

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

**16 December 2022**  
**SC(22)DEC04 – Miscellaneous**  
**Amendments**

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## **1 ISSUE**

1.1 This is the first of two meetings to discuss the responses to the miscellaneous amendments consultation which closed on 30 November. The amendments need to be finalised at the January meeting to enable any changes agreed upon to be published in March and made on 1 April 2023.

## **2 RECOMMENDATION**

2.1 The Council is asked to consider suggested changes to the proposals as consulted on relating to disqualification from driving the minimum term steps in guidelines.

2.2 The Council is asked to agree to adopt proposals as consulted on relating to Football banning orders, criminal damage and unlawful act manslaughter.

## **3 CONSIDERATION**

3.1 We received 24 responses to the consultation 18 from individuals and six from organisations. The majority were supportive of the proposals and some made helpful suggestions for changes. The more critical responses tended to focus on issues that were outside the scope of the consultation.

### **Disqualification from driving**

3.2 We consulted on revisions to the wording on disqualification in the drug driving guidance and the excess alcohol, unfit through drink or drugs (drive/attempt to drive) and fail to provide specimen for analysis (drive/attempt to drive) guidelines. The proposals aimed to clarify the relevant dates (i.e. the date of the commission of the offence, date of conviction or date of the imposition of a disqualification) for each provision.

The proposed wording (additions shown in red):

- Must endorse and disqualify for at least 12 months
- Must disqualify for at least 2 years if offender has had two or more disqualifications for periods of 56 days or more **imposed** in the 3 years **preceding the commission of the**

**current offence** – refer to [disqualification guidance](#) and consult your legal adviser for further guidance

- Must disqualify for at least 3 years if offender has been **convicted** of a relevant offence in **the 10 years preceding the commission of the current offence** – consult your legal adviser for further guidance
- [Extend disqualification](#) if imposing immediate custody

3.3 All those who responded to this question agreed with the changes (though two raised general issues about sentencing for motoring offences). One magistrate suggested that ‘relevant offence’ (in the third bullet point) should contain a link to further information. The applicable information is in the ‘obligatory disqualification guidance’ which is linked to from the second bullet point. It seems sensible to add the same link to the third bullet point so it would read:

- Must disqualify for at least 3 years if offender has been **convicted** of a relevant offence in the 10 years preceding the **commission** of the current offence – refer to [disqualification guidance](#) and consult your legal adviser for further guidance

**Question 1: Does the Council agree make the changes consulted on with the additional wording proposed at 3.3 above?**

3.4 We consulted on changes to the obligatory disqualification guidance to clarify the relevant dates and to reflect legislative changes:

The proposed wording (changes shown in red)

## 1. Obligatory disqualification

**Note: The following guidance applies to offences with a 12 month minimum disqualification.**

Some offences carry obligatory disqualification for a minimum of 12 months (Road Traffic Offenders Act (“RTOA”) 1988, s.34). The minimum period is automatically increased where there have been certain previous convictions and disqualifications.

An offender must be disqualified for at least two years if **a disqualification** of at least 56 days **has been imposed on them** in the three years preceding the commission of the offence (RTOA 1988, s.34(4)(b)). The following disqualifications are to be disregarded for the purposes of this provision:

- interim disqualification;
- disqualification where vehicle used for the purpose of crime;
- disqualification for stealing or taking a vehicle or going equipped to steal or take a vehicle.

An offender must be disqualified for at least three years if he or she is convicted of one of the following offences:

- driving or attempting to drive while unfit;
- driving or attempting to drive with excess alcohol;
- driving or attempting to drive with concentration of specified controlled drug above specified limit;
- failing to provide a specimen (drive/attempting to drive).

**and** has within the 10 years preceding the commission of the offence been convicted of any of those offences or causing death by careless driving when under the influence of drink or drugs (RTOA 1988, s.34(3)):

The individual offence guidelines indicate whether disqualification is mandatory for the offence and the applicable minimum period. **Consult your legal adviser for further guidance.**

3.5 Again, responses were supportive but with a few suggestions for changes. A judge suggested changing ‘and’ to ‘or’ as highlighted below:

Some offences carry obligatory disqualification for a minimum of 12 months (Road Traffic Offenders Act (“RTOA”) 1988, s.34). The minimum period is automatically increased where there have been certain previous convictions **or** disqualifications.

