Sentencing Council

Office of the Sentencing Council
Room EB16 East Block
Royal Courts of Justice
Strand
London WC2A 2LL
DX 44450 Strand
T 020 7071 5793
E Steve.Wade@sentencingcouncil.gsi.gov.uk

www.sentencingcouncil.org.uk

23 February 2023

Dear Members

Meeting of the Sentencing Council – 3 March 2023

The next Council meeting will be held in the **Queens Building Conference Suite, 2nd Floor Mezzanine** at the Royal Courts of Justice, on Friday 3 March 2023 at 9:45. This will be a hybrid meeting, so a Microsoft Teams invite is also included below**..**

A security pass is **not** needed to gain access to this meeting room and members can head straight to the room. Once at the Queen's building, go to the lifts and the floor is **2M** Alternatively, call the office on 020 7071 5793 and a member of staff will come and escort you to the meeting room.

The agenda items for the Council meeting are:

▪ Agenda	SC(23)MAR00
▪ Minutes of meeting held on 27 January	SC(23)JAN01
▪ Action log	SC(23)MAR02
▪ Imposition	SC(23)MAR03
▪ Motoring offences	SC(23)MAR04
▪ Blackmail, kidnap etc	SC(23)MAR05
▪ Perverting the course of justice	SC(23)MAR06
▪ Totality	SC(23)MAR07
▪ Environmental revision	SC(23)MAR08

The external communication evaluation for January is also included with the papers as well as minutes from all three subgroups which have met since the last meeting.

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

Blank page

Sentencing Council

COUNCIL MEETING AGENDA

3 March 2023
Royal Courts of Justice
Queen's Building

09:45 – 10:00	Minutes of the last meeting and matters arising (papers 1 and 2)
10:00 – 11:15	Imposition - presented by Jessie Stanbrook (paper 3)
11:15 – 11:30	Break
11:30 – 12:00	Motoring - presented by Ollie Simpson (paper 4)
12:00 – 13:00	Blackmail, kidnap and false imprisonment - presented by Mandy Banks (paper 5)
13:00 – 13:30	Lunch
13:30 – 14:30	Perverting the course of justice and witness intimidation - presented by Mandy Banks (paper 6)
14:30- 14:45	Break
14:45 – 15:45	Totality - presented by Ruth Pope (paper 7)
16:00 – 16:30	Environmental revision - presented by Ruth Pope (paper 8)

COUNCIL MEETING AGENDA

Blank page

Sentencing Council

MEETING OF THE SENTENCING COUNCIL

27 JANUARY 2023

MINUTES

Members present:	Bill Davis (Chairman) Tim Holroyde Rebecca Crane Rosa Dean Nick Ephgrave Diana Fawcett Elaine Freer Max Hill Jo King Stephen Leake Juliet May Maura McGowan Beverley Thompson Richard Wright
Representatives:	Catherine Elkington for the Lord Chancellor (Head of Sentencing Strategy and Policy, MoJ) Lynette Woodrow for the Director of Public Prosecutions
Members of Office in attendance:	Steve Wade Vicky Hunt Ruth Pope Ollie Simpson Mandy Banks
Observers:	John Smith, Bail, Sentencing & Release Policy Team, Ministry of Justice

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 16 December 2022 were agreed.

2. MATTERS ARISING

2.1 The Chairman welcomed Mark Wall to his first meeting as the High Court judge member of the Council.

2.2 The Chairman thanked all those involved in several recent activities: the launch of the data collection in magistrates' courts and the Crown Court on 9 January; the publication of the externally-commissioned research report on equality and diversity in the work of the Sentencing Council, and the Council's response paper on 10 January; and the Sentencing seminar on current issues in sentencing policy and research, held in conjunction with City Law School, City, University of London, and the Sentencing Academy on 13 January.

3. DISCUSSION ON IMMIGRATION – PRESENTED BY VICKY HUNT, OFFICE OF THE SENTENCING COUNCIL

3.1 The Council agreed to start work on producing a package of immigration guidelines. The Council considered what offences should be included in the package and agreed that ten offences where either key or had sufficient volume to justify a guideline. The agreed package includes a number of offences that were created or amended by the Nationality and Borders Act 2022.

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

4.1 The Council discussed the remaining responses to the consultation and agreed to publish a response to the consultation in March with the changes to be made to guidelines on the Council's website on 1 April 2023.

5. DISCUSSION ON ANIMAL CRUELTY – PRESENTED BY VICKY HUNT, OFFICE OF THE SENTENCING COUNCIL

5.1 The Council considered some changes to the explanatory materials on disqualification from owning an animal and deprivation from keeping animals and asked for a few more changes to make clearer what considerations should be borne in mind when making such orders.

5.2 The Council signed off the Animal cruelty and Failure to ensure animal welfare guidelines and agreed that the guidelines should be published in spring this year alongside a consultation response document.

6. DISCUSSION ON THEFT – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL

6.1 The Council considered some recent sentencing data on shop theft in relation to the findings from the evaluation of the definitive guideline, which was published in 2019. The Council concluded that there was no evidence to justify any revision to the guideline.

7. DISCUSSION ON PERVERTING THE COURSE OF JUSTICE – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL

7.1 The Council considered consultation responses relating to harm factors across both perverting the course of justice and witness intimidation and agreed some changes to the wording and placement of factors as a result.

7.2 The Council also considered some information in relation to specific police warnings and court orders in relation to witness intimidation offences and agreed an amended culpability factor.

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

8.1 The Council considered responses to the consultation on new and revised motoring guidelines, relating to the offences of causing death by driving whilst disqualified, causing serious injury by driving whilst disqualified, causing death by driving whilst unlicensed/uninsured, and the proposed drug driving guidelines.

8.2 Among other things, the Council considered the culpability of offenders who drove having taken a combination of different drugs or drugs and alcohol and how this should properly be measured. The Council also looked at sentence levels across all the offences it had consulted on as part of the motoring consultation.

9. DISCUSSION ON REDUCTION IN SENTENCE FOR A GUILTY PLEA – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

9.1 The Council discussed a suggestion that the guilty plea guideline could be amended to assist with tackling the backlog of cases in the Crown Court. The Council concluded that problems with delayed pleas were not as a result of the guideline and that changes to the guideline would not achieve a reduction in the backlog of cases.

Blank page

Sentencing Council

SC(23)MAR02 February Action Log

ACTION AND ACTIVITY LOG – as at 23 February 2023

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 23 September 2022					
1	**False Imprisonment and Kidnap offences**	Mandy to devise a combined false imprisonment and kidnap guideline to be used in a resentencing exercise by Judicial Council members to test the viability of such a guideline for both offences with one sentence table. Results of this exercise to be discussed at the next meeting for this guideline (March).	**Judicial members**		**ACTION CLOSED:** Members have completed the resentencing exercise and findings will be reported at March Council meeting.
SENTENCING COUNCIL MEETING 18 November 2022					
2	**Animal Cruelty**	SL to share information from District Judges' training materials on disqualifying offenders from keeping animals	**Stephen Leake**	**ACTION ONGOING:** Vicky is making further amendments to the proposed explanatory materials in line with the 27 Jan meeting.	
SENTENCING COUNCIL MEETING 27 January 2023					
3	**Animal Cruelty**	VH to amend the explanatory materials in line with the comments made at Council and will circulate the revised draft via email seeking agreement.	**Vicky Hunt** **All members**	**ACTION ONGOING:** Responses received from some Council members but still awaiting a response from others.	

