Sentencing Council

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9 June 2022

Dear Members

Meeting of the Sentencing Council – 17 June 2022

The next Council meeting will be held in the **Queens Building, Judges Conference Room, 1st Floor Mezzanine at the Royal Courts of Justice.** This will be a hybrid meeting, so a Microsoft Teams invite is also included below. **The meeting is Friday 17 June 2022 and will from 9:45 to 14:15**.

If you are not planning on attending in person please do let me know ASAP so Jessica and I can plan accordingly.

A **security pass is needed** to gain access to this meeting room. Members who do not know how to access this room can, after entry head straight to the Queen's Building where Jessica and Gareth will meet members at the lifts and escort them up to the meeting room. If you have any problems getting in or finding the Queen's Building, then please call the office number on 020 7071 5793.

The agenda items for the Council meeting are:

▪ Agenda	SC(22)JUN00
▪ Minutes of meeting held on 13 May	SC(22)MAY01
▪ Action log	SC(22)JUN02
▪ Miscellaneous amendments	SC(22)JUN03
▪ Imposition	SC(22)JUN04
▪ Child Cruelty	SC(22)JUN05
▪ Guideline priorities	SC(22)JUN06
▪ Annual Report	SC(22)JUN07
▪ Totality	SC(22)JUN08

Refreshments

Tea, coffee and water will be provided on the day but, due to the current existing RCJ safety guidance, a buffet style lunch will not be provided. Members are welcome either to bring lunch with them (the kitchen area next door contains a fridge) or to avail themselves of the local lunch options. The lunch break is 30 minutes.

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

Sentencing Council

COUNCIL MEETING AGENDA

17 June 2022
Royal Courts of Justice
Queen's Building

09:45 - 10:00	Minutes of the last meeting and matters arising (papers 1 & 2)
10:00 - 11:00	Miscellaneous amendments - presented by Ruth Pope (paper 3)
11:00 - 11:30	Imposition Guideline - presented by Jessie Stanbrook (paper 4)
11:30- 11:45	Break
11:45 - 12:30	Child cruelty - presented by Ollie Simpson (paper 5)
12:30 - 12:45	Guideline priorities - presented by Steve Wade (paper 6)
12:45 - 13:00	Annual Report - presented by Phil Hodgson (paper 7)
13:00 - 13:30	Lunch
13:30 - 14:15	Totality - presented by Ruth Pope (paper 8)

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COUNCIL MEETING AGENDA

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MEETING OF THE SENTENCING COUNCIL

13 MAY 2022

MINUTES

Members present:	Tim Holroyde (Chairman) Rosina Cottage Rebecca Crane Rosa Dean Nick Ephgrave Michael Fanning Diana Fawcett Adrian Fulford Jo King Maura McGowan Alpa Parmar Beverley Thompson
Apologies:	Max Hill Juliet May
Representatives:	Hanna van den Berg for the Lord Chief Justice (Legal and Policy Advisor to the Head of Criminal Justice) Lynette Woodrow, for the DPP (Head of the Director of Legal Services Team) Claire Fielder for the Lord Chancellor (Director, Youth Justice and Offender Policy)
Observers:	Sarah Bergstrom, Criminal Appeal Office
Members of Office in attendance:	Steve Wade Mandy Banks Ruth Pope Zeinab Shaikh Ollie Simpson

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 8 April 2022 were agreed.

2. MATTERS ARISING

2.1 The Chairman noted that this was the last meeting for both Adrian Fulford and Mike Fanning. He thanked them both for their excellent work on behalf of the Council. On behalf of the Council he wished Adrian well for his retirement. He also thanked Mike for having continued to serve after his appointment as a Circuit Judge, in order to allow time for a new District Judge member to be appointed.

3. DISCUSSION ON MOTORING OFFENCES – PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL

3.1 The Council considered and agreed draft guidance on disqualification periods for inclusion in the proposed motoring guidelines. Following a discussion on the estimated impacts of the proposed guidelines on the prison population, the Council agreed to sign off on the 12 draft motoring guidelines for consultation.

4. DISCUSSION ON MISCELLANEOUS AMENDMENTS – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

4.1 The Council considered a diverse range of matters, many of which were raised by guideline users but which also included changes necessitated by the Police, Crime, Sentencing and Courts (PCSC) Act 2022. The Council agreed to consult on changes to the wording on discretionary disqualification in the explanatory materials to the magistrates' courts sentencing guidelines and breach of a post sentence supervision guideline.

4.2 The Council also agreed that some of the changes arising from the PCSC Act could be made without consultation, but the exact wording of the revised text in guidelines should be discussed and agreed at the June Council meeting in time for them coming into force on 28 June 2022.

5. DISCUSSION ON BLACKMAIL AND THREATS TO DISCLOSE – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL

5.1 The Council considered proposals for work on a new guideline for blackmail offences, noting that blackmail was one of the few serious offences remaining without a guideline. The Council confirmed that work should start on this new guideline.

5.2 The Council also discussed some changes brought in by the Domestic Abuse Act 2021, namely the expansion of the disclosing private sexual images offence to include threats to disclose, and the creation of the new strangulation and suffocation offence. The commencement date for the latter offence is to be June 2022.

5.3 The Council discussed the merits of either starting work straight away on a new guideline for the strangulation and suffocation offence, or waiting for a period of time to see volumes of likely cases, etc before starting work, and potentially creating some interim guidance in the meantime. The Council asked that thought be given to creating some interim guidance, to be brought back to the meeting next time the project is discussed.

5.4 As it has been a year since the changes to the disclosing private sexual images offence came into force, the Council was content for work to begin to either amend the existing guideline or potentially develop a new guideline, to take into account the changes.

6. DISCUSSION ON TERRORISM – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

6.1 The Council considered responses to the consultation on the approach to cases involving undercover police or security services in the Preparation of terrorist acts, and Explosive substances (terrorism only) guidelines and agreed changes to take account of those responses and the research carried out with judges.

6.2 The Council discussed the remaining issues arising from the consultation and signed-off the revised guidelines for publication in July, to come into force in October.

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7. DISCUSSION ON AGGRAVATED VEHICLE TAKING – PRESENTED BY ZEINAB SHAIKH, OFFICE OF THE SENTENCING COUNCIL

7.1 This was the first meeting to discuss potential revisions to the sentencing guidelines for aggravated vehicle taking without consent, last updated in 2008. The Council considered the scope of this offence and agreed to proceed with four sentencing guidelines for offences involving: vehicle/property damage; dangerous driving; injury; and death.

7.2 The Council also discussed how culpability and harm factors could be updated in line with the structure of more recent guidelines, agreeing to a number of revisions and additional factors.

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SC(22)JUN02 June Action Log

ACTION AND ACTIVITY LOG – as at 9 June 2022

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 8 April 2022					
1	**Totality**	Working group to meet to discuss outstanding issues	**Tim, Maura, Jo and Rebecca**		**ACTION CLOSED:** Meeting held on 16 May

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Sentencing Council meeting:	**17 June 2022**
Paper number:	**SC(22)JUN03 – Miscellaneous Amendments**
Lead Council member:	**Jo King**
Lead official:	**Ruth Pope** **Ruth.pope@sentencingcouncil.gov.uk**

1 ISSUE

1.1 This is the second of three meetings to decide the content of this year's annual consultation on miscellaneous changes to guidelines and supporting material.

1.2 At the May meeting the Council considered various possible changes (arising from feedback from users and from legislative changes) and considered whether these could be made with or without consultation. At this meeting the proposed changes will be set out in more detail in order for those decisions to be made. There are further matters arising from legislative changes which will affect the Sentencing children and young people guideline and these will be considered at the July meeting.

1.3 The timetable we aim to keep to is to consult from September to November and consider the responses to the consultation in December and January to enable any changes agreed upon to be made on 1 April 2023.

2 RECOMMENDATION

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

3 CONSIDERATION

Changes to the Imposition guideline

3.1 This is covered in a separate paper presented by Jessie Stanbrook.

The wording on obligatory disqualification in guidelines.