3.6 HM Council of District Judges (MC) pointed out an error in the proposed wording. It should read (revised wording highlighted):

An offender must be disqualified for at least two years if **more than one** disqualification of at least 56 days has been imposed on them in the three years preceding the commission of the offence (RTOA 1988, s.34(4)(b)).

3.7 Section 34(4) of the Road Traffic Offenders Act 1988 states:

(4) Subject to subsection (3) above and subsection (4ZA) below, subsection (1) above shall apply as if the reference to twelve months were a reference to two years—

...

(b) in relation to a person on whom more than one disqualification for a fixed period of 56 days or more has been imposed within the three years immediately preceding the commission of the offence.

3.8 The West London Magistrates Bench suggested that it would be helpful to give the statutory reference for the types of disqualification to be ignored. While this might be helpful, the level of detail required to make it comprehensive and accurate could overcomplicate the guidance. The relevant statutory provision reads:

(4A) For the purposes of subsection (4)(b) above there shall be disregarded any disqualification imposed under section 26 of this Act or section 147 of the Powers of Criminal Courts (Sentencing) Act 2000 or section 164 of the Sentencing Code or section 223A or 436A of the Criminal Procedure (Scotland) Act 1975 (offences committed by using vehicles) and any disqualification imposed in respect of an

offence of stealing a motor vehicle, an offence under section 12 or 25 of the Theft Act 1968, an offence under section 178 of the Road Traffic Act 1988, or an attempt to commit such an offence.

**Question 2: Does the Council agree to make the changes to the obligatory disqualification guidance set out at paragraphs 3.5 and 3.6 but not that suggested at 3.8?**

3.9 We consulted on changes to the discretionary and ‘totting up’ disqualification guidance.

The proposed wording (changes shown in red)

**‘Totting-up’ guidance:**

Incurring 12 or more penalty points means a minimum period of disqualification must be imposed (a ‘totting up disqualification’) – s.35 Road Traffic Offenders Act (RTOA) 1988. **Points are not to be taken into account for offences committed more than three years before the commission of the current offence – s.29 RTOA 1988.**

[...]

The court should first consider the circumstances of the offence, and determine whether the offence should attract a [discretionary period of disqualification](#). But the court must note the statutory obligation to disqualify those repeat offenders who would, were penalty points imposed, be liable to the mandatory “totting” disqualification and, **unless the court is of the view that the offence should be marked by a period of discretionary disqualification in excess of the minimum totting up disqualification period, the court should impose penalty points rather than discretionary disqualification so that the minimum totting up disqualification period applies.**

**Discretionary disqualification guidance:**

In some cases in which the court is considering discretionary disqualification, the offender may already have sufficient penalty points on his or her licence that he or she would be liable to a ‘totting up’ disqualification if further points were imposed. In these circumstances, **unless the court is of the view that the offence should be marked by a period of discretionary disqualification in excess of the minimum totting up disqualification period, the court should impose penalty points rather than discretionary disqualification so that the minimum totting up disqualification period applies** ([see ‘totting up’](#)).

3.10 Several respondents welcomed these changes. One individual suggested adding in guidance on the approach to be taken to new drivers, to discourage the practice of imposing a short disqualification rather than six points so that the offender does not have to retake the driving test. There is some merit in this suggestion but as it is something that we have not consulted on, it would be better to add it to the list of things to consider for next year’s consultation.

3.11 A judge suggested replacing 'he or she' with 'they' and 'his or her' with 'their'. This ties in with a suggestion we have had for being more consistent and inclusive in the use of personal pronouns in guidelines. Some proposals will be brought to the January meeting on this point.

3.12 A magistrate (whose original suggestion had led to the changes consulted on) suggested that it would be clearer if the wording focussed on the need to prefer points over discretionary disqualification which she suggested gets lost in the explanation consulted on. She suggested combining the wording to read:

In some cases in which the court is considering discretionary disqualification, the offender may already have sufficient penalty points on his or her licence that he or she would be liable to a 'totting up' disqualification if further points were imposed. In these circumstances, the court should impose penalty points rather than discretionary disqualification so that the minimum totting up disqualification period applies (see 'totting up'). The court should first consider the circumstances of the offence, and determine whether the offence should attract a discretionary period of disqualification. Unless the court is of the view that the offence should be marked by a period of discretionary disqualification in excess of the minimum totting up disqualification period, the court should impose penalty points rather than discretionary disqualification so that the minimum totting up disqualification period applies.