Blank page

Sentencing Council

Sentencing Council meeting:	**3 March 2023**
Paper number:	**SC(23)MAR03 – Imposition**
Lead Council member:	**Jo King**
Lead official:	**Jessie Stanbrook** Jessie.stanbrook@sentencingcouncil.gov.uk

1 ISSUE

1.1 This paper considers the *custodial sentences* section of the Imposition guideline, including *suspended sentence orders*, and by virtue of a discussion at the first Imposition working group, a first draft of a new '*Purposes and Effectiveness of Sentencing'* section.

1.2 While these two sections are not strictly related, the consideration of the findings of the Effectiveness literature review are relevant and considered in both, so while questions posed below are separate, members should read the entire paper before forming views.

2 RECOMMENDATION

2.1 It is recommended that the Council agrees to:

I. Amendments to the suspended sentence order section;

II. Amendments to the sentencing flow chart;

III. Inclusion of a new section on 'Purposes and Effectiveness of Sentencing'.

3 CONSIDERATION

I. *Amendments to the Custodial Sentences & Suspended Sentence Orders Section*

3.1 As members are aware, a significant driver behind the initial development of the Imposition guideline was to ensure that suspended sentence orders (SSOs) were only being imposed as a custodial sentence that was suitable to be suspended, not as a more severe form of a community order (CO) for cases that had not passed the custodial threshold. It is difficult to ascertain whether the Guideline has addressed this issue; the Imposition guideline evaluation found evidence that showed the anticipated increase in the proportion of COs and a corresponding decrease in the proportion of SSOs after the issuing of a letter to the judiciary by the then Chairman in April 2018 (reminding sentencers of the principles contained in the guideline which was in force from February 2017). However, initial data analysis as part of the ongoing breach evaluation shows that after a breach of an SSO, the proportion of custodial sentences activated remained very similar before and after the introduction of the guideline. *(N.B. This alludes to sentencing data from the magistrates' courts data collection from November 2017 to March 2018, capturing pre-letter data, and*

April 2019 to September 2019, capturing post-letter data. This evaluation is in the relatively early stages and will come to Council later in the year.) This is despite the Breach of SSOs Guideline stating that the custodial sentence should be always activated, unless it is a breach resulting from a further offence that does not require a custodial sentence, or it would be unjust in all the circumstances to activate it. Initial analysis found that the most frequently cited reasons for not activating the custodial sentence were that the offender had a realistic prospect of rehabilitation (50 per cent), or strong personal mitigation (40 per cent), and there was little difference between the reasons pre- and post-guideline.

3.2 This data questions whether the Imposition guideline has indeed resolved the issue of SSOs being imposed as more severe forms of COs where the custodial threshold has not been passed, especially given the high proportion of reasons given being a realistic prospect of rehabilitation or strong personal mitigation, which may have made a CO an appropriate initial sentence. In addition, published offender management data between 2010-2021 shows that sentencers generally impose more requirements on SSOs than on COs, and this has not changed since the introduction of the guideline, despite the Imposition guideline specifying "*A court wishing to impose onerous or intensive requirements should reconsider whether a community sentence might be more appropriate*". **Annex A** shows this data in a table with the mean number of requirements imposed on COs (1.6 in 2021) as compared to SSOs (1.8 in 2021). Stakeholders in MoJ Sentencing Policy contributed that this lack of distinction between COs and SSOs may be further compounded due to the fact that sentencers can give COs with a duration of up to 3 years in length, compared to an SSO which can only be up to 2 years.

3.3 The *custodial sentences* section of the guideline has been reviewed with these considerations in mind. The first Imposition working group discussed whether guidance currently provided for sentencers to consider a) when a potential custodial sentence should be brought down to a CO and b) when a custodial sentence should be suspended, are distinctive enough from each other. The group also considered whether they were content that similar factors are suggested to sentencers to consider both for the imposition of COs and suspended custodial sentences, such as a realistic prospect of rehabilitation, strong personal mitigation and impact on dependants.

3.4 As part of this discussion, I posed that the difficulty distinguishing between the determinations for these difference sentence outcomes may risk leading to potential unconscious bias in this decision making, for example different factors being considered for either of the decisions depending on the offender's individual characteristics or background.

3.5 The working group considered an amended sentencing flow chart that attempted to define the two different intended thought processes for the imposition of a CO (especially when the custodial threshold was initially passed), and the decision to suspend a custodial sentence. However, it was concluded that the original sentencing flow chart was more aligned with the direction the working group felt the guideline should be giving, and that the factors to consider both whether a sentence can be brought down to a CO or suspended are necessarily similar, as they should be decided on the individual facts and circumstances of the offence and the offender.

3.6 Instead of defining a different thought process for sentencers to go through, given the possibility that SSOs may still be being imposed in unsuitable cases, it is recommended that amendments are made to the SSO section of the guideline. The potential amendments discussed by the working group are broadly:

a) **Inclusion of reference to the purposes of sentencing**

b) **Highlighting that COs can be punitive**

c) **Defining 'short custodial sentence' rather than 'cusp of custody' as sentencers perception of the latter differs between magistrates' courts and the Crown Court, and including findings from the Effectiveness review highlighting potential detrimental impact of short custodial sentences**

d) **Considering the weight of previous convictions on eventual sentence**

3.7 Further potential amendments that were not discussed in detail by the working group but that I have included in this paper are:

e) **Removal of the first question on thresholds and adding an introductory line to custodial sentencing**

f) **Reference to considerations for sentencing pregnant offenders**

g) **Inclusion of reference to assessments done by Probation**

h) **Addition of factors and detail to the factors indicating it would not, or may be, appropriate to suspend**

i) **Reference to suspending sentences for offences with statutory minimum terms**

j) **Inclusion of reference to requirements on community orders**

3.8 I have provided some detail after each of these potential amendments in turn below, however the full proposed new *custodial sentences* section, without changes highlighted as they are within the paper below, can be seen in **Annex B.**

Please note: Proposed amendments to the guideline are in **bold** and **red**:

a) Inclusion of reference to the purposes of sentencing

3.9 Based on the agreement in a previous meeting to include the five purposes of sentencing in the guideline (more on this below), it was considered useful to also make reference to all these purposes in the *custodial sentences* section when advising courts that COs can still be imposed even if a case has passed the custodial threshold.

> Passing the custody threshold does not mean that a custodial sentence is inevitable. Custody should not be imposed where **the purposes of sentencing could be achieved by** a community order **(for example, a community order** could provide sufficient restriction on an offender's liberty, by way of punishment, while addressing the rehabilitation of the offender to prevent future crime).

b) Highlighting that COs can be punitive

3.10 The working group had a significant discussion about the reality of COs being quite punitive, particularly for offenders who may struggle with the rigidity of imposed requirements that can often involve offenders needing to attend a particular place at a particular time, with consequences if they do not. A line has therefore been drafted to make this clear under the question '*Is it unavoidable that a sentence of imprisonment be imposed?'* to make this fact clear to sentencers so this can be considered, particularly when thinking about offenders on the 'cusp' of a custodial sentence.

> **Community orders can be punitive; they last longer than a short custodial sentence and can restrict an offender's day to day liberties, as well as provide a strong rehabilitative effect, especially imposed on an offender who may find regular attendance at a specific place or time a challenge to manage around their personal life.**

c) Defining 'short custodial sentence' rather than 'cusp of custody' as sentencers perception of the latter differs between magistrates' courts and the Crown court, and including findings from the Effectiveness review highlighting potential detrimental impact of short custodial sentences

3.11 Initiated by a conversation on pre-sentence reports, the working group agreed that court and sentencer processes can be quite different in magistrates' courts compared to the Crown Court, and that this guideline must ensure it captures this breadth. Due to this difference, what is meant by 'cusp of custody' for sentencers in the magistrates' and Crown courts may differ considerably. It was therefore concluded that it is more useful to refer to

'short custodial sentences', which can be defined, rather than 'cusp of custody', which is different, and cannot easily be defined, in the section on SSOs. (*This is a different matter to the custodial threshold, which is dealt with in a different section of the guideline, and which courts will have already considered prior to getting to this section*.) I have suggested defining 'short custodial sentences' at 12 months given that this is the measure that the Effectiveness review used in their concluding remarks about their findings (below):

> *"The evidence strongly suggests that short custodial sentences under twelve months are less effective than other disposals at reducing re-offending. There is little evidence demonstrating any significant benefits of such sentences. Indeed, there is a reasonable body of evidence to suggest short custodial sentences can make negative outcomes (such as reoffending) worse."*

3.12 I have therefore drafted a paragraph that takes this into account and directs sentencers to consider these findings when thinking about short custodial sentences. Please note that general reference to findings in the Effectiveness review are also included in the new Purposes of Sentencing and Effectiveness section, included later in this paper.