3.2 The Council agreed to update the wording relating to disqualification in the drug driving guidance and the excess alcohol guideline subject to clarifying the relevant dates for each provision (commission of offence, conviction or imposition of disqualification). The changes proposed below would also apply to the unfit through drink or drugs (drive/ attempt to drive) and the fail to provide specimen for analysis (drive/attempt to drive) guidelines. Suggested additions in red and deletions ~~struck through~~:

- 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 ~~preceding~~ 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 ~~preceding~~ 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 Confusingly the position is different depending on the statutory provision. The requirement in the Road Traffic Offenders Act 1988 s.34(4)(b) to disqualify for at least two years depends on more than one previous disqualification having been **imposed** in the three years preceding the commission of the current offence. Whereas the requirement under s34(3) to disqualify for at least three years, depends on being **convicted** of a relevant offence in the ten years preceding the commission of the current offence.

3.4 A further complication relating to totting disqualifications is the way in which points on the licence are taken into account – for these purposes the points that count are any relating to offences **committed** in the three years up to and including commission of the current offence (s29 RTOA) – see further 3.8 below.

3.5 It may also be helpful to modify the disqualification guidance linked to from the guidelines. Suggested additions in red and deletions ~~struck through~~:

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 ~~he or she has been disqualified~~ a disqualification ~~two or more times for a period~~ 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:

- ~~causing death by careless driving when under the influence of drink or drugs;~~
- 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 ~~these~~ 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.**

3.6 The changes proposed above seek to clarify the present position but also to ensure that the guidance is still accurate when the changes brought about by the Police, Crime, Sentencing and Courts Act 2022 ('PCSC') come into force (the minimum disqualification for causing death by careless driving whilst under the influence of drink or drugs will be 5 years, increasing to 6 years for repeat offending).

3.7 Consulting on the proposed changes would ensure that the wording is clear and helpful to guideline users and would serve to draw attention to the changes.

Question 1: Does the Council agree to consult on the changes proposed for obligatory disqualification?

The wording on discretionary bans in the totting guidance

3.8 At the last meeting the Council agreed to consult on amending the wording in the explanatory materials to the MCSG on 'totting up' disqualifications and discretionary disqualifications. The proposed changes are set out on page 1 of Annex A.

3.9 However, as noted at 3.4 above, the way in which points are taken into account is subtly different to the way previous disqualifications are taken into account and it may also be useful to set this out in the guidance. The 'totting up' guidance currently opens with:

> Incurring 12 or more penalty points within a three-year period means a minimum period of disqualification must be imposed (a 'totting up disqualification') – s.35 Road Traffic Offenders Act (RTOA) 1988.

3.10 Section 20 RTOA states:

> **29.— Penalty points to be taken into account on conviction.**
>
> (1) Where a person is convicted of an offence involving obligatory endorsement, the penalty points to be taken into account on that occasion are (subject to subsection (2) below)—
>
> > (a) any that are to be attributed to the offence or offences of which he is convicted, disregarding any offence in respect of which an order under section 34 of this Act is made, and

(b) any that were on a previous occasion ordered to be endorsed on his driving record, unless the offender has since that occasion and before the conviction been disqualified under section 35 of this Act.

(2) If any of the offences was committed more than three years before another, the penalty points in respect of that offence shall not be added to those in respect of the other.

3.11 Suggested revised wording:

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 if imposed for a previous offence **committed** more than three years before the **commission** of the current offence – s.29 RTOA 1988

Question 2: Does the Council agree to consult on the changes to the totting up guidance as set out at Annex A and 3.11 above?

Default relevant weekly income amounts

3.12 The Council considered whether to consult on amending the default relevant weekly income (RWI) figures used to calculate fines, and concluded that in the current financial climate it would not be appropriate to do so. However, it was recognised that the information currently on the website in the explanatory materials setting out how the figures were arrived at was out of date and potentially misleading. The proposal is to remove the detailed explanation of how the amounts were calculated and to simplify the explanation in relation to those on low income/ benefits.

3.13 The proposed wording is in Annex A from page 2. The change to the wording will not affect sentences. If the Council were to consult on the change of wording it risks opening a debate about the default RWI figures and the reasons why the Council has chosen not to review them. Therefore, the recommendation is not to consult on this change but simply to log it in the record of minor amendments. Alternatively, the Council may feel that in the interests of transparency, it should consult on the decision not to review the figures at this time.

Question 3: Does the Council agree to remove the explanations of how the default RWI figures were calculated, and to do so without consultation?

Changes required by legislation

3.14 The Council asked for detailed proposals for how changes required by provisions in the PCSC relating to sentencing (most of which come into force on 28 June) could be dealt with in guidelines. In drafting the proposals it has become apparent that some of the changes are not entirely straightforward and the Council may feel it appropriate to consult on

the wording. If that is the case, the issue will remain of what changes should be made to guidelines in the short term.

Assaults on emergency workers

3.15 Section 2 of the PCSC doubles the maximum penalty for assaulting an emergency worker for offences committed on or after 28 June. This is a change that the Council had anticipated when it developed the guideline and referenced in the response to the consultation. Therefore, it is proposed that the necessary changes can be made to the guideline without further consultation.

3.16 The proposal is to change the maximum from 1 year to 2 years and add the highlighted wording at the top of the guideline:

> **Section 39**
> Triable only summarily
> Maximum: 6 months' custody
>
> Offence range: Discharge – 26 weeks' custody
>
> **Racially or religiously aggravated offence – Section 29**
> Triable either way
> Maximum: 2 years' custody
>
> **Offence committed against an emergency worker – Section 1**
> Triable either way
> Maximum: 2 years' custody (1 year's custody for offences committed before 28 June 2022)

3.17 Also, at step 3 of the guideline:

> **ASSAULT ON EMERGENCY WORKER AGGRAVATED OFFENCES**
>
> **Maximum sentence for the aggravated offence of assault on an emergency worker is 2 years' custody (1 year's custody for offences committed before 28 June 2022)**

Question 4: Does the Council agree to make the changes relating to assaults committed against an emergency worker without consultation?

3.18 Section 3 of the PCSC inserts a new s258A (re 16 and 17 year olds), s274A (re 18-20 year olds) and s285A (re 21 and older) in the Sentencing Code. Section 285A is reproduced at page 4 of Annex A.

3.19 The effect of this is that for unlawful act manslaughter where the victim is an emergency worker acting in that capacity, the court must impose a life sentence (unless

there are exceptional circumstances). This provision will apply only very rarely in practice and so it is proposed to make only minor changes to the guideline.

3.20 Firstly, adding the following to the header of the guideline (immediately before the text on the type of manslaughter):

> For offences committed on or after 28 June 2022, if 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).

3.21 Secondly, in statutory aggravating factors at step 2, changing:

> Offence was committed against an emergency worker acting in the exercise of functions as such a worker

To:

> Offence was committed against an emergency worker acting in the exercise of functions as such a worker. NOTE: For offences committed on or after 28 June 2022, if 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)

3.22 It is proposed that these changes could be made without consultation, as they simply reflect the change in the legislation. Additionally or alternatively, the Council may feel that it would be preferable to give more detailed guidance, possibly by adding an exceptional circumstances step to the guideline. If so, proposals will be brought to the July meeting.

Question 5: Does the Council agree to make the changes set out above to the unlawful manslaughter guideline without consultation?

Criminal damage to memorials

3.23 Section 50 of the PCSC inserts subsections 11A to 11D and amends schedule 2 to the Magistrates' Courts Act 1980 which has the effect of excluding criminal damage to memorials from offences which are to be tried summarily if the value involved is not more than £5,000 (for offences committed on or after 28 June 2022). Criminal damage which is to be tried summarily has a maximum sentence of 3 months' custody and/or a £2,500 fine whereas the either way offence has a maximum of 10 years.

