code, s.55](#)).**

### Question 2: Should guidelines include a reminder to give reasons where compensation is not awarded?

#### *Speeding*

3.6 The [speeding guideline](#) contains a table and text as shown below:

Speed limit (mph)	Recorded speed (mph)		
20	41 and above	31 – 40	21 – 30
30	51 and above	41 – 50	31 – 40
40	66 and above	56 – 65	41 – 55
50	76 and above	66 – 75	51 – 65
60	91 and above	81 – 90	61 – 80
70	101 and above	91 – 100	71 – 90
<b>Sentencing range</b>	<b>Band C fine</b>	<b>Band B fine</b>	<b>Band A fine</b>
<b>Points/disqualification</b>	<b>Disqualify 7 – 56 days OR 6 points</b>	Disqualify 7 – 28 days OR 4 – 6 points	3 points

- Must endorse and may [disqualify](#). If no disqualification impose 3 – 6 points

- **Where an offender is driving grossly in excess of the speed limit the court should consider a disqualification in excess of 56 days.**

3.7 A magistrates' court legal adviser pointed out that the reference to 7-56 days disqualification is potentially misleading. A disqualification of up to 55 days does not require the offender to reapply for a licence, whereas one for 56 days or more does. The suggestion is that the reference to disqualifying for 7-56 days be changed to 7-55 days and the wording below the table be changed to 'Where an offender is driving grossly in excess of the speed limit the court should consider a disqualification of 56 days or more'.

### **Question 3: Should the speeding guideline be amended as outlined above?**

#### *Drink-driving calculator*

3.8 The Council has recently piloted a drink-driving disqualification calculator on the website. The pilot has now ended and the calculator has been taken down pending review. Members can still access it via this link:

<https://www.sentencingcouncil.org.uk/drink-driving-calculator-private/>

Password: extra.bands.deputy

Then click the link to go to the calculator page

3.9 The calculator is a tool rather than a guideline and so, while we have developed it with input from users and more recently have sought feedback from users on the pilot, it is not something that we would formally consult on.

3.10 Feedback was generally positive with users saying that it was practical, clear, well laid-out and easy to use. However, several users including the Justices' Clerks' Society (JCS) have pointed out that the method the calculator uses is different from the guidance we give in the [explanatory materials to the MCSG](#) which says:

The reduction must be at least three months but cannot be more than one quarter of the total period of disqualification:

- a period of 12 months disqualification must be reduced to nine months;
- in other cases, a reduction of one week should be made for every month of the disqualification so that, for example, a disqualification of 24 months will be reduced by 24 weeks.

3.11 It is the second bullet point in the guidance which is at odds with the calculator (or vice versa). The guidance has been in force for many years and it is assumed that the use of one week per month (for disqualifications other than 12 months) rather than the 25 per cent which is the maximum allowed by statute ([s34A of the Road Traffic Offenders Act 1988](#)) was to make the reduction easier to calculate if doing it manually. The calculator, on the other hand, reduces the period by 25 per cent in all cases. Obviously the guidance and the

calculator will need to be consistent. The guidance in the explanatory materials is not strictly speaking covered by the statutory duty on courts to follow sentencing guidelines but in practice it is treated by magistrates' courts as part of the guidelines and the Council always consults on significant changes to the explanatory materials. The JSC instructed legal advisers to calculate the reduction in accordance with the guidance in the explanatory materials rather than use the calculator.

3.12 Other issues that have been noted in feedback are:

- the calculator asks for the period of disqualification to be entered in days, months or years whereas in the [drink-driving guideline](#) disqualification periods are always expressed in months (although for other offences days might be used);
- the calculator asks for the length of a custodial sentence to be entered in days, months or years whereas magistrates' courts normally (but not universally) express custodial sentences in weeks (although it is possible that some periods would need to be expressed in days);
- the calculator expresses the length of the reduction and disqualification in days and also in years, months and days. Some users found it confusing that depending on the start date, the conversion from days to years, months and days varied.

3.13 The pronouncement card (provided by the Judicial College) that magistrates use when disqualifying from driving states:

#### **Disqualification – general**

You are disqualified from driving for ..... days/weeks/months/years. This means you cannot drive any motor vehicle on a road or public place from this moment until the end of your disqualification. If you drive while disqualified, you will commit a serious offence and you may be sent to custody and disqualified again.