If the court is considering an immediate custodial sentence of up to 12 months after all calculations have been completed (e.g. reduction for a guilty plea), it should take into account that research suggests that short custodial sentences of less than 12 months are less effective than other disposals at reducing reoffending, that there is little evidence demonstrating any significant benefits to short custodial sentences, and that there is a reasonable body of evidence to suggest that short custodial sentences can lead to negative outcomes. Short custodial sentences can disrupt potential employment or accommodation and interfere with relationships with friends and family. Courts must be confident if they are imposing a custodial sentence of less than 12 months that it is absolutely necessary to do so.

d) Considering the weight of previous convictions on eventual sentence

3.13 Some members of the working group discussed how, in their experience, short custodial sentences can often be given to offenders who have previously been given COs but have reoffended (and hence are back in court), even if the offence being sentenced would not necessarily pass the custodial threshold.

3.14 While the guideline currently states that sentences should not necessarily escalate from one CO range to the next on each sentencing occasion (currently in the *Community Orders: General Guidance* section earlier in the guideline), it does not state this for escalating between COs and custodial sentences. This view is, however, currently contained within the expanded explanation for the statutory aggravating factor of Previous convictions, which can be seen in full at **Annex C**, excerpt below:

"6. If the offender received a non-custodial disposal for the previous offence, a court should not necessarily move to a custodial sentence for the fresh offence."

3.15 The Council may want to encourage sentencers to think more broadly, and creatively, across the possibilities that different requirements imposed as part of a CO can bring, rather than automatically 'ratcheting up' to a custodial sentence when faced with an offender with multiple previous convictions, especially if the offence does not necessarily pass the custodial threshold on its own. This is particularly pertinent given the Effectiveness review outlines that a short custodial sentence is not likely to be any more successful in reducing the offender's risk of reoffending and is more likely to lead to negative outcomes.

3.16 Further, depending on location/area of the case, Probation is now able to offer a broader variety of support and services against an individual offender's needs. Since unification in 2020 services newly include referrals to, where available, organisations that support a variety of accommodation, addiction, health, employment, and other personal issues. If an offender's needs are changing or changed, advice from Probation or a pre-sentence report can recommend alternative and more unique requirements or services, that are available in the local area, that may be able to meet the offender's needs better than a short custodial sentence, with the intention of reducing the risk of further reoffending.

3.17 This consideration and approach is already used in the expanded explanation for the statutory aggravating factor of Previous Convictions:

"5. Numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary."

3.18 It is therefore recommended that this is included in the *custodial sentences* section of the Imposition guideline. The following draft paragraph is proposed to come directly after the above proposed paragraph on short custodial sentences of up to 12 months.

This also applies in relation to an offender with previous convictions. If an immediate custodial sentence is considered due to the prior imposition of community sentences for previous convictions, the court should consider whether alternative requirements can be imposed instead of escalating to a custodial sentence. Advice from Probation may be helpful to the court in considering suitable alternative requirements that may be more successful in engaging the offender than requirements imposed previously, and whether Probation considers the offender safe to be managed in the community.

3.19 Of course, there will be cases in which it will be necessary for sentencers to impose a custodial sentence in the face of multiple previous convictions, and the expanded explanation for the statutory aggravating factor of Previous Convictions allows for this:

"7. In cases involving significant persistent offending, the community and custody thresholds may be crossed even though the current offence normally warrants a lesser sentence. If a custodial sentence is imposed it should be proportionate and kept to the necessary minimum."

3.20 Further potential amendments that were not discussed in detail by the working group but that I have included are:

e) Removal of the first question on thresholds and adding an introductory line to custodial sentencing

3.21 As agreed in the October Council meeting, a new section on Thresholds has been drafted which is currently at the top of the guideline as section 1. This section and the rest of the draft will be presented to Council at a later date once all sections have been considered separately. Text on thresholds in the *custodial sentences* section in the current version of the guideline, including the first question 'Has the custody threshold been passed' has therefore been moved to this new section.

3.22 To present information in the guideline more clearly, as requested by some Council members, some of the text from the *Suspended sentences: general guidance* has been moved and amended to introduce the *custodial sentences* section. This includes a new addition of reference to the fact that sentencers will normally use the offence specific or general guideline to determine whether a custodial threshold has been passed, which was discussed in the Imposition working group. This new paragraph is currently drafted as follows:

Imposition of custodial sentences

A custodial sentence should only be considered where the court is satisfied that the seriousness of an offence and all circumstances of the offence mean that no other sentence is suitable. A custodial sentence can be immediate or suspended. If the custodial threshold has been passed according to the sentencer's determination using the offence specific guideline (or general guideline where no offence specific guideline exists), the court should ask the following questions before committing an offender to an immediate custodial sentence:

~~The approach to the imposition of a custodial sentence should be as follows.~~

Is it unavoidable that a sentence of imprisonment be imposed?

f) Reference to considerations for sentencing pregnant offenders

3.23 The Council has received multiple letters on the subject of sentencing pregnant offenders in the last few months, including in reference to recent and multiple deaths of babies in custody. According to the organisation No Births Behind Bars, Ministry of Justice figures show that the number of pregnant women in prison is rising – in 2021/22, there were 50 births to women in custody, and NHS data last year found that pregnant women in prison are five times more likely to suffer a stillbirth than women in the community.

3.24 While the expanded explanation for Sole Carer currently states that "*when sentencing an offender who is pregnant relevant considerations may include: any effect of the sentence on the health of the offender and any effect of the sentence on the unborn child*", the Imposition guideline could say more on this topic. The following amendments have been suggested to lines under the subheading 'Is it unavoidable that a sentence of imprisonment be imposed':

~~For offenders on the cusp of custody~~, Imprisonment should not be imposed where there would be an impact on dependants, **including on unborn children where the offender is pregnant**, which would make a custodial sentence disproportionate to achieving the aims of sentencing. **In particular, courts should avoid the possibility of an offender giving birth in prison unless the imposition of a custodial sentence is absolutely necessary due to public protection concerns.**

g) Inclusion of reference to assessments done by Probation

3.25 Under the question 'Can the sentence be suspended', I have suggested a line about the fact that the court can benefit from assessments done by Probation. This takes into account the importance of Probation's assessment of whether an offender can be safely managed in the community, proposed to be added to the factors below, and aligns with the current working draft of the pre-sentence report section (not yet seen by Council in full).