3.24 The header of the guideline where the damage does not exceed £5,000 reads:

> 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

Maximum: Level 4 fine and/or 3 months' custody
Offence range: Discharge – 3 months' custody

Note: Where an offence of criminal damage is **added** to the indictment at the Crown Court **(having not been charged before)** 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

Option one

3.25 There are several possible ways of reflecting this change; one would be to add the following text to the header of the under £5,000 guideline:

> This guideline does **not** apply to an offence committed by destroying or damaging a memorial as defined by s22(11A) - (11D) of the Magistrates' Courts Act 1980 if committed on or after 28 June 2022. In such cases refer to the Criminal damage over £5,000 guideline.

3.26 If sentencers are to be guided to the over £5,000 guideline, this would need to be amended to indicate that it may apply to cases where the value is less than £5,000 if it is an offence committed by destroying or damaging a memorial, for example by adding:

> This guideline also applies to cases where the value is less than £5,000 if 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.

Option two

3.27 However, it could be argued that the under £5,000 guideline would still be appropriate for sentencing low value cases of criminal damage to memorials (which could, for example, be a bunch of flowers), in which case the header could be amended to read:

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

*Triable either way if 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.

Maximum: 10 years' custody

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

Triable either way
Maximum: 14 years' custody

Option three

3.28 Another solution would be to amend the existing note in both guidelines relating to cases added to the indictment at the Crown Court. For the under £5,000 guideline:

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.

For the exceeding £5,000 guideline:

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.

3.29 None of the proposed solutions is entirely satisfactory, but option three has the advantage of being fairly straightforward and giving sentencers the maximum flexibility to sentence according to the seriousness of the offending in individual cases.

3.30 The Council may feel, that as the choice of how to approach this could affect the level of sentence, it would be appropriate to consult. If so, the Council will need to consider how the guideline(s) should reflect the change in the short term (possibly option 2?).

Question 6: Does the Council agree to consult on making the changes in option 3? If so, should any interim changes be made?

Minimum terms – exceptional circumstances

3.31 Section 124 of the PCSC changes the threshold for passing a sentence below the minimum term for repeat offenders for certain offences from 'unjust in all the circumstances' to 'exceptional circumstances' for offences committed on or after 28 June 2022.

3.32 Step 3 of the possession of a bladed article/offensive weapon guideline is reproduced on page 5 of Annex A.

3.33 Any changes to step 3 will need to accommodate both tests (at least in the short term). This could be achieved by having the two different tests as dropdowns within step 3. The proposed wording for the exceptional circumstances test is adapted from the firearms and revised terrorism guidelines:

> **Step 3 – Minimum Terms – second or further relevant offence**
>
> When sentencing the offences of:
>
> - possession of an offensive weapon in a public place;
> - possession of an article with a blade/point in a public place;
> - possession of an offensive weapon on school premises; and
> - possession of an article with blade/point on school premises
>
> a court must impose a sentence of at least 6 months' imprisonment where this is a second or further relevant offence **unless:**
>
> - (If the offence was committed before 28 June 2022) **the court is of the opinion that there are particular circumstances relating to the offence, the previous offence or the offender which make it unjust to do so in all the circumstances**; or
> - (If the offence was committed on or after 28 June 2022) **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.**
>
> A 'relevant offence' includes those offences listed above and the following offences:
>
> - threatening with an offensive weapon in a public place;
> - threatening with an article with a blade/point in a public place;
> - threatening with an article with a blade/point on school premises; and
> - threatening with an offensive weapon on school premises.

Unjust in all of the circumstances v

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. 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**.

The offence

Having reached this stage of the guideline the court should have made a provisional assessment of the seriousness of the current offence. In addition, the court must consider the seriousness of the previous offence(s) and the period of time that has elapsed between offences. Where the seriousness of the combined offences is such that it falls far below the custody threshold, or where there has been a significant period of time between the offences, the court may consider it unjust to impose the statutory minimum sentence.

The offender

The court should consider the following factors to determine whether it would be unjust to impose the statutory minimum sentence;

- any strong personal mitigation;
- whether there is a realistic prospect of rehabilitation;
- whether custody will result in significant impact on others.

Exceptional circumstances v

In considering whether there are exceptional circumstances that would justify not imposing the minimum term 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.

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
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 exceptional circumstances.

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 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

Where exceptional circumstances are found
If there are exceptional circumstances that justify not imposing the statutory minimum sentence then the court must impose either a shorter custodial sentence than the statutory minimum provides or an alternative sentence.

3.34 For the threats guideline the changes could be the same. The only difference being that the first part of step 3 would read:

When sentencing these offences a court must impose a sentence of at least 6 months imprisonment **unless**

- (If the offence was committed before 28 June 2022) **the court is of the opinion that there are particular circumstances relating to the offence, the previous offence or the offender which make it unjust to do so in all the circumstances; or**
- (If the offence was committed on or after 28 June 2022) **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.**

3.35 The proposed changes go beyond merely updating the statutory wording, and so it is recommended that they are consulted on. If the Council agrees to consult, consideration will need to be given to what changes should be made in the short term. This could possibly be adding a note to step 3 in both guidelines which says:

For offences committed on or after 28 June 2022 the minimum sentence must be imposed 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.

Question 7: Does the Council agree to consult on the proposed changes to the bladed articles/offensive weapons guidelines? If so, should a note be added to the guidelines in the interim?

3.36 The same approach could be applied to the supply of prohibited drugs and drugs importation guidelines.

Question 8: Should the same approach be applied to the relevant drugs guidelines?

3.37 The domestic burglary guideline (which comes into force on 1 July 2022) is different in that there is no minimum term step in the guideline. The following is included in the header and repeated above the sentence table:

Where sentencing an offender for a qualifying third domestic burglary, the Court must apply section 314 of the Sentencing Code and impose a custodial term of at least

three years, unless it is satisfied that there are particular circumstances which relate to any of the offences or to the offender which would make it unjust to do so.

3.38 In this guideline the legislative change could be accommodated by changing both occurrences to:

> Where sentencing an offender for a qualifying third domestic burglary, the Court must apply section 314 of the Sentencing Code and impose a custodial term of at least three years, unless:.
>
> - (If the offence was committed before 28 June 2022) **the court is of the opinion that there are particular circumstances relating to the offence, the previous offence or the offender which make it unjust to do so in all the circumstances**; or
> - (If the offence was committed on or after 28 June 2022) **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.**

3.39 As this change does not go beyond merely reflecting the legislative change, it is proposed that it could be made without consultation.

Question 9: Should the proposed changes be applied to the domestic burglary guideline without consulting?

Statutory aggravating factor relating to assaults on those providing a public service

3.40 Section 156 PCSC inserts section 68A into the Sentencing Code which creates a statutory aggravating factor where the victim is a person providing a public service for five offences: common assault, ABH, s20, s18 and threats to kill. This duplicates a factor that is already in all of the guidelines that cover these offences.

3.41 The common assault, ABH, s20, s18 guidelines have the existing (non-statutory) aggravating factor 'Offence committed against those working in the public sector or providing a service to the public or against a person coming to the assistance of an emergency worker'. The threats to kill guideline has the factor 'Offence committed against those working in the public sector or providing a service to the public'.

3.42 A similar factor with the same expanded explanation also appears in the following guidelines: affray; attempted murder; threatening with bladed article/ offensive weapon; disorderly behaviour with intent (s4A Public Order Act); disorderly behaviour (s5 Public Order Act); Drunk and disorderly; Harassment/stalking (fear of violence); Harassment/stalking; Manslaughter (diminished responsibility); Manslaughter (loss of control); Manslaughter (unlawful act); Owner or person in charge of a dog dangerously out of control; Owner or person in charge of a dog dangerously out of control- person injured; Owner or person in charge of a dog dangerously out of control assistance dog injured;

Owner or person in charge of a dog dangerously out of control death caused; threatening behaviour (s4 Public Order Act).