[If the disqualification is 56 days or more](#) – You must apply to the DVLA for a new photocard licence if you wish to drive once your disqualification has ended. You should not drive until you have received your new photocard licence. [Where a photocard licence has not been surrendered to the court] Your current photocard licence is no longer valid and you must send it to the DVLA.

[If you are a high risk offender](#)– You must satisfy the DVLA that you are medically fit to drive again. You will need to complete, and pay for, a medical assessment including blood tests.

[If the disqualification is for 55 days or less](#) – The disqualification will be noted on your DVLA driving record. You do not need to hand in your photocard licence, but it is not valid until the disqualification has ended.

[If an immediate custodial sentence is imposed](#) – The period of your disqualification will be extended to take into account the custodial sentence imposed.

Do you understand?

[\[If applicable consider any ancillary orders and/or compensation\]](#)

[\[If applicable consider drink-driving rehabilitation course\]](#)

3.14 Additionally if offering the drink-driving rehabilitation course the pronouncement is:

**Drink-driving rehabilitation courses**

We are offering you the opportunity to reduce the period of your disqualification by ..... weeks if you successfully complete a drink-driver rehabilitation course by .....

This course will last at least 16 hours spread over a number of days. You will have to pay the cost of the course.

If you wish to have the opportunity of reducing your disqualification you must tell us now. It cannot be offered later. You are not forced to attend the course but if you do not attend and complete it, to the satisfaction of the course organisers, you will have to serve the whole disqualification.

Do you agree to attend the course?

3.15 The calculator was designed to give the sentencer the information necessary to make the relevant pronouncements (although the pronouncements are not set in stone). We are developing a pronouncement card tool for the website which in time could allow the results of the calculation to be fed into the pronouncement.

3.16 **Annex A** contains some options for amending the calculator to take account of the points raised.

3.17 If the calculator were to be amended to be consistent with the explanatory materials there would be no requirement to consult on any presentational changes to the calculator – these could be made following informal discussions with users. If, however, the calculator were to continue to use a 25 per cent reduction in all cases, the explanatory materials would need to be amended and that would require consultation.

**Question 4: Should the reduction in disqualification for completion of the drink-driving rehabilitation course be calculated on the basis of 25% or on the basis of one week per month?**

**Question 5: Should the presentation of the calculator be simplified in line with the suggestions in Annex A?**

*Uplift for racially or religiously aggravated offences*

3.18 In the new assault guidelines (coming into force on 1 July) a separate step has been created for the uplift for racially or religiously aggravated/ emergency worker offences. This has been done to give the uplift process prominence and to make it easier to signpost the process at the beginning of the guideline. The Council indicated that existing guidelines could be amended to create a separate step for the uplift for racial/ religious aggravation.

The guidelines it would apply to are:

- [criminal damage \(under £5,000\)](#) and [criminal damage \(over £5,000\)](#)



- [s4](#), [s4A](#) and [s5](#) Public Order Act offences
- [harassment/ stalking](#) and [harassment/ stalking \(with fear of violence\)](#)

3.19 The change would be relatively straightforward to make and the substantive content of the guidelines would not be affected. Consulting on the change would serve to draw it to the attention of users.

**Question 6: Should the uplift for racial/ religious aggravation be in a separate step (as has been done in the new assault guidelines) in existing guidelines?**

#### *Victims of modern slavery*

3.20 During the consultation on the modern slavery guidelines, Christopher Goard JP provided some valuable input related to academic research he had undertaken on different types of modern slavery victim. He wanted to ensure that sentencing guidelines generally (not just for modern slavery offences) took into account the possibility of offenders themselves being the victims of modern slavery/coercion, where either a statutory defence was unavailable or had not been proved to the necessary standard. This point was echoed in a response to the 'What Next for the Sentencing Council' consultation by another magistrate, who cited modern slavery as well as domestic coercion and control as matters magistrates should be aware of.

3.21 Since 2019, we have had an expanded explanation for the common mitigating factor 'Involved through coercion, intimidation or exploitation' which states:

- Where this applies it will reduce the culpability of the offender.
- This factor may be of particular relevance where the offender has been the victim of domestic abuse, trafficking or modern slavery, but may also apply in other contexts.
- Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation which the offender may find difficult to articulate, and where appropriate ask for this to be addressed in a PSR.
- This factor **may** indicate that the offender is vulnerable and would find it more difficult to cope with custody or to complete a community order.

3.22 The Modern Slavery working group agreed, rather than making any changes now with publication of the definitive modern slavery guidelines, to return to Mr Goard to test with him initially whether the current expanded explanation is sufficient or could be usefully amended. If he had credible suggestions, these could be brought to the July meeting for consideration as part of this consultation.