3.26 I have also proposed that it is specified that this list is non-exhaustive, as this was a question posed by the Sentencing and Probation Policy teams in the MoJ. These words can be removed if Council intends this list to be exhaustive. This is currently drafted as:

The court will benefit from Probation's assessment of any relevant circumstances (such as dependents), whether the offender can be safely managed in the community, and in weighing the ~~The~~ following, **non-exhaustive** factors ~~should be weighed~~ in considering whether it is ~~possible~~ **appropriate** to suspend the sentence.

h) Addition of factors and detail to the factors indicating it would not, or may be, appropriate to suspend

3.27 Based on the discussion at the working group, some additions and amendments have been suggested to the table of factors indicating that it would not be, or may be, appropriate to suspend a sentence. These include the importance of Probation's assessment of whether the offender can or cannot be safely managed in the community, whether or not the offender presents a high risk of reoffending or harm (which is also assessed by Probation), reference to the seriousness of the offence being the primary factor in considering whether appropriate punishment can only be achieved by immediate custody and giving possible examples of personal mitigation. Finally, based on the discussion mentioned above on encouraging sentencers to think about alternative requirements on COs for offenders who have previously had COs imposed and reoffended, the removal of 'history of poor compliance with COs', so that sentencers are given more discretion to potentially be creative with imposing different requirements on a potential SSO, supported by any assessments by Probation.

Factors indicating that it would not be appropriate to suspend a custodial sentence	**Factors indicating that it may be appropriate to suspend a custodial sentence**
Offender presents a risk/danger to the public	Realistic prospect of rehabilitation
Probation assess that the offender cannot be safely managed in the community	**Offender does not present high risk of reoffending or harm**
The seriousness of the offence means that appropriate punishment can only be achieved by immediate custody	Strong personal mitigation **such as age, mental disorders, remorse, etc**
~~History of poor compliance with court orders~~	Immediate custody will result in significant harmful impact upon others

i) Reference to suspending sentences for offences with statutory minimum terms

3.28 When the Council discussed the revised minimum term sections of the bladed articles guidelines as part of the miscellaneous amendments consultation, the case law

Where a statutory minimum term for an offence is 24 months or lower, the court may lawfully impose a suspended sentence order, but in practice this will only be appropriate in rare cases.

around the suspending of sentences for offences that have a statutory minimum term of 24 months or lower was discussed. It was suggested that the Imposition guideline could consider directing sentencers on this point. Therefore, the following line has been suggested:

j) Inclusion of reference to requirements on community orders

3.29 Based on the information provided above about data showing that more requirements are imposed on SSOs than on COs, I have suggested a few additional lines in the *Requirements on a SSO* subsection. This includes suggesting that requirements on a SSO should usually be more rehabilitative in nature, given that an SSO is a custodial sentence and by definition a punitive sentence. I have suggested that this section also refers back to the main Requirements section (yet to be discussed in detail by the Council).

Requirements on a Suspended Sentence Order

When the court suspends a sentence, it may impose one or more requirements for the offender to undertake in the community. The requirements that may be considered are identical to those available for community orders. The court must follow the guidance in the requirements section of this guideline (*link up*), including ensuring that any requirements imposed are the most suitable for the offender, and where multiple requirements are imposed, they are compatible with each other.

Requirements imposed as part of a suspended sentence order are more likely to be predominantly rehabilitative in purpose, as the imposition of a custodial sentence, **whether immediate or suspended,** is itself both **a** punishment and a deterrent. To ensure that the overall terms of the suspended sentence are commensurate with offence seriousness, care must be taken to ensure requirements imposed are not excessive. A court wishing to impose onerous or intensive requirements should reconsider whether a community sentence might be more appropriate.

Question 1: Does the Council agree with the above amendments proposed, resulting in an updated version of the *custodial sentences* section, seen in full in Annex B? What revisions would Council like to be made?

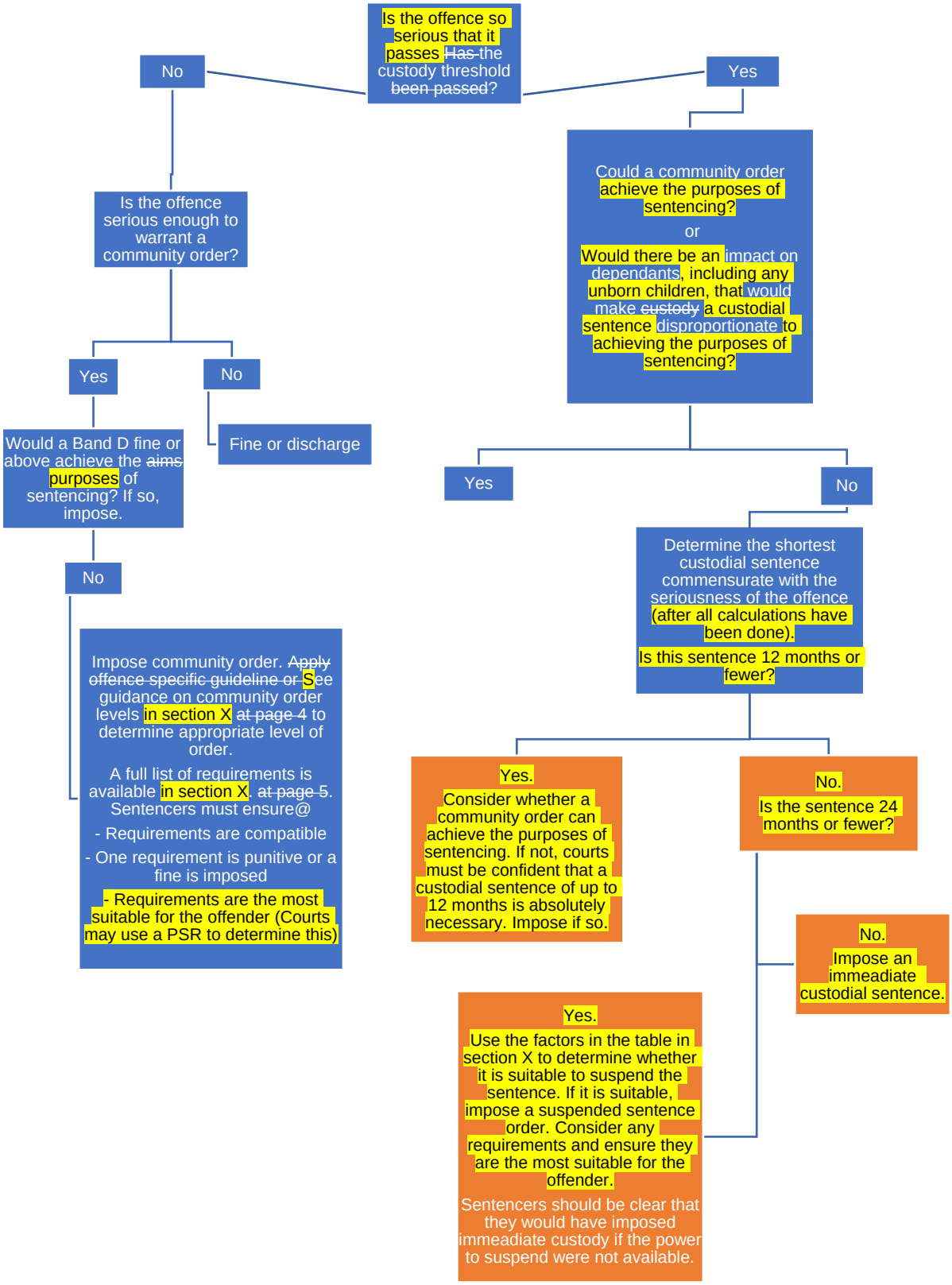
a) **Inclusion of reference to the purposes of sentencing**
b) **Highlighting that COs can be quite punitive**
c) **Defining 'short custodial sentence' rather than 'cusp of custody' as sentencers perception of the latter differs between magistrates' courts and the Crown Court, and including findings from the Effectiveness review highlighting potential detrimental impact of short custodial sentences**
d) **Considering the weight of previous convictions on eventual sentence**
e) **Removal of the first question on thresholds and adding an introductory line to custodial sentencing**
f) **Reference to considerations for sentencing pregnant offenders**
g) **Inclusion of reference to assessments done by Probation**
h) **Addition of factors and detail to the factors indicating it would not, or may be, appropriate to suspend**
i) **Reference to suspending sentences for offences with statutory minimum terms**
j) **Inclusion of reference to requirements on community orders**

II. *Sentencing Flow Chart*

3.30 The current version of the sentencing flow chart can be seen at **Annex D**. Even if no substantive amendments are made, the flowchart still needs to be updated due to the references to pages that no longer exist.