3.43 The common assault, ABH and s20 guidelines also cover the racially or religiously aggravated version of these offences, so for these guidelines the (non-statutory) aggravating factor would still be relevant. The threats to kill and s18 guidelines apply only to offences covered by the new statutory aggravating factor, so the existing factor could be redundant (though not immediately as the new factor applies to convictions on or after 28 June).

3.44 It is proposed to add the following statutory aggravating factor and expanded explanation to the relevant guidelines:

- Offence was committed against person providing a public service, performing a public duty or providing services to the public

---

Effective in relation to convictions on or after 28 June 2022

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

See below for the statutory provisions.

- **Note the requirement for the court to state that the offence has been so aggravated.**
- **Note this statutory factor only applies to certain violent offences as listed below.**
- **For other offences the aggravating factor relating to offences committed against those working in the public sector or providing a service to the public can be applied where relevant.**

The Sentencing Code states:

68A Assaults on those providing a public service etc
(1) This section applies where—
(a) a court is considering the seriousness of an offence listed in subsection (3), and
(b) the offence is not aggravated under section 67(2).

(2) If the offence was committed against a person providing a public service, performing a public duty or providing services to the public, the court—
(a) must treat that fact as an aggravating factor, and
(b) must state in open court that the offence is so aggravated.

(3) The offences referred to in subsection (1) are—
(a) an offence of common assault or battery, except where section 1 of the Assaults on Emergency Workers (Offences) Act 2018 applies;
(b) an offence under any of the following provisions of the Offences against the Person Act 1861—
(i) section 16 (threats to kill);

(ii) section 18 (wounding with intent to cause grievous bodily harm);
(iii) section 20 (malicious wounding);
(iv) section 47 (assault occasioning actual bodily harm);

(c) an inchoate offence in relation to any of the preceding offences.

(4) In this section—

(a) a reference to providing services to the public includes a reference to providing goods or facilities to the public;

(b) a reference to the public includes a reference to a section of the public.

(5) Nothing in this section prevents a court from treating the fact that an offence was committed against a person providing a public service, performing a public duty or providing services to the public as an aggravating factor in relation to offences not listed in subsection (3).

(6) This section has effect in relation to a person who is convicted of the offence on or after the date on which section 156 of the Police, Crime, Sentencing and Courts Act 2022 comes into force.

3.45 The expanded explanation for the existing (non-statutory) aggravating factor could be amended as follows (additions in red):

This reflects:

- the fact that people in public facing roles are more exposed to the possibility of harm and consequently more vulnerable and/or
- the fact that someone is working in the public interest merits the additional protection of the courts.

This applies whether the victim is a public or private employee or acting in a voluntary capacity.

Care should be taken to avoid double counting where the statutory aggravating factor relating to emergency workers or to those providing a public service, performing a public duty or providing services to the public applies.

3.46 There seems little point in consulting on these changes which are largely technical and are unlikely to have any impact on sentencing.

Question 10: Should the proposed changes to accommodate the new statutory aggravating factor for assaults on those providing a public service be applied to the relevant guidelines without consulting?

Explanatory materials SHPOs

3.47 Section 175 PCSC makes changes to section 343 of the Sentencing Code regarding sexual harm prevention orders (SHPOs) which will enable courts to include positive requirements in SHPOs. There is, as yet, no date appointed for when this change will take effect. The Council has published revised guidance on SHPOs in sexual offences guidelines following consultation as follows:

Sentencing Code s345

> To make an SHPO, the court must be satisfied that the offender presents a risk of sexual harm to the public (or particular members of the public) and that an order is necessary to protect against this risk. The only prohibitions which can be imposed by an SHPO are those which are necessary for the purpose of protecting the public from sexual harm from the offender.
>
> The order may have effect for a fixed period (not less than five years) or until further order, with the exception of a foreign travel prohibition which must be a fixed period of no more than five years (renewable). Different time periods may be specified for individual restrictions and requirements.
>
> Where an SHPO is made in respect of an offender who is already subject to an SHPO, the earlier SHPO ceases to have effect. If the offender is already subject to a Sexual Offences Prevention Order or Foreign Travel Order made in Scotland or Northern Ireland, that order ceases to have effect unless the court orders otherwise.
>
> Chapter 2 of Part 11 of the Sentencing Code sets out further matters related to making SHPOs [link to be provided].

3.48 The explanatory materials to the MCSG contains guidance on SHPOs as an ancillary order. It includes the following statements:

> The order may include only negative prohibitions; there is no power to impose positive obligations.
>
> The order may have effect for a fixed period (not less than five years) or until further order.

3.49 When section 175 PCSC comes into force the first sentence will be incorrect and can be removed. The second statement could be expanded immediately to include the text agreed for sexual offences:

> with the exception of a foreign travel prohibition which must be a fixed period of no more than five years (renewable). Different time periods may be specified for individual restrictions and requirements.

3.50 Another very minor change that can be made is to change refences to the 'national probation service' to the 'probation service' (as noted in the paper on the Imposition guideline). That same correction will be made wherever it appears in guidelines, expanded explanations and explanatory materials.

3.51 Any substantive changes have already been consulted on and so it is proposed that there is no need to consult further.

Question 11: Should the proposed changes to the guidance on SHPOs be made without consulting?

Explanatory materials FBOs

3.52 The explanatory materials to the MCSG contains some guidance on football banning orders. Section 190 of the PCSC has amended Schedule 1 to the Football Spectators Act

1989 (reproduced from page 6 of Annex A) which sets out the offences for which a football banning order can be imposed. The changes are already in force.

3.53 The changes principally affect the following section in the guidance:

> disorderly behaviour – Public Order Act 1986, s.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;

3.54 This could be amended to read:

> public order offences – Public Order Act 1986, s. 3, 3A, 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;

3.55 Also, the following could be added:

> any offence under section 31 of the Crime and Disorder Act 1998 (racially or religiously aggravated public order offences) which 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 letter, electronic communication or article with intent to cause distress or anxiety) which 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 which 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) which 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 which 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.

3.56 The proposed changes merely reflect changes to legislation but it may be helpful to consult on them to ensure that the information is set out in a way that is helpful to users of the MCSG.

Question 12: Should the proposed changes to the guidance on football banning orders be consulted on?

Other changes not previously considered

3.57 Feedback (via the website) from a magistrate has questioned the use of the term BAME in the mental disorders guideline, it occurs twice in paragraph 5. Central Government guidance is now not to use that term. The government's preferred style is to write about ethnic or ethnic minority 'groups' and people from ethnic minority 'backgrounds' but not to use the term ethnic minority 'communities'. In addition 'gender and race' might be better expressed as 'gender and ethnicity'. Suggested revised wording:

> It is important that courts are aware of relevant cultural, ethnicity and gender considerations of offenders within a mental health context. This is because a range of evidence suggests that people from ~~BAME communities~~ ethnic minority backgrounds may be more likely to experience stigma attached to being labelled as having a mental health concern, may be more likely to have experienced difficulty in accessing mental health services and in acknowledging a disorder and seeking help, may be more likely to enter the mental health services via the courts or the police rather than primary care and are more likely to be treated under a section of the MHA. In addition, female offenders are more likely to have underlying mental health needs and the impact therefore on females from ~~BAME communities~~ ethnic minority backgrounds in particular is likely to be higher, given the intersection between gender and ~~race~~ ethnicity. Moreover, refugees and asylum seekers may be more likely to experience mental health problems than the general population. Further information can be found at Chapters six and eight of the Equal Treatment Bench Book.

3.58 These changes to terminology could be made without consultation as they are not substantive, but the Council may feel that consulting on them would draw attention to the changes.

Question 13: Should the proposed changes to the mental disorders guideline be made and should they be consulted on?

4 IMPACT AND RISKS

4.1 The impact on sentencing of the majority of the proposals in this paper will be relatively minor. The most significant changes are those necessitated by legislative changes.

4.2 The proposed changes are largely technical and most are unlikely to be of wide interest, but they present an opportunity to show that the Council is responsive to feedback and makes every effort to keep guidelines relevant and up to date. There is also the possibility that the Council may be criticised for the way in which the legislative changes are dealt with.