**Question 7: Does the Council wish to explore whether changes should be made to the expanded explanation for the mitigating factor 'Involved through coercion, intimidation or exploitation'?**

### *Recent legislative changes*

3.23 Two statutes that relate to existing sentencing guidelines have been given royal assent: the [Domestic Abuse Act 2021](#) and the [Animal Welfare \(Sentencing\) Act 2021](#).

3.24 The Domestic Abuse Act creates a statutory definition of domestic abuse; we understand that this will be commenced this summer. The [Domestic abuse – overarching principles guideline](#) currently states:

1. This guideline identifies the principles relevant to the sentencing of cases involving domestic abuse. There is no specific offence of domestic abuse. It is a general term describing a range of violent and/or controlling or coercive behaviour.

2. A useful, but not statutory, definition of domestic abuse presently used by the Government is set out below. The Government definition includes so-called ‘honour’ based abuse, female genital mutilation (FGM) and forced marriage.

Any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality. The abuse can encompass, but is not limited to: psychological, physical, sexual, financial, or emotional.

3. Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capabilities for personal gain, depriving them of the means needed for independence, resistance and escape and/or regulating their everyday behaviour.

4. Coercive behaviour is an act or pattern of acts of assault, threats, humiliation (whether public or private) and intimidation or other abuse that is used to harm, punish, or frighten the victim. Abuse may take place through person to person contact, or through other methods, including but not limited to, telephone calls, text, email, social networking sites or use of GPS tracking devices.

5. Care should be taken to avoid stereotypical assumptions regarding domestic abuse. Irrespective of gender, domestic abuse occurs amongst people of all ethnicities, sexualities, ages, disabilities, religion or beliefs, immigration status or socio-economic backgrounds. Domestic abuse can occur between family members as well as between intimate partners.

6. Many different criminal offences can involve domestic abuse and, where they do, the court should ensure that the sentence reflects that an offence has been committed within this context.

3.25 The definition in the legislation is:

#### **1 Definition of “domestic abuse”**

(1) This section defines “domestic abuse” for the purposes of this Act.

(2) Behaviour of a person (“A”) towards another person (“B”) is “domestic abuse” if—

- (a) A and B are each aged 16 or over and are personally connected to each other, and
- (b) the behaviour is abusive.

(3) Behaviour is “abusive” if it consists of any of the following—

- (a) physical or sexual abuse;
- (b) violent or threatening behaviour;
- (c) controlling or coercive behaviour;
- (d) economic abuse (see subsection (4));
- (e) psychological, emotional or other abuse;

and it does not matter whether the behaviour consists of a single incident or a course of conduct.

(4) “Economic abuse” means any behaviour that has a substantial adverse effect on B’s ability to—

- (a) acquire, use or maintain money or other property, or
- (b) obtain goods or services.

(5) For the purposes of this Act A’s behaviour may be behaviour “towards” B despite the fact that it consists of conduct directed at another person (for example, B’s child).

(6) References in this Act to being abusive towards another person are to be read in accordance with this section.

(7) For the meaning of “personally connected”, see section 2.

## **2 Definition of “personally connected”**

(1) For the purposes of this Act, two people are “personally connected” to each other if any of the following applies—

- (a) they are, or have been, married to each other;
- (b) they are, or have been, civil partners of each other;
- (c) they have agreed to marry one another (whether or not the agreement has been terminated);
- (d) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);
- (e) they are, or have been, in an intimate personal relationship with each other;
- (f) they each have, or there has been a time when they each have had, a parental relationship in relation to the same child (see subsection (2));
- (g) they are relatives.

(2) For the purposes of subsection (1)(f) a person has a parental relationship in relation to a child if—

- (a) the person is a parent of the child, or
- (b) the person has parental responsibility for the child.

(3) In this section—

“child” means a person under the age of 18 years;

“civil partnership agreement” has the meaning given by section 73 of the Civil Partnership Act 2004;

“parental responsibility” has the same meaning as in the Children Act 1989 (see section 3 of that Act);

“relative” has the meaning given by section 63(1) of the Family Law Act 1996.

3.26 As can be seen above, the new legislative definition is broadly in line with that in the guideline but some changes would be needed to align the guideline with the new definition.