3.31 A more detailed version of the flow chart was discussed by the Imposition working group, although it was concluded by most members that the current version of the flow chart is more aligned with the intention of the Council for the thought process that sentencers go through when considering whether to impose a CO, custodial sentence or an SSO. Based firmly on the suggested amendments to the *custodial sentences* section above, proposed amendments have been made to the flow chart which can be seen below. However, if proposed amendments to the *custodial sentences* section are not agreed, it may be unnecessary to consider this flow chart at this point.

Please note*: The boxes in blue exist in the current version of the sentencing flow chart. New text that has been proposed is highlighted, with subtractions in ~~strikethrough~~, and new boxes that are proposed are in orange.*



Question 2: Does the Council agree with the proposed amendments to the sentencing flow chart? What revisions would Council like to be made?

III. *Inclusion of a new section on 'Purposes and Effectiveness of Sentencing'.*

3.32 In the December meeting, Council agreed to include the five purposes of sentencing in the Imposition guideline. There was a discussion on how the guideline could include an overview of each of these purposes, initiated by the Council's intention that the guideline includes information on the importance of rehabilitation, stimulated by the findings in the Effectiveness literature review.

3.33 After consideration of various options to give an overview of each purpose of sentencing within the guideline, given their breadth and overlap, it has been concluded that it would be more impactful to include a more general line about all the purposes, and specifically the fact that both a community and custodial sentence can fulfil all the purposes of sentencing. This is currently drafted as follows. In this example, the non-bold black text is not currently in the guideline, but has been provisionally agreed by the Council in a previous meeting. The bold red text simply highlights the newly proposed lines since this agreement:

The court must have regard to the five purposes of sentencing when determining sentence. **The weighting each purpose should be given will vary from case to case, however both community and custodial sentences can achieve all the purposes of sentencing.**

- The punishment of offenders
- The reduction of crime (including its reduction by deterrence)
- The reform and rehabilitation of offenders
- The protection of the public
- The making of reparation by offenders to persons affected by their offences

The court must ensure that any restriction on the offender's liberty is commensurate with the seriousness of the offence. A restriction on liberty can be achieved by a community or a custodial sentence.

3.34 The Effectiveness literature review was discussed in the October meeting in which it was agreed that the Imposition guideline should be one of the main vehicles in which the Council notes the findings of the work, specifically that "the *evidence strongly suggests that short custodial sentences under twelve months are less effective than other disposals at reducing re-offending*", and that "*there is little evidence demonstrating any significant benefits of such sentences. Indeed, there is a reasonable body of evidence to suggest short custodial sentences can make negative outcomes (such as reoffending) worse.*" A 'step back step' was preliminarily agreed to be included to ask courts to review whether the sentence it has initially arrived at fulfils the purposes of sentencing, noting the findings of the review.

3.35 These proposals have all been pulled together into a new section entitled 'Purposes and Effectiveness of Sentencing'. This can be seen in full at **Annex E.** This section currently comes third, after an initial note on deferring sentences, a first section on thresholds and a second section on pre-sentence reports. (As mentioned earlier, a full first draft will be presented to Council at a later date, once all separate sections have been discussed).

3.36 While Council has seen a variation of all of the paragraphs in this section, these have been updated following the discussion.

Question 3: Does the Council agree with the proposed new section on Purposes and Effectiveness of Sentencing?

Question 3: What amendments would the Council make to the current version of the draft of the section on Purposes and Effectiveness of Sentencing at Annex E?

4 EQUALITIES

4.1 There are several equality issues throughout this paper. These will be kept in close consideration and be outlined in more detail at a later date.

5 IMPACT AND RISKS

There are some risks throughout this paper. These will be considered in more detail at a later date. It is not possible to quantify impact of these decisions yet but this will also be considered in more detail at a later date.

Sentencing Council

Sentencing Council meeting:	**3 March 2023**
Paper number:	**SC(23)MAR04 – Motoring offences**
Lead Council member:	**Rebecca Crane**
Lead official:	**Ollie Simpson** **ollie.simpson@sentencingcouncil.gov.uk**

1 ISSUE

1.1 Consultation responses received on proposed driving disqualification guidance.

2 RECOMMENDATIONS

2.1 That:

- Council produces disqualification guidance now, in line with that consulted on, even though it may be replaced or supplemented following further work on disqualification;
- the language about lengthy driving bans is tempered in light of consultation responses;
- we add some more text to clarify the situation for extending a disqualification where an offender is already serving a custodial sentence.

3 CONSIDERATION

3.1 We consulted on overall principles related to imposing disqualification to appear at the ancillary orders stage of each proposed motoring guideline. These would be tailored to the specific offence so the information would vary from guideline to guideline, but a full version is included at **Annex A**. The proposed guidance covers:

- Principles
- Minimum disqualification periods
- Special reasons (not to impose a disqualification or a required minimum period)
- Interaction with a custodial period (same offence)

- Interaction with a custodial period (different offence)

3.2 At November's meeting Council agreed we should do further work on disqualification as part of a separate motoring project, in light of the strength and breadth of feeling in responses urging the Council to look at greater use of disqualifications, including as a more appropriate alternative to time in custody. I propose to undertake that work in parallel with finalising the draft guidelines on aggravated vehicle taking. Subject to a fuller scoping exercise which may identify further motoring-related issues, these would be combined into one follow-up motoring consultation.

3.3 Council may feel in the meantime that we should hold back the disqualification guidance we had proposed, pending a fuller exploration of the issues surrounding disqualification and consultation. However, subject to the points discussed below, I believe there is merit in providing this guidance now, as it provides a helpful steer on matters which can trip sentencers up. We could look to revise, expand or replace it following the next consultation.

Question 1: do you agree to provide the guidance we consulted on now (subject to the discussion points below), on the understanding that further work on disqualification will take place?

3.4 Subject to that decision, we may nonetheless wish to revisit some aspects of our proposed disqualification guidance following consultation responses.

3.5 Many respondents were content with the guidance, welcomed it and offered no suggestions for change. Whilst most judges and magistrates involved road testing did not find the guidance without prompting, when they did access it they generally agreed it was helpful. There were some suggestions, both from road testing and written responses that the guidance was too long. I have sympathy with this, but I believe we have presented the guidance we need to present in a complicated area in the most concise way we can.

3.6 We did receive some more specific recommendations for change.

3.7 There were strong views amongst many consultees about two of the principles set out in the first section of the guidance:

- In setting the length of any disqualification, sentencers should not disqualify for a period that is longer than necessary and should bear in mind the need for rehabilitation (for example, by considering the effects of disqualification on employment or employment prospects).
- Sentencers should also be mindful of the risk of long disqualifications leading to further offences being committed, by reason of a temptation to drive unlawfully.

The latter in particular provoked strong criticism from several members of the public. Some typical responses:

> "That sentence is embarrassing as it seems to place emphasis on there not being further crimes rather than trying to reduce dangerous drivers on the roads."

> "This seems to bias disqualification periods lower inappropriately. Driving vehicles inappropriately is dangerous and should not be treated as a "semi-crime". Would a judge reduce the length of a custodial sentence because a long sentence may tempt the offender to abscond from prison? I think not?"

> "Why on earth should long sentences not be used as the offender might be tempted to drive while disqualified? Do we limit prison sentences because a felon with a long sentence might be more likely to attempt escape? Of course not. Who formulated this point? What an extraordinary and wrong headed suggestion."