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Sentencing Council

Sentencing Council meeting:	**17 June 2022**
Paper number:	**SC(22)JUN[04] – Imposition Guideline**
Lead Council member:	**n/a**
Lead official:	**Jessie Stanbrook** **jessie.stanbrook@sentencingcouncil.gov.uk**

1 ISSUE

1.1 In the May Council Meeting, there was a broad consensus that if we were to make any amendments to the Imposition Guideline, it would benefit from a more comprehensive review and as such, be done as a standalone project. If the Council agrees to this, in advance of this project, there are some technical amendments which we recommend are made immediately.

2 RECOMMENDATION

2.1 That the council:

- Agrees to do the Imposition Guideline as a comprehensive standalone project;
- Agrees to amending references to the *National Probation Service* to the *Probation Service* (three instances in the Guideline);
- Agrees to removing reference to *Attendance centres* (two instances in the Guideline);
- Agrees to amending the *curfew* wording under the Requirements heading to align with the legislative changes in the Police, Crime, Sentencing and Courts Act 2022 ("PCSC Act");
- Agrees to amending inconsistencies in the *curfew* wording across the different levels under the Community Orders Levels Table;
- and; Agrees to amending the *curfew* wording under the Community Orders Levels Table to align with the legislative changes in the PCSC Act according to *Option 2*, outlined below.

3 CONSIDERATION

3.1 Following the May Council meeting, further discussion within the Office has led to our view that there is merit in taking forward a review of the Imposition guideline and, in line with Council's view at the May meeting, this should be a more considered separate project. The various factors that have led to this view include: the Analysis and Research team will shortly be concluding their evaluation of this Guideline (due to be completed next month) which may

uncover potential amendments to be made; HMCTS Legal Operations colleagues have suggested some potential amendments to the PSR sections of the guideline; and there are a number of possible further amendments that might usefully be made related to the inclusion of the purposes of sentencing and the wording from the Expanded Explanations relating to the sentencing of young adults, primary carers and old/infirm offenders that have previously been suggested. If Council members agree in principle to this approach, an initial scoping paper for this standalone project will be presented in the July Council meeting.

Question 1: Is the Council content for Imposition to be a standalone project?

3.2 Notwithstanding this decision, as discussed in the May Council meeting, there are several technical amendments that are recommended to be made immediately, prior to starting a standalone project. We do not believe they require consultation due to the fact they are based on either legislative change (the enactment of the PCSC Act) or policy change (reunification of the National Probation Service), so have the sole purpose of correcting the now outdated elements of the Guideline.

Probation Service

3.3 Probation services in England and Wales reunified on 26 June 2021 which brought together the National Probation Service and community rehabilitation companies into one administration. The new Probation Service is now responsible for managing all those on a community order or licence following their release from prison in England and Wales.

3.4 The three references in the Guideline would therefore be amended from:

National Probation Service

To:

Probation Service

Question 2: Is the Council content for these changes to be made?

Attendance centres

3.5 The PCSC Act effectively removed attendance centres as an active requirement by amending the applicability of this requirement only to those convicted of the offence before the day on which section 152 of the PCSC Act came into force, which was 28 April 2022 (and as before, only if the offender was aged under 25 when convicted of the offence).

3.6 Therefore, the following text in the Guideline, under the Requirements heading, would be removed:

~~*"attendance centre requirement (12 – 36 hours. Only available for offenders under 25 when convicted)."*~~

3.7 Reference to attendance centres would also be removed from the community order levels table:

~~*"Attendance centre requirement (where available)"*~~

Question 3: Is the Council content for these changes to be made?

Curfew – Requirement section of the Guideline

3.8 The PCSC Act also increased the maximum daily curfew hours and curfew requirement period. The maximum daily curfew hours has been increased from 16 hours to 20 hours, and the curfew requirement period has been increased from 12 months to 2 years, in respect of an offence of which the offender was convicted before the day on which section 152 of the PCSC Act came into force, which was 28 April 2022.

3.9 The Bill also included a third specification for sentencing curfew hours, specifically that they cannot be *"more than 112 hours in any period of 7 days beginning with the day of the week on which the requirement first takes effect."*

3.10 To align the Imposition Guideline with these changes, wording in the Guideline, under the Requirements heading, would change, from:

- *"curfew requirement (2 – 16 hours in any 24 hours; maximum term 12 months; must consider those likely to be affected; see note on electronic monitoring below)"*

to:

- ***"curfew requirement (2 – 20 hours in any 24 hours; maximum 112 hours in any period of 7 days beginning with the day of the week on which the requirement first takes effect; maximum term 2 years (or 2 – 16 hours in any 24 hours; maximum term 12 months in relation to a relevant order in respect of an offence of which the offender was convicted before 28 April 2022); must consider those likely to be affected; see note on electronic monitoring below)"***

Question 4: Is the Council content for these changes to be made?

Curfew – community order levels table

3.11 Before setting out the options for amendments to the curfew wording to the community order levels table in line with the PCSC Act, it is worth noting that the current text between the three levels is inconsistent, so at the very least it is recommended that these are made consistent. These inconsistencies are:

- The words “per day” after the number of hours are written in the ‘low’ and ‘high’ levels but not the ‘medium’ level

  “per day” to be added to the ‘medium’ level curfew wording

- The words “for example up to…” are in parentheses in the ‘low’ and ‘medium’ levels but not the ‘high’ level.

  parentheses to be added to the ‘high’ level curfew wording

- The words “within the lowest/middle” range are written in the ‘low’ and ‘medium’ levels but not the ‘high’ level

  “within the highest range” to be added to the ‘high’ level curfew wording

Question 5: Is the Council content for these inconsistencies to be corrected?

Low	Medium	High
Suitable requirements might include: • Any appropriate rehabilitative requirement(s) • 40 – 80 hours of unpaid work • ***Curfew requirement within the lowest range (for example up to 16 hours per day for a few weeks)*** • Exclusion requirement, for a few months • Prohibited activity requirement • ~~Attendance centre requirement (where available)~~	Suitable requirements might include: • Any appropriate rehabilitative requirement(s) • Greater number of hours of unpaid work (for example 80 – 150 hours) • ***Curfew requirement within the middle range (for example up to 16 hours for 2 – 3 months****)* • Exclusion requirement lasting in the region of 6 months • Prohibited activity requirement	Suitable requirements might include: • Any appropriate rehabilitative requirement(s) • 150 – 300 hours of unpaid work • ***Curfew requirement for example up to 16 hours per day for 4 – 12 months*** • Exclusion requirement lasting in the region of 12 months

3.12 While the amendments to the curfew wording under the Requirements heading (above) are primarily technical to align with the PCSC Act, amendments to the curfew wording under the Community Order Levels Table is not as straightforward, and as such, there are a number of options for the Council to consider.

3.13 To note, as specified by the text “suitable requirements may include”, guidance in the Community Order Levels Table is highly discretionary. However, the council may still wish to reflect the increased maximum daily curfew hours and curfew requirement duration in line with the PCSC Act. We believe there are three main options for how this can be done, which are set out in more detail below. These are:

- Option 1: *Make no changes to the text now beyond correcting the inconsistencies; but include its consideration in the standalone Imposition Guideline project (and subsequent consultation)*
- Option 2: *In addition to correcting the inconsistencies,* r*eplace only the new maximum daily curfew hours but do not amend the ranges of the requirement duration;*
- Option 3: *In addition to correcting the inconsistencies, replace the new maximum daily curfew hours and amend the ranges of the requirement duration, either in line with ranges in the exclusion requirement, or using another approach to be agreed.*

3.14 Option 1: *Make no changes to the text now beyond correcting the inconsistencies but include its consideration in the upcoming standalone Imposition Guideline project (and subsequent consultation).* The Requirement section and relevant wording in the current sections of the Community Order Levels Table have been pulled out below.