3.27 There are other changes in the Domestic Abuse Act that may require action by the Council. Notably the offence of disclosing private sexual images will be extended to cover

threats to disclose. This is expected to come into force in June 2021. The guideline for [disclosing private sexual images](#) would need to be reviewed to ascertain what changes were needed to accommodate this change.

3.28 The Act also introduces domestic abuse protection orders which can be made on conviction or acquittal, breach of which would be a criminal offence and there is a new offence of strangulation or suffocation. The work required to develop guidelines for the new offence would be outside the scope of this consultation.

3.29 The issue for consideration today is whether to consider making changes to the domestic abuse and disclosing private sexual images guidelines as part of this consultation (in which case firm proposals would be brought to the July meeting) or whether to leave all matters to be considered as a separate strand of work at a later date.

**Question 8: Does the Council wish to consider making changes to the domestic abuse and disclosing private sexual images guidelines as part of this consultation?**

3.30 The Animal Welfare (Sentencing) Act 2021 increases the maximum sentence for some offences covered by the [Animal cruelty guideline](#) (in the MCSG) from six months to five years. The guideline covers offences under sections 4, 7 and 9 of the Animal Welfare Act 2006. The 2021 Act which comes into effect on 29 June increases the maximum sentence for sections 4 and 7 but not section 9. This means that ultimately there would need to be two guidelines to replace the existing one.

3.31 There are various options as to how the Council could approach the changes:

- (a) When the changes come into effect add a note to the existing guideline saying that the sentence levels no longer apply to offences under sections 4 and 7.
- (b) In addition to (a), as part of this consultation, consult on an interim note that suggests how the existing guideline should be adapted pending a revised guidelines.
- (c) In addition to (a), as part of this consultation, consult on revised guidelines.
- (d) In addition to (a) and/or (b) develop revised guidelines as a separate work stream at a later date.

3.32 If the Council wishes to pursue options (b) or (c), firm proposals would be brought to the July meeting. For option (c) in particular, it would not be possible within that timeframe to do much detailed work – any proposals for revised guidelines would be on the assumption that the existing guideline is working well and any changes would only be to accommodate the change to the statutory maximum sentence.

**Question 9: Which, if any, of the options above does the Council wish to pursue in relation to the Animal cruelty guideline?**

3.33 There may be other miscellaneous or cross-cutting issues that members think could and should be addressed in the consultation. Any suggestions can be taken away and proposals can be presented to the July meeting.

**Question 10: Are there any other matters that this consultation should address?**

*Timing and management of the process*

3.34 The provisional plan for this consultation is to have one more meeting in July to agree the content of the consultation (with potentially a working group to look at points of detail between now and then). The consultation could then run from September to November. Responses could be considered at the December and January meetings with changes coming into effect from 1 April 2022.

3.35 This timetable would be subject to there being space on Council agendas and capacity within the team to cover the necessary work.

3.36 The process could then start again at this time next year. The Council has already agreed that it wants to proactively seek suggestions for changes to guidelines and the issue of how best to achieve this technically is being discussed with our website developers. It seems likely that there will be a steady stream of matters for an annual 'miscellaneous' consultation to address.

**Question 11: Is the Council happy with the proposed timetable for the consultation in this and future years?**

**4 EQUALITIES**

4.1 This paper does not include any proposals specifically relating to equalities. Any suggestions for changes to guidelines specifically related to issues of equality and diversity are being considered separately by the Equality and Diversity working group.

4.2 Most of the proposals within this paper are for relatively minor or technical changes which are unlikely to have any impact on equality issues. If, however, revision of the Animal cruelty guideline is included in the consultation, consideration will be given at the July meeting as to whether any issues arise with those offences.

**Question 12: Are there any equalities issues that should be addressed in the consultation?**

**5 IMPACT AND RISKS**

5.1 The impact on prison and probation resources from the changes proposed in this consultation would be negligible. Any increase in sentence levels for animal cruelty offences would be due to the change to legislation rather than any action taken by the Council. A fuller consideration will be provided at the July meeting once the scope of the consultation is confirmed.

5.2 As the number of guidelines and associated material produced by the Council has increased, there is increasingly a risk that guidelines may contain errors or become out of date. The rationale for conducting an annual consultation on miscellaneous issues is to ensure that the guidelines remain current, accurate and useful. It is possible that by carrying out an annual consultation on miscellaneous changes to guidelines the Council will create unrealistic expectations of what changes can be brought about in this way, but this can be addressed in the consultation document and the communications that we issue.

**Question 13: Are there any issues relating to impact and risks that require further consideration?**