> "This is tantamount to blackmail of society by offenders – 'give me a short ban or I'll just drive anyway'. The point being that long bans cause serious thought in would-be offenders and during the duration of the ban, increases the jeopardy of being caught whilst banned leading to custodial punishments."

3.8 The London Cycling Campaign echoed the views of others:

> "The Sentencing Council advises against using longer driving bans because offenders may choose to disregard them and drive without the authority to do so. Enforcement is matter for the police and legislators and we are concerned that the Sentencing Council's perception of ineffective enforcement should then be considered a factor in determining penalties. The Sentencing Council may wish to advise police and legislators to consider new technologies to monitor and enforce against disqualified drivers using vehicles instead of suggesting more lenient penalties because it considers enforcement is inadequate."

3.9 On the related, but distinct, subject of rehabilitation some members of the public questioned the extent to which this was a relevant factor:

> "In my view, as a non-essential activity that requires training and licensing to legally undertake, longer terms of disqualification should be considered. Part of the problem with the danger on our roads is the false assumption that driving a motor vehicle is a fundamental right, not a privilege or responsibility, leading to instances of aggression against vulnerable

road users, disqualified drivers continuing to drive and cases where those convicted of a driving offence who were able to continue driving legally then go on to cause death or injury at a later date.

There are many people in the UK that are unable to drive a motor vehicle due to disability or poverty that are not excluded from society, and instead must use public transport or active travel such as walking, yet the guidelines here would suggest that those people who have committed an offence would be unfairly hindered by a lack of access to a private, personal motor vehicle"

"Individuals are capable of making decisions regarding the way they conduct themselves in society and also of calculating the risks involved in breaking the law, for example by driving dangerously. Allowing defendents to rely (often repeatedly) on mitigation due to the impacts of disqualification on employment is egregious and undermines the public's confidence in the judiciary. If the defendent needs to drive for employment purposes, they should exercise greater caution when driving and should not expect to receive a lesser or no disqualification merely because they need to drive for work."

3.10 These principles reflect long-established case law, as rehearsed in cases such as Backhouse [2010] EWCA Crim 1111, Needham [2016] EWCA Crim 455 and Mohammed [2016] EWCA Crim 1380. The origins of the principles are worth considering. The case of Cooksley [2003] 996 EWCA Crim 996 borrowed heavily from advice provided by the Sentencing Advisory Panel (SAP). At paragraph 43 the then Lord Chief Justice, referring to the SAP advice, said:

"we accept that to extend the ban for a substantial period after release can be counter−productive particularly if it is imposed on an offender who is obsessed with cars or who requires a driving licence to earn his or her living because it may tempt the offender to drive while disqualified."

The relevant SAP advice from February 2003 in context was:

"There is some authority, in Thomas *and* Matthews *that a ban which will extend for a substantial period after release is likely to be counterproductive if it is imposed on an offender who is obsessed with cars, or who requires a driving licence to earn his or her living, because it may tempt the offender to drive while disqualified. Other cases, such as* Gibbons*, suggest that the safety of the public should outweigh these considerations.*

Despite the observations in Gibbons *the prevailing view, with which the Panel agrees, is that expressed in the other two cases. The argument there may well be the stronger now since the introduction of the requirement to pass an extended driving test."*

3.11 The cases referred to here date from the 1980s and themselves follow case law dating back further. The language used in them is striking:

"[The sentencing judge] was influenced….[by] accepted sentencing policy in this type of case, that is with persons like the present appellant, who seem to be incapable of leaving motor vehicles alone, to impose a period of disqualification which will extend for a substantial period after their release from prison may well, and in many cases certainly will, invite the offender to commit further offences in relation to motor vehicles. In other words a long period of disqualification may well be counter-productive and so contrary to the public interest" (Thomas)

"We are impressed that given the history of this particular applicant, the likelihood that he would be able to keep his hands off other people's motor cars during such a period [five and a half years after release] is so remote that it is undesirable that this Court should in any way increase the probability of the commission of any further similar offence" (Matthews)

3.12 Some observations:

- The cases of Matthews, Thomas and similar cases from the period do not tend to involve egregiously bad driving – unlike Gibbons, also referred to by the SAP – but rather petty offenders who repeatedly drive whilst disqualified and/or refuse to pass a test. In that light, the Court of Appeal may have been instructing the courts not to keep persisting in a disposal that is clearly ineffective.
- The SAP advice conflates this with the related, but separate, issue of rehabilitation in general. The case of *Wright* from 1979 cited in these cases involved a taxi driver who had driven his car to steal some sheet metal and received a disqualification. The Court of Appeal thought it would be more helpful if his disqualification was short so that he could pursue a legitimate enterprise.
- Even in giving that advice, the SAP foresees disqualifications of 5-10 years for bad cases of causing death by dangerous driving, and acknowledges that lifetime bans will be appropriate on occasion.

- Attitudes have moved on, as have the statute and case law: disqualification is now seen as a backwards-looking, punitive measure, as much as a forwards-looking protective one, which was only just beginning to be the case in 2003.

3.13 There appears at least a question to be asked over the received wisdom about not imposing lengthy disqualifications, and I believe this will be worth considering as part of the next project on disqualification. At this stage I do not propose removing it from the advice we proposed (it would stand as case law in any case), but we could temper it in the following way (changes in **bold**):

> In setting the length of any disqualification, sentencers should not disqualify for a period that is longer than necessary and should bear in mind the need for rehabilitation (for example, by considering the effects of disqualification on employment or employment prospects).
>
> **It is also a well established principle that s**entencers should ~~also~~ be mindful of the risk of long disqualifications leading to further offences being committed, by reason of a temptation to drive unlawfully. **These considerations should be balanced against the need to protect the public, and to provide punishment which is just to the offender and proportionate to the offence.**

Question 2: do you want to amend the text on principles as set out above?

3.14 HM Council of District Judges made two suggestions to clarify the situation where a disqualification needs to take account of time spent in custody. First, they pointed out a variant of the scenario where the custodial sentence is not for the offence for which disqualification is being imposed and suggested this addition (new text in bold):

> "The Court may be imposing a custodial sentence on the offender for another offence, which is not the one for which they are being disqualified **or the offender may already be serving a custodial sentence for another offence. In either of these circumstances**, under section 35B of the Road Traffic Offenders Act 1988, **the Court** should have regard to "the diminished effect of disqualification as a distinct punishment if the person who is disqualified is also detained in pursuance of a custodial sentence".

3.15 They also suggested that:

> "the guidance should also make clear that when ordering an extended disqualification mentioned in the circumstances indicated in D and/or E, [the court] should announce:
> - The discretionary period it would have imposed had the defendant not been serving a custodial sentence

- Any extension under D
- Any uplift under E”

I am less convinced by this suggestion, simply because based on transcripts I have seen, explaining the calculation is second nature and I am mindful of adding to the length of the guidance. However, I do see the case for clarifying the first point made by HM Council of District Judges.

Question 3: do you agree to add wording to cater for the scenario where the offender is already in custody for another offence?

3.16 The West London Magistrates Bench believed the information provided was useful, and had suggestions for additional guidance. They asked for additional guidance on “special reasons” not to impose a disqualification, or not to impose a minimum. They suggest:

“The most common examples of what might constitute special reasons include:

• Very short distance driven (for example, moving a car a few yards to safety).

• Driving due to an emergency (medical or otherwise) – if this falls short of a defence.

• A drivers’ drink being laced or spiked without their knowledge.”