<table>
<tr><td colspan="3">Requirements

• curfew requirement (2 – 20 hours in any 24 hours; maximum 112 hours in any period of 7 days beginning with the day of the week on which the requirement first takes effect; maximum term 2 years (or 2 – 16 hours in any 24 hours; maximum term 12 months in relation to a relevant order in respect of an offence of which the offender was convicted before 28 April 2022)…)”</td></tr>
<tr><td colspan="3">Community Order Levels Table</td></tr>
<tr><td>Low</td><td>Medium</td><td>High</td></tr>
<tr><td>From:

Curfew requirement within the lowest range (for example up to 16 hours per day for a few weeks)</td><td>From:

Curfew requirement within the middle range (for example up to 16 hours per day for 2 – 3 months)</td><td>From:

Curfew requirement within the highest range (for example up to 16 hours per day for 4 – 12 months)</td></tr>
</table>

3.15 If no changes were made to the text in the levels table now, the main disadvantage would be that the maximum number of hours and requirement duration under the Requirements heading and the wording in the Community Order Levels Table would not be aligned. This may be justified by the guidance in the levels table being highly discretionary, and the fact that sentencers can choose to go above the suitable requirement levels.

Advantages of this option would be not pre-judging considerations in the Imposition Guideline consultation of wording in the Community Order Levels Table.

3.16 Option 2: *In addition to correcting the inconsistencies, replace only the new maximum daily curfew hours but do not amend the ranges of the requirement duration.* This option would amend the text in the Community Order Levels Table as per the below (amendments underlined):

Low	**Medium**	**High**
From: *Curfew requirement within the lowest range (for example up to 16 hours per day for a few weeks)* To: ***Curfew requirement within the lowest range (for example up to 20 hours per day for a few weeks)***	From: *Curfew requirement within the middle range (for example up to 16 hours for 2 – 3 months)* To: ***Curfew requirement within the middle range (for example up to 20 hours per day for 2 – 3 months)***	From: *Curfew requirement for example up to 16 hours per day for 4 – 12 months* To: ***Curfew requirement within the highest range (for example up to 20 hours per day for 4 – 12 months)***

3.17 If only the maximum daily curfew hours were changed, this would ensure the correct maximum number of hours was stated in the levels table as per the legislation, and would allow the ranges in the levels table to be consulted on. This option may be the best option to balance aligning updated legislation with the need to consult on more detailed application of that legislation, namely the possible sentencing ranges.

3.18 Option 3: *In addition to correcting the inconsistencies,* r*eplace the new maximum daily curfew hours as well as amend the ranges of the requirement duration, either in line with ranges in the exclusion requirement, or using another approach to be agreed.*

3.19 If the Council wishes to take the opportunity to amend the ranges as well, there is a risk that these changes may be considered sufficiently complex that they require consultation. Nevertheless, should the Council wish to amend the ranges, we believe the most logical approach is to bring the wording in line with the exclusion requirement ranges (included below), due to the fact that one of the reasons behind the legislative increase of the maximum duration of the curfew requirement was to bring it in line with the maximum period for the exclusion zone requirement. This would amend the text in the community order levels table as per the below (amendments underlined):

Low	Medium	High
("Exclusion requirement, for a few months") From: *Curfew requirement within the lowest range (for example up to 16 hours per day for a few weeks)* To: ***Curfew requirement within the lowest range (for example up to <u>20 hours</u> per day <u>for a few months</u>)***	*("Exclusion requirement lasting in the region of 6 months")* From: *Curfew requirement within the middle range (for example up to 16 hours for 2 – 3 months)* To: ***Curfew requirement within the middle range (for example up to <u>20 hours</u> per day <u>lasting in the region of 6 months</u>)***	*("Exclusion requirement lasting in the region of 12 months")* From: *Curfew requirement for example up to 16 hours per day for 4 – 12 months* To: ***Curfew requirement within the highest range (for example up to <u>20 hours</u> per day <u>lasting in the region of 12 months</u>)***

3.20 However, while these requirements have similarities, they are not the same, and we do not yet know what the impact of these increases will be on those with curfew requirements, or on probation resources or ability to deliver. As noted above, this more detailed applicability of sentencing ranges may be more appropriate to consult on, especially considering the intention to run a standalone project on the Imposition Guideline.

3.21 The Council may also wish to consider amending the curfew requirement duration ranges using another approach, however the approach outlined above is most consistent with the reason for which the legislative change was made.

3.22 On balance we think Option 2 is the better option as it aligns the new maximum number of hours in the Community Order Levels Table with the new legislation but does not amend sentencing ranges for now. Sentencing ranges and any further changes could then be tested at consultation as part of the standalone Imposition project

Question 6: Does the Council agree to proceed with Option 2?

4 EQUALITIES

4.1 While most proposals are updating the Guideline in accordance with legislative or policy change, we do not know at this point what the impact would be of amending the curfew requirement duration ranges. This may be another reason for the Council to decide on Option 1 or 2, or 3 as a temporary measure, so that the duration ranges can be consulted on to understand the full impact of any proposal.

5 IMPACT AND RISKS

5.1 The impact of the majority of proposed amendments in this paper will be relatively minor. The amendments to the curfew requirement will have the biggest impact, specifically the increase of the requirement duration ranges in the levels table should the Council favour Option 3. This may increase the length of community orders with curfew requirements which would require increased probation resources to manage.

Sentencing Council

Sentencing Council meeting:	**17 June 2022**
Paper number:	**SC(22)JUN05 – Child cruelty**
Lead Council member:	**N/A**
Lead official:	**Ollie Simpson** **ollie.simpson@sentencingcouncil.gov.uk**

1 ISSUE

1.1 Signing off draft revisions to the child cruelty guidelines for consultation.

2 RECOMMENDATIONS

2.1 That:

- Council consult on the revised drafts at **Annexes A and B**;
- the culpability factor "prolonged and/or multiple incidents of serious cruelty, including serious neglect" remains at Culpability B; and
- Council note the draft consultation-stage resource assessment at **Annex C**.

3 CONSIDERATION

3.1 At April's Council meeting, Council agreed to a focused revision to the guidelines for causing or allowing a child to die/suffer serious physical harm (section 5 of the Domestic Violence, Crime and Victims Act 2004) and cruelty to a child (section 1 of the Children and Young Persons Act 1933). The revisions are needed to reflect the increase in maximum penalties under the Police, Crime, Sentencing and Courts Act 2022. The maximum for section 5 cases involving physical harm and section 1 cases has increased from 10 to 14 years' custody; the maximum for section 5 cases involving death has increased from 14 years to life.

3.2 It was agreed the guidelines should be revised by adding new "very high" culpability levels, to allow for the very worst cases to be sentenced in the new ranges above the old maximums. Borrowing wording from the manslaughter guidelines, new Category A cases would be marked out by: the extreme character of one or more culpability B factors; and/or a combination of culpability B factors.

3.3 The range for causing or allowing a child to die goes up to 18 years' custody, with a top category starting point of 14 years, and a range of 12 to 18 years. This places it between the top two levels of unlawful act manslaughter. The non-death guidelines have a range up to 12 years, two years below the statutory maximum. The top box starting point for both of these is 9 years, with a range of 7 to 12 years.

3.4 The revised guidelines, with the sentence levels agreed in April, are at **Annexes A and B**.

3.5 It was suggested that wording could be added to this new very high culpability category, echoing the rape guideline, along the lines of "prolonged detention/sustained incident" to capture particularly sadistic cases. A similar culpability factor already exists in the guidelines "prolonged and/or multiple incidents of serious cruelty, including serious neglect".

3.6 We could add this factor to the new very high culpability category. However, based on a resentencing exercise we have done to inform the resource assessment, there is the strong possibility that this would bring a fairly high proportion of cases currently being categorised as high into the very high category. It is a factor which judges bring out frequently where they have seen repeated assaults and/or a sustained campaign of violence and intimidation towards a victim prior either to intervention or to the child's death, which is quite common in these cases.