3.13 It is not entirely clear whether this wording is proposed for just for the discretionary disqualification guidance or for the totting guidance as well. The proposal would (as the magistrate accepts) make the explanation lengthy and this may make it less effective. Bearing in mind the level of support from other respondents, the recommendation is to retain the wording consulted on.

**Question 3: Does the Council agree to make the changes consulted on to the totting and discretionary disqualification guidance?**

### **Football banning orders**

3.14 We consulted on changes to the football banning orders guidance.

The proposed wording (changes shown in red)

- public order offences – Public Order Act 1986, **Parts 3 and 3A, and s.4, 4A or 5** – committed: (a) during a period relevant to a football match (see below) at any premises while the offender was at, or was entering or leaving or trying to enter or leave, the premises; (b) on a journey to or from a football match and the court makes a declaration

that the offence related to football matches; or (c) during a period relevant to a football match (see below) and the court makes a declaration that the offence related to that match;

- any offence under section 31 of the Crime and Disorder Act 1998 (racially or religiously aggravated public order offences) where the court makes a declaration that the offence related to a football match, to a football organisation or to a person whom the accused knew or believed to have a prescribed connection with a football organisation,
- any offence under section 1 of the Malicious Communications Act 1988 (offence of sending any letter, electronic communication or article with intent to cause distress or anxiety) where the court has stated that the offence is aggravated by hostility of any of the types mentioned in section 66(1) of the Sentencing Code (racial hostility etc), and where the court makes a declaration that the offence related to a football match, to a football organisation or to a person whom the accused knew or believed to have a prescribed connection with a football organisation,
- any offence under section 127(1) of the Communications Act 2003 (improper use of public telecommunications network) where the court has stated that the offence is aggravated by hostility of any of the types mentioned in section 66(1) of the Sentencing Code (racial hostility etc), and where the court makes a declaration that the offence related to a football match, to a football organisation or to a person whom the accused knew or believed to have a prescribed connection with a football organisation.

3.15 All of those who commented agreed with the proposals.

**Question 4: Does the Council agree to make the changes consulted on for football banning orders?**

### **Criminal Damage**

3.16 We consulted on changes to the headers of the criminal damage guidelines to direct courts to the appropriate guideline when sentencing cases where the value does not exceed £5,000 but the case may be tried in the Crown Court and/or the maximum penalty for the offence is not limited to three months' imprisonment because it relates to a memorial.

The proposed wording (changes shown in red)

### **Criminal damage (other than by fire) value exceeding £5,000/ Racially or religiously aggravated criminal damage**

Crime and Disorder Act 1998, s.30, Criminal Damage Act 1971, s.1(1)

Effective from: 01 October 2019

Criminal damage (other than by fire) value exceeding £5,000, Criminal Damage Act 1971, s.1(1)

Triable either way

Maximum: 10 years' custody

Offence range: Discharge – 4 years' custody

**Note:** Where an offence of criminal damage:

a) is **added** to the indictment at the Crown Court (**having not been charged before**)

**or**

b) it is an offence committed by destroying or damaging a memorial as defined by s22(11A) - (11D) of the Magistrates' Courts Act 1980 committed on or after 28 June 2022

the statutory maximum sentence is 10 years' custody regardless of the value of the damage. In such cases where the value does not exceed £5,000 regard should also be had to the not exceeding £5,000 guideline.

### **Racially or religiously aggravated criminal damage, Crime and Disorder Act 1998, s.30**

Triable either way

Maximum: 14 years' custody

### **Criminal damage (other than by fire) value not exceeding £5,000/ Racially or religiously aggravated criminal damage**

Crime and Disorder Act 1998, s.30, Criminal Damage Act 1971, s.1(1)

Effective from: 01 October 2019

### **Criminal damage (other than by fire) value not exceeding £5,000, Criminal Damage Act 1971, s.1 (1)**

Triable only summarily (except as noted below)

Maximum: Level 4 fine and/or 3 months' custody

Offence range: Discharge – 3 months' custody

**Note:** Where an offence of criminal damage:

a) is **added** to the indictment at the Crown Court (*having not been charged before*)

**or**

b) it is an offence committed by destroying or damaging a memorial as defined by s22(11A) - (11D) of the Magistrates' Courts Act 1980 committed on or after 28 June 2022

the statutory maximum sentence is 10 years' custody regardless of the value of the damage. In such cases where the value does not exceed £5,000, the exceeding £5,000 guideline should be used but regard should also be had to this guideline.