3.17 I would be worried about hinting too much at what may or may not constitute special reasons. From the case law, even though the bar is a high one, there may be a variety of special reasons and they are fact-sensitive. On the one hand, we would not want the fact of (say) a short distance driven automatically to amount to special reasons (location and further intention would be just two elements which could negate this). On the other hand, there may be a variety of – by definition, unusual – circumstances which we cannot envisage but that could reasonably amount to special reasons. We are also looking at a range of offences which go beyond those seen commonly in the Magistrates’ courts and I am not confident that these are the “most common examples” of special reasons across all offending.

3.18 The West London Bench then sought more information about “totting-up” disqualifications. For most of the offences in scope, disqualification is mandatory and totting up points should not be an issue. I therefore propose keeping this issue separate as part of the magistrates’ explanatory materials.

3.19 Finally, they sought further guidance on offering a reduction in sentence for taking part in a drink drive rehabilitation scheme. The only offence in scope of this consultation to which this is relevant is causing death by careless driving whilst under the influence. We

could provide a pointer to this possibility by recycling material already in the explanatory materials, but there is a potential handling issue with providing guidance on disqualification reductions in relation to what may be very serious cases of drink driving where a death has been caused. I therefore think we should be silent and let defence teams argue the case for this where they believe it appropriate.

Question 4: do you agree <u>not</u> to add the extra information proposed by the West London Bench?

4 IMPACT AND RISKS

4.1 The disqualification guidance will not have a direct impact on probation and prison resources. A move to greater use of disqualification over custody or even community orders could reduce the impact on prisons and probation, although it could also lead to more offending if those subject to a ban do go on to breach it.

4.2 There may be a handling issue if we present guidance now which is regarded as inadequate, given the strength of feeling about disqualification from consultation responses. We can explain in response to this that we are working on further guidance, but it remains a risk that whatever guidance we produce now is fairly quickly superseded.

4.3 As discussed before, the revised guidelines as consulted on may result in a requirement for additional prison places running into the hundreds. The new causing death by dangerous driving guideline could result in a requirement for up to around 260 additional prison places, with around 20 additional prison places for causing death by careless driving when under the influence of drink or drugs, and around 80 additional prison places for causing serious injury by dangerous driving. We aim to present Council with a revised version of the resource assessment at the 31 March meeting.

Sentencing Council

Sentencing Council meeting:	**3 March 2023**
Paper number:	**SC(23)MAR05 - Blackmail, kidnap, false imprisonment and threats to disclose private sexual images**
Lead Council member:	**Juliet May**
Lead official:	**Mandy Banks** **Mandy.Banks@sentencingcouncil.gov.uk** **0207 071 5785**

1 ISSUE

1.1 This is the fourth meeting to discuss the offences and will focus on draft guidelines for kidnap and false imprisonment. At the next meeting a draft of the disclosing private sexual images guideline will be discussed. This will be revised to incorporate threats to disclose images. On the current schedule there will then be one further meeting to sign the guidelines off ahead of a consultation in the summer.

2 RECOMMENDATION

2.1 At today's meeting the Council is asked:

- To consider the results of the sentencing exercise on the draft combined kidnap and false imprisonment guidelines
- To agree what action to take as a result of the sentencing exercise

3 CONSIDERATION

Kidnap and false imprisonment offences

3.1 At the last meeting that these offences were discussed in September it was agreed to devise a combined guideline for both offences, with one sentence table, which Judicial members would then use to resentence cases using transcripts. This exercise has taken place and the results of the exercise have been analysed. The Council may recall from the discussion at the last meeting that other options for presenting the guidelines were discussed- potentially two separate guidelines, or one guideline for both offences, but two separate sentence tables. It was agreed that as there are similarities between the offences and they are quite interlinked it was unnecessary to have two separate guidelines- otherwise there would be two guidelines with near identical factors in. However, current sentencing practice shows that kidnap offences are sentenced more severely than false imprisonment - so there is a possible risk that by having one sentence table, sentencing severity could increase for false imprisonment.

3.2 For kidnap offences, in 2020, the mean average custodial sentence length (ACSL) estimated pre-guilty plea was seven years three months, with a mean ACSL post guilty plea of five years nine months (tab 1.3 of **Annex A).** For false imprisonment, in 2020, the mean ACSL estimated pre-guilty plea was four years eight months, with a mean ACSL post guilty plea of three years seven months (tab 2.3). Also from the statistics at **Annex A** the Council can see that a greater proportion of offenders sentenced for kidnap receive sentences over 10 years, than offenders for false imprisonment do. Additionally, a greater proportion of offenders for false imprisonment receive sentences at the lower end, 73 per cent receiving a sentence of up to and including four years (post guilty plea), compared to 31 per cent of offenders for kidnap (post guilty plea).

3.3 In the discussion on the issues last time the Council thought one of the risks of having two separate tables, with lower ranges for false imprisonment may be that offenders would then plead to that rather than kidnap, also that perhaps historically sentences for false imprisonment were artificially low. So, the decision was taken to develop one guideline with one sentence table and test it by conducting a resentencing exercise.

3.4 The guideline used in the exercise is attached at **Annex B,** and the results of the exercise at **Annex C**. Six scenarios were tested, three kidnap cases, and three false imprisonment. As can be seen from the table, nearly all scenarios across both offences were categorised as culpability A, high culpability, despite a range of scenarios being selected for resentencing. Within each scenario, final sentence outcomes were reasonably similar with the exception of scenario D, where there was more variability in final sentence lengths. What is most striking from the exercise is that nearly all of the sentences were higher, in some cases considerably so, than the actual sentence given in the case. If these issues are not addressed we would likely see an impact on resources, although volumes for both offences range between around 80 to 120 cases a year (for each offence) the impact of such potential increases could be considerable.

3.5 It must be said of course that this was a very small exercise, and participants were given very brief sentencing remarks with which to sentence the cases, so not an accurate representation of sentencing in reality. However, it does act as a useful tool in identifying potential problems with the initial draft of a guideline, ones that can be resolved ahead of the consultation on the draft guidelines.

3.6 It is interesting from this small sample that the increase in sentence lengths following resentencing for false imprisonment cases were of a similar size increase to the kidnap cases. As false imprisonment cases now have higher starting points due to a combined sentence table (compared to a separate sentence table reflecting current sentencing practice for false imprisonment cases) we may have expected false imprisonment cases to have higher increases to sentence lengths than kidnap cases, where starting points were

more in line with existing sentencing practice. The clear issue remains that nearly all cases were categorised as culpability A. It is not clear whether the false imprisonment cases were sentenced higher due an issue with culpability A, or a combination of that and higher starting points. It is difficult therefore to say with certainty at this stage whether one combined sentence table, or two separate ones would be more appropriate, as it partly depends on what is driving the higher sentences (on average) for kidnap and lower sentences for false imprisonment in current practice.

3.7 However, the sentences were also higher for kidnap offences, using this combined guideline with one table, so the issues with the categorisation of cases is a priority to be addressed, alongside other issues discussed below. At this stage it is proposed that we continue with developing one combined guideline, agree on changes to it to try and address the problems highlighted by the first exercise, and then possibly re-run the resentencing exercise to see if the changes are sufficient.

Question one: Does the Council wish to continue with the guideline with a combined sentence table for both offences (at Annex B)- but address all of the issues raised in the exercise, and then re-run the resentencing exercise? Or should the option of two separate guidelines or two separate sentence tables be revisited?