3.7 The elevation of these offenders would not have a significant impact on prison resources given the low volumes of these cases. It is also true that all of these cases are very distressing. But I suggest that we would be diluting the purpose of our revisions – allowing for the very worst cases to be sentenced in the very high box – if we allowed every case involving prolonged or multiple incidents into the top category. I therefore recommend leaving that factor at Category B.

Question 1: do you agree to keep "prolonged and/ or multiple incidents of serious cruelty, including serious neglect" as High (rather than Very High) culpability?

Question 2: are you content to sign off the revised guidelines for consultation at Annexes A and B?

3.8 If you are content, we will prepare a (likely very short) consultation paper with the aim of launching the consultation in early August. That would run to the end of October. Subject to responses and further Council consideration, we may then be able to publish the definitive guideline early in 2023 to come into force in April.

4 IMPACT AND RISKS

4.1 The consultation-stage resource assessment is at **Annex C**. Given that almost all section 5 offenders already receive immediate custody, the proposed revisions are not anticipated to change the proportion of offenders who receive immediate custodial sentences. It is likely that there may be a very small number of offenders at the highest level of culpability across both offences who will receive longer custodial sentences under the draft guideline.

4.2 For section 1 offences, there may be a very small impact on prison and probation resources as offenders at the highest level of culpability currently may receive longer sentences under the draft guideline, reflecting the increase in statutory maximum sentence. There is no indication that the guideline will lead to a change in sentencing outcomes for these offences; the majority of offenders are likely to continue receiving a community order or suspended sentence order since the guideline remains largely unchanged.

4.3 There is a risk that when judges are given an extra culpability category alongside increased sentencing powers, they will be tempted automatically to place a bad case in the worst possible category. That would mean, for example, a case of causing/allowing serious physical harm that would have had a starting point of seven years' custody would now have a starting point of nine years, even though the facts are the same. We have not attempted to capture this risk in the resource assessment.

4.4 In terms of handling the consultation, there have been several high-profile cases recently of incidents of child cruelty resulting in death. Whilst we can show responsiveness to the change in the maximum penalties, we may need to explain carefully why offenders at the lower end of culpability are not deserving of significantly higher sentences.

4.5 Arguably, an anomaly remains whereby the worst cases of GBH with intent committed against an adult will be sentenced more severely than cases prosecuted under child cruelty legislation where a child has been killed or left with serious permanent disabilities. At root, this is reflective of the different maximum penalties available for different offences and charging decisions will determine the penalty available. Revised sentencing levels as above will mitigate this to some extent.

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Sentencing Council

Sentencing Council meeting:	**17 June 2022**
Paper number:	**SC(22)JUN06 – Guideline priorities**
Lead Council member:	**N/A**
Lead official:	**Steve Wade** **steve.wade@sentencingcouncil.gov.uk**

1 ISSUE

1.1 To seek agreement from the Council on the proposed approach *not* to produce interim guidance for the new strangulation and suffocation offence and to make Council aware of revision to the scope of Mandy's Blackmail and Threats to Disclose Sexual Images paper to include Kidnap, False Imprisonment and Child Abduction and related matters.

2 RECOMMENDATIONS

2.1 That:

- The Council agrees not to produce interim guidance related to non-fatal strangulation and suffocation offences;
- That the Council notes the revised scope of the Mandy's Blackmail and Threats to Disclose project;
- That the Council notes the decision to hold off Immigration offences until the new offences have bedded down a little but for that to be the next guideline picked up.

3 CONSIDERATION

Strangulation and suffocation

3.1 At the last meeting the new strangulation and suffocation offence which commenced on the 7th June was discussed. The merits or otherwise of starting work on a new guideline were debated, bearing in mind that it is a completely new offence. It was decided that it would be wise to wait until there is an opportunity for the Council to see what kinds of cases are coming before the courts, and how they are dealt with, before commencing on a guideline. It was suggested that officials should consider whether it might be feasible or desirable to produce interim 'guidance' to go on the website and for work on a new guideline not to start until it could be seen how the cases were being sentenced. S

3.2 Since that meeting thought has been given to producing guidance, but it is recommended that the we do not proceed with this option. To date, the Council has very infrequently produced 'guidance' for sentencing offences instead of guidelines and normally only where there are compelling reasons. Producing interim guidance for this offence may set a precedent or raise expectations about how quickly the Council may be expected to deal with other similar cases in future. Given guideline development is a fairly lengthy process the Council could be asked to produce guidance in lieu of guidelines for other offences which would not be practicable or helpful.

3.3 In addition, in drafting the General Guideline, Council had in mind that that guideline would be it would be capable of accommodating just such cases as the one at hand. Indeed, it is unlikely that any guidance on this topic could say much more than that which the General Guideline already sets out for consideration when sentencing offences without a guideline:

> a) *Where there is no definitive sentencing guideline for the offence, to arrive at a provisional sentence the court should take account of all of the following (if they apply):*
>
> - *the statutory maximum sentence (and if appropriate minimum sentence) for the offence;*
> - *sentencing judgments of the Court of Appeal (Criminal Division) for the offence; and*
> - *definitive sentencing guidelines for analogous offences.*
>
> *The court will be assisted by the parties in identifying the above. For the avoidance of doubt the court should not take account of any draft sentencing guidelines.*
>
> *When considering definitive guidelines for analogous offences the court must apply these carefully, making adjustments for any differences in the statutory maximum sentence and in the elements of the offence. This will not be a merely arithmetical exercise.*

3.4 Although this new offence has attracted a certain amount of interest and attention, it is recommended that the Council does not produce interim guidance, but instead waits to produce a complete guideline in due course, once we can see how the cases are being sentenced. We would argue that the new offence is not so exceptional that it requires special treatment by the Council.

Question 1: ***Does the Council agree to the recommendation that guidance is not produced for the new strangulation and suffocation offence, but that work will commence on drafting a new guideline in due course?***

Blackmail, Kidnap, false imprisonment, child abduction and threats to disclose private sexual images

3.5 At the last meeting a scoping paper on blackmail and threats to disclose private sexual images presented by Mandy was discussed. Members asked whether or not it would be appropriate for the offences of kidnap and false imprisonment to also be added to this work- there being synergy between the offences. Prior to this discussion it had been planned that Jessie would separately be working on kidnap, false imprisonment and child abduction. Following the meeting the work plan was reviewed and it was agreed that it would make sense for this work to transfer to Mandy, who would now have a project that considered: blackmail, kidnap, false imprisonment, child abduction and threats to disclose private sexual images. This would allow Jessie to concentrate on the changes to the Imposition guideline, which the Council had decided should not be done piecemeal but as part of a considered larger piece of work (and which Council is considering elsewhere on today's agenda).

Immigration Offences

3.6 At the May meeting we also briefly discussed the proposed revision of Immigration Offences and inclusion of the new offences arising from changes to legislation. We had pushed this guideline back for two reasons. First, it was not entirely clear that the legislation would have received Royal Assent by the end of the Parliamentary Session. Second, that (in line with our usual practice) it was desirable to allow at least some time for any new offences to 'bed in' and for us to see what was actually being charged as a result of the legislative changes and how the courts were dealing with such cases. By the time of the May meeting it was clear that the changes had reached the statute book in time and Council asked when we were now likely to pick this up.

3.7 At our post-Council planning meeting we agreed this would be the next major guideline to be picked up – likely to be in the autumn / winter 2022-3 – assuming by that stage Council is content that the changes have bedded in sufficiently. At this stage there it is hard to know who will be free to pick the project up next as it will depend on what progress is made on the projects already in train.

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Sentencing Council

Sentencing Council meeting:	**17 June 2022**
Paper number:	**SC(22)JUN07 – Annual Report**
Lead official:	**Phil Hodgson 020 7071 5788**

1. Issue

1.1 This paper presents the Sentencing Council Annual Report 2021/22 for consideration by members of the Council. The full report is at annex A.

2. Recommendation

2.1 That the Council approves the Annual Report for submission to the Lord Chancellor and subsequent laying before Parliament.