### **Racially or religiously aggravated criminal damage, Crime and Disorder Act 1998, s.30**

Triable either way

Maximum: 14 years' custody

3.17 Most respondents who commented agreed with the proposals. Of those who expressed different views, these related to matters outside of the scope of the consultation (one complained about the legislation and two commented on sentencing for criminal damage more generally). One magistrate said that he did not find the drafting particularly clear but was unable to suggest an alternative.

## Question 5: Does the Council agree make the changes consulted on to the criminal damage guidelines?

### Minimum sentences

3.18 We consulted on changes to reflect the change to the statutory test for the threshold for passing a sentence below the minimum term for relevant offenders for certain offences from 'unjust in all the circumstances' to 'exceptional circumstances' for offences committed on or after 28 June 2022. The guidelines affected are:

- Bladed articles and offensive weapons – possession
- Bladed articles and offensive weapons – threats
- Bladed articles and offensive weapons (possession and threats) – children and young people
- Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it to another
- Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug
- Domestic burglary
- Aggravated burglary

3.19 The consultation noted that any changes would need to accommodate both tests (at least in the short term). For clarity and to avoid the guideline becoming cluttered the proposal was to have some general information and then too put the different tests in drop down boxes. The proposed changes are illustrated in a revised version of the possession of a bladed article/offensive weapon guideline which can be viewed on-line [here](#).

3.20 The proposals were very similar for most of the guidelines and the comments made by respondents were often the same for each guideline. Therefore, it is helpful to consider some cross-cutting suggestions.

3.21 A judge suggested some further exposition of the term exceptional. Another judge suggested changing the wording slightly. These suggestions are illustrated below:

#### Principles

The circumstances must truly be exceptional. Circumstances are exceptional if the imposition of the minimum term would result in an arbitrary and disproportionate sentence.

It is important that courts adhere to the statutory requirement and do not too readily accept ~~that the exceptional~~ circumstances **are exceptional. A factor is unlikely to be regarded as exceptional if it would apply to a significant number of cases.**

The court should look at all of the circumstances of the case taken together. A single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances. The seriousness of the previous



offence(s) and the period of time that has elapsed between offences will be a relevant consideration.

The mere presence of one or more of the following should not **in itself** be regarded as exceptional:

- One or more lower culpability factors
- One or more mitigating factors
- A plea of guilty

3.22 The Criminal Sub-Committee of HM Council of Circuit Judges suggested slightly different wording:

It is important that courts adhere to the statutory requirement and do not too readily **treat or accept exceptional circumstances as being exceptional.**

3.23 They also suggested adding in a section similar to that proposed in the unlawful act manslaughter guideline:

Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see Criminal Practice Directions VII: Sentencing B.

3.24 The CPS suggested adding a reference to the Totality guideline as this ‘may require sentencers to consider imposing a higher overall sentence than the minimum term’. They also suggested (for the six month minimum terms) noting that suspending a minimum term, though lawful, will rarely be appropriate as in the majority of cases suspension would undermine the punitive and deterrent effect of the minimum sentencing provisions, to reflect the judgment in R v Uddin [2022] EWCA Crim 751.

3.25 It is not clear that a reference to totality is necessary as part of this step – it will be considered at step 6. At the July meeting the Council considered consulting on adding a reference to the availability of suspended sentences for the weapons and bladed article offences but concluded that if there were to be any such reference it should be in the Imposition guideline.

3.26 A reference to resolving factual disputes with a Newton hearing could apply whether the test is ‘exceptional circumstances’ or ‘unjust in all the circumstances’ so could be included in the general text above the drop down boxes but might sit more logically in the dropdown sections. For example:

**Exceptional circumstances (offence committed on or after 28 June 2022)**

In considering whether there are exceptional circumstances that would justify not imposing the minimum term the court must have regard to:

- the particular circumstances which relate to any of the offences **and**
- the particular circumstances of the offender.

either of which may give rise to exceptional circumstances.

Where the issue of exceptional circumstances has been raised the court should give a clear explanation as to why those circumstances have or have not been found.

Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see Criminal Practice Directions VII: Sentencing B.

...

### **Unjust in all of the circumstances (offence committed before 28 June 2022)**

In considering whether a statutory minimum sentence would be 'unjust in all of the circumstances' the court must have regard to the particular circumstances of the offence and the offender.

Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see Criminal Practice Directions VII: Sentencing B.