3. Consideration

3.1 The Annual Report is a summary of the activities and achievements of the Sentencing Council between 1 April 2021 to 31 March 2022.

3.2 This year's report follows a new structure that reflects the strategic objectives set by the Council in the five-year strategy. It includes:

- Foreword from the Chairman
- Strategic objective 1: reporting on all work done during the year relating to the development, revision and release of sentencing guidelines, including policy development, consultation, A&R and communication
- Strategic objective 2: reporting on all other aspects of A&R work
- Strategic objective 3: reporting on the work we have done in relation to equality and diversity, including the research commissioned from the University of Hertfordshire
- Strategic objective 4: reporting on our effectiveness research
- Strategic objective 5: reporting on work done to improve public confidence in sentencing
- Sentencing and non-sentencing factors reports
- About the Sentencing Council section, including membership, governance and budget
- Three feature articles covering research we have conducted into the impact of the Council and the guidelines over 10 years, why and how we conduct data collections and the tools we have developed this year to support sentencers

3.3 The Council is required by statute to provide the Lord Chancellor with a report on the exercise of the Council's functions during the year. The Lord Chancellor must lay a copy of the report before Parliament, after which the Council will publish it. The schedule for this year is as follows:

- Friday 17 June – consideration at Council meeting
- Thursday 23 June – submission to the Lord Chancellor and sponsoring Minister James Cartlidge MP; circulation to MoJ Bail, Sentencing and Release Policy Unit
- Wednesday 20 July – laid in Parliament (am) and published (pm)

3.4 Members are asked to discuss any substantive corrections or suggestions for changes to the report at the Council meeting on Friday 17 June and to forward any further minor changes to Phil (phil.hodgson@sentencingcouncil.gov.uk) by end of Monday 20 June.

Question: Subject to any minor changes, does the Council approve the Annual Report 2021/22 for submission to the Lord Chancellor?

Sentencing Council

Sentencing Council meeting:	**17 June 2022**
Paper number:	**SC(22)JUN08 – Totality**
Lead Council member:	**Maura McGowan**
Lead official:	**Ruth Pope** **Ruth.pope@sentencingcouncil.gov.uk**

1 ISSUE

1.1 At the April Council meeting, the content and format of the Totality guideline was agreed subject to consideration of how sentencing for offences committed prior to other offence(s) already sentenced should be dealt with.

1.2 This issue and some other changes were considered by a working group in May and a draft was agreed for consideration by the full Council.

1.3 If the draft revised guideline can be signed off by the Council at this meeting, the consultation will run from September to November (in tandem with the miscellaneous amendments consultation). The aim will then be to publish the revised guideline in March to come into force in April 2023.

2 RECOMMENDATION

2.1 That the Council agrees:

- proposed textual and formatting changes to the draft guideline; and
- the approach to sentencing for offences committed prior to other offence(s) already sentenced.

2.2 That the draft guideline is signed off for consultation.

3 CONSIDERATION

3.1 The current Totality guideline can be viewed online or in document form at **Annex A**.

3.2 A revised version of the guideline incorporating changes agreed at the March and April meetings is at **Annex B**.

3.3 Annex B also shows proposed additions in red and deletions ~~struck through~~. The suggested revisions taken in the order they appear in the guideline are:

3.4 On Page 1 of Annex B at the end of the second point under General principles, the words ‘as a whole’ have been removed as unnecessary.

3.5 On Page 3 of Annex B a change to the wording to improve clarity in the dropdown box of examples under paragraph d.

3.6 On Page 3 of Annex B, an additional example (of possession of prohibited firearms) for where consecutive sentences should not be used to evade the statutory maximum penalty – this is the other obvious example of this situation.

3.7 On Page 3 of Annex B, adding a heading 'Reaching a just and proportionate sentence' and rewording the introductory paragraph to this section. In the previous draft this important guidance had followed on from the guidance on passing consecutive sentences, but it is potentially relevant to both consecutive and concurrent sentences (and combinations of the two), so giving it a separate heading should give it due prominence. Some slight changes to the text are also proposed for clarity.

3.8 On page 4 of Annex B, adding wording in the new section on sentencing for offences committed prior to other offences for which an offender is being sentenced, to link it to the more technical information in later sections and making this a dropdown box.

3.9 Related to this, on page 5 of Annex B, changes to the section 'Existing determinate sentence, where determinate sentence to be passed'. See paragraph 3.11 onwards for a discussion on these changes.

3.10 A minor change to the section on extended sentences at the bottom of page 5 of Annex B to remove unnecessary wording.

Question 1: Does the Council agree to the change proposed at 3.4?

Question 2: Does the Council agree to the change proposed at 3.5?

Question 3: Does the Council agree to add the example at 3.6?

Question 4: Does the Council agree with the creation of a separate heading of 'Reaching a just and proportionate sentence' and the proposed textual changes (at 3.7)?

Question 5: Does the Council agree with the proposed change at 3.10?

3.11 The new section on sentencing for offences committed prior to other offences for which an offender is being sentenced (on page 4 of Annex B) taken from the case of *Green* [2019] EWCA Crim 196 was proposed at the April meeting. The Council agreed that it was useful, but there was concern as to how the guidance might differ depending on whether the offender had been released from or was still serving the previous sentence.

3.12 On reflection it seems as though the guidance in this section can usefully apply whether or not the earlier sentence is still being served and so wording has been added to that effect. However, the structure of the sentence may depend on whether the earlier

sentence is still being served and so some additional wording is proposed to cater for that and to refer to the guidance in the later section.

3.13 Consideration was given to adding further examples of possible combinations of sentences (e.g. currently subject to an SSO and falls to be sentenced for an offence committed before that was imposed) – but the working group agreed that it would be difficult to give any useful guidance of general application and to attempt to do so would risk overcomplicating the guideline.

3.14 As this section is quite long and will not apply to the majority of cases and it is proposed to put it in a dropdown box rather than have it as a core part of the guideline.

3.15 In the next section 'Existing determinate sentence, where determinate sentence to be passed' wording relating to an offender who has been released from custody has been changed so that it works for situations when the new offence is committed before or after the previously sentenced offence. Other minor changes are proposed for clarity. Note that the following text from this section has been removed (as discussed at the April meeting):

Offender serving a determinate sentence (Offence(s) committed before original sentence imposed)	Consider what the sentence length would have been if the court had dealt with the offences at the same time and ensure that the totality of the sentence is just and proportionate in all the circumstances. If it is not, an adjustment should be made to the sentence imposed for the latest offence.

Question 7: Is the Council content with the section on sentencing for an offence committed prior to a previous sentence?

Question 8: Is the Council content with the proposed changes to the section 'Existing determinate sentence, where determinate sentence to be passed'?

3.16 A version of the proposed guideline (incorporating the changes above) showing just the core content without the text of the dropdown boxes is at Annex C. A demonstration of how it will look as a digital guideline will be given at the meeting.

Question 9: Is the overall structure of the guideline right?

Question 10: Are there any other changes that should be made before the guideline is consulted on?

4 IMPACT AND RISKS

4.1 The limited nature of the revisions to the guideline is likely to attract criticism from academics. The Council has considered the suggestions for more radical change and noted the lack of data on multiple offences. The consultation document will explain that the guideline is a practical document used by sentencers and that our research has shown that overall, sentencers find it to be helpful. Therefore the Council has set out to improve the

guideline without risking changing the aspects of it that are useful to sentencers. We will relate the proposed changes to the findings from our research and also (where relevant) to the issues raised by academics.

4.2 The guideline is of wide application and therefore any changes could theoretically have a significant impact on sentencing practice. The nature of the proposed revisions which are designed to clarify and encourage existing best practice, are unlikely to lead to substantive changes. In view of this and the lack of data on multiple offences, a narrative resource assessment will be published with the consultation, rather than a statistics based one. This will be circulated to Council members for approval along with the consultation document. We are also planning to add a small number of questions to our forthcoming data collection to capture information on whether offences have been adjusted to take account of totality and if so in what way.