If the circumstances of the offence, the previous offence or the offender make it unjust to impose the statutory minimum sentence then the court **must impose either a shorter custodial sentence than the statutory minimum provides or an alternative sentence.**

3.27 The remaining points raised in relation to the various minimum term steps will be discussed at the January meeting.

**Question 6: Does the Council wish to adopt any of the suggested changes to wording suggested at 3.21 and 3.22?**

**Question 7: Does the Council agree not to add a reference to totality or to suspending sentences at the minimum term step?**

**Question 8: Does the Council wish to add a reference to Newton hearings to the minimum term step and, if so, should the wording suggested at 3.26 be adopted?**

### **Life sentence for manslaughter of an emergency worker**

3.28 The Council consulted on an additional step 3 in the Unlawful act manslaughter guideline to provide guidance for where the victim is an emergency worker acting in that capacity and the court must impose a life sentence unless there are exceptional circumstances.

3.29 The proposed wording was:

### **Step 3 – Required sentence and exceptional circumstances**

**The following paragraphs apply to adult offenders – there is a separate dropdown section for those aged under 18 at the date of conviction below**

#### **Required sentence**

1. Where the offence was committed against an emergency worker acting in the exercise of functions as such a worker, the court must impose a life sentence unless the court is

of the opinion that there are exceptional circumstances which (a) relate to the offence or the offender, and (b) justify not doing so (sections 274A and 285A of the Sentencing Code).

### **Applicability**

2. The required sentence provisions apply when a person is convicted of unlawful act manslaughter committed on or after 28 June 2022, the offender was aged 16 or over at the offence date and the offence was committed against an emergency worker acting in the exercise of functions as such a worker.
3. The circumstances in which an offence is to be taken as committed against a person acting in the exercise of their functions as an emergency worker include circumstances where the offence takes place at a time when the person is not at work but is carrying out functions which, if done in work time, would have been in the exercise of their functions as an emergency worker.
4. An emergency worker has the meaning given by section 68 of the Sentencing Code.
5. Where the required sentence provisions apply a guilty plea reduction applies in the normal way (see step 5 – Reduction for guilty pleas).
6. Where the required sentence provisions apply and a life sentence is imposed, the notional determinate sentence should be used as the basis for the setting of a minimum term to be served.
7. Where the required sentence provisions apply, this should be stated expressly.

### **Exceptional circumstances**

8. In considering whether there are exceptional circumstances that would justify not imposing the statutory minimum sentence, the court must have regard to:
  - the particular circumstances of the offence and
  - the particular circumstances of the offender

either of which may give rise to exceptional circumstances.

9. Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see Criminal Practice Directions VII: Sentencing B.
10. Where the issue of exceptional circumstances has been raised the court should give a clear explanation as to why those circumstances have or have not been found.

### **Principles**

11. Circumstances are exceptional if the imposition of the required sentence would result in an arbitrary and disproportionate sentence.
12. The court should look at all of the circumstances of the case taken together, including circumstances personal to the offender. A single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances.

### **Where exceptional circumstances are found**

13. If there are exceptional circumstances that justify not imposing the required sentence then the court should impose the sentence arrived at by normal application of this guideline.

### **Sentencing offenders aged under 18 at the date of conviction**

1. Where the offender is aged 16 or 17 at the date of conviction, the required sentence provisions apply only if the offender is aged 16 or over when the offence was committed

and the offence was committed against an emergency worker acting in the exercise of functions as such a worker (section 258A of the Sentencing Code).

2. Subject to the required sentence provisions, where the offender is aged under 18 at the date of conviction the court should determine the sentence in accordance with the Sentencing Children and Young People guideline, particularly paragraphs 6.42-6.49 on custodial sentences.
3. This guidance states at paragraph 6.46: “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. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age.”
4. The considerations above on exceptional circumstances relating to the offence or offender apply equally when sentencing offenders aged 16 or 17 at the date of the conviction.

3.30 All who responded agreed with the proposals apart from one individual who wanted more whole life orders. No changes to the consultation version are proposed.

**Question 9: Does the Council agree to adopt the proposed additions to the Unlawful act manslaughter guideline?**

#### **4 EQUALITIES**

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

#### **5 IMPACT AND RISKS**

5.1 The consultation noted that the impact of majority of the proposals on prison or probation resources will be relatively minor. The most significant changes are those necessitated by legislative changes.

5.2 Respondents agreed with that analysis. The narrative resource assessment which accompanied the consultation will be updated and discussed at the January meeting.