3.8 One of the key issues highlighted by the exercise was the wording of the high culpability factor regarding violence. A majority of the resentencing participants mentioned this as an issue, as so many cases seemed to automatically fall into category A because of this. Currently the wording of the factor in category A is: ‘use of violence and/or use of a weapon’, with ‘threat of violence to victim and/or others’ in culpability B. The proposed rewording of factors in culpability A is: ‘use of very significant force and/or use of a weapon in the commission of the offence’. In culpability B the proposed rewording is: ‘some force in the commission of the offence’ and ‘use of a weapon to threaten violence’, and a new factor in culpability C of ‘limited use of force in the commission of the offence’. These changes can be seen in track changes on page two of **Annex B.** Rewording the factors in this way tries to graduate the assessment of culpability regarding the use of force, with significant force in culpability A, some use of force in culpability B, and so on. Use of a weapon is in culpability A, with the threat of use of a weapon in culpability B. There are now more factors in culpability B, including ‘some element of planning in the offence’, which resentencing participants suggested was required, and there is an additional factor in category C of ’limited use of force in the commission of the offence’.

Question two: Does the Council agree with the reworded culpability factors regarding use of violence?

Question three: Does the Council agree with the reworded culpability B factors?

3.9 It is also possible that there are too many factors in culpability A, an issue highlighted in the exercise. Clearly the more factors there are, the more likely that cases will be captured in that category. An option would be to move some of the factors to step two, such as 'offence was committed as part of a group', 'offence motivated by financial gain', and 'offence committed in the context of other criminal activity'. However, it is thought that some of these factors, particularly ones relating to financial gain and group activity are often seen in the more serious kidnap cases. Therefore, the Council may not want to move them to step two, potentially reducing the sentence in more serious kidnap cases. So, if the factors remained at step one, the aim of the guideline would be that the more serious kidnap cases are captured in the higher categories, with the less serious false imprisonment ones captured by the lower categories. The proposal therefore is to not move any factors to step two, and perhaps see what sentences result in a second resentencing exercise, if the Council wish to conduct one. However, it may be appropriate to amend the 'offence was committed as part of a group' to 'leading role in group offending' to try to ensure only those playing a more directional role in a group fall into culpability A.

Question four: Does the Council agree not to move the factors from step one to step two, and see what effect this has during a resentencing exercise? And reword the group offending factor?

3.10 It was also suggested during the exercise that the wording of the high culpability factor of 'detention over a substantial period of time' needed to be refined. Options for rewording this could be 'detention over a sustained and prolonged period of time', or 'detention over a protracted period of time' One participant said that there was an overlap with this culpability factor and the step two factor of 'detention in an isolated location', with another participant saying that isolated location needed to be further defined, and that an element of it is implicit in these cases. The aggravating factor was proposed as it was thought worse if the victim is held in an abandoned property miles from anywhere with no-one else around and little hope of rescue, compared to being held in a room in a house, for example. An option would be to add 'where not taken into account at step one' to the wording, to stop double counting, but not make any other changes to allow for the factor to aggravate the sentence in the more serious kidnap cases, for example.

Question five: Does the Council wish to reword the culpability A factor to either 'detention over a sustained and prolonged period of time' or 'detention over a protracted period of time'?

Question six: Does the Council agree to the addition of the wording 'where not taken into account at step one' to the aggravating factor of 'detention in an isolated location'?

3.11 Some of the participants in the exercise suggested that the harm factor of 'victim forcibly restrained' needed to be reworded, one saying that an element of this is implicit in these cases. The intention behind this factor was to differentiate between the possible ways a victim may be restrained, and the differing physical effects these methods may result in. A way of rewording this is possibly 'victim kept in a position of extreme discomfort'. This could be being handcuffed to a radiator which allows for barely any free movement, compared to being kept locked in a room which at least allows the victim to stand up -change position and so on.

Question seven: Does the Council agree with the rewording of the harm factor relating to being forcibly restrained?

3.12 Two participants in the exercise suggested that the word distress in the harm factors was not helpful, that most cases will involve distress. Accordingly, the references to distress could be removed from the harm factors, leaving just reference to psychological harm, which is a higher bar than distress.

Question eight: Does the Council agree to removing the word 'distress' from the harm factors?

3.13 The draft combined sentence table for both offences, used in the exercise, can be seen at page three of **Annex B.** Tiny amounts of offenders receive non-custodial disposals each year for both offences, so the range starts at six months custody. The maximum for both offences is life imprisonment. The top of the range in A1 is 16 years. Only a handful of offenders receive custodial sentences above 12 years each year, but the top of the range needs to incorporate the most serious cases of these offences. In AG's Ref (nos 102 and 103 of 2014) (R v Perkins) the court said that cases involving hostage taking and ransom demands will attract a starting point of close to 16 years for an adult: others, where behaviour is absent, will still attract double figures, regardless of the degree of violence.

3.14 Looking across at comparable (to some extent) offences, the top of the range in robbery in a dwelling is 16 years, in aggravated burglary it is 13 years, for GBH (s.20) it is 16

years and for rape it is 19 years. It is possible that one of the contributing factors to the sentences seen in the exercise was that the draft sentence ranges in the table were too high. Therefore, some of the ranges have been slightly reduced at the lower end of the table, namely within 2C, 3B, 1C, 2B and 3A. These can be seen in track changes in **Annex B.**

Question nine: What are the Council's views on the proposed changes to the combined sentence ranges? Should they be reduced further?

4. EQUALITIES

4.1 As part of the development of these guidelines, the available equalities data will be examined for any disparities within the sentencing of these offences. This data will be presented to Council at a future meeting.

4 IMPACT AND RISKS

4.1 It is anticipated that the development of these new guidelines will be welcomed by stakeholders. Blackmail, kidnap and false imprisonment are some of the few remaining serious offences without a guideline, so producing a guideline ends that gap.

Sentencing Council

Sentencing Council meeting:	**3 March 2023**
Paper number:	**SC(23)MAR06 - Perverting the Course of Justice and Witness intimidation**
Lead Council member:	**Juliet May**
Lead official:	**Mandy Banks**
	Mandy.Banks@sentencingcouncil.gov.uk
	0207 071 5785

1 ISSUE

1.1 This is the third meeting following the consultation on the draft perverting the course of justice (PTCJ) and revised witness intimidation guidelines. This meeting will focus on responses regarding sentence levels, aggravating and mitigating factors, and equality and diversity issues. There is one final meeting to sign off the guidelines ahead of publication of the definitive guidelines in the summer.

2 RECOMMENDATION

2.1 At today's meeting the Council is asked:

- To agree the high culpability factor in witness intimidation regarding police warnings, court orders, and notices
- To consider the consultation responses regarding sentence levels, aggravating and mitigating factors and equality and diversity issues

3 CONSIDERATION

3.1 The changes agreed at the last meeting to the harm factors have been made and can be seen in track changes within the PTCJ and witness intimidation guidelines, attached at **Annexes A** and **B** respectively. At the last meeting the Council discussed the information on court orders, notices and police warnings, attached at **Annex C,** and how best to present this as a high culpability factor. Officials have looked into the information in **Annex C** further and the only item that could be classed as a police warning that is relevant to witness intimidation, is the Domestic Violence Protection notice- due to be replaced by the Domestic Abuse Protection Notice. In both cases these are notices that the police can issue while applying for a court order. All the other items in the document are court orders (apart from the s.59 warning under the Police Reform Act 2002 which allows the police to seize a vehicle- so not relevant.) The Osman warning is a warning to a potential victim- not to an

offender so is not relevant. Breach of most of the orders is a criminal offence punishable with five years' custody, except the Domestic Violence Protection Order (DVPO) which is treated as a civil breach. The suggestion therefore is to have two factors:

- Breach of specific bail conditions and/or protection notice imposed to protect a witness
- Breach of court order (see step five on totality when sentencing more than one offence)

Question one: Does the Council agree with the proposed two high culpability factors?

3.2 Starting firstly with the consultation responses regarding sentence levels within the PTCJ guideline at **Annex A.** Of those that answered the question, the views expressed were that the sentence ranges were a little low. The Justice Committee (JC), the Justices' Clerks' Society (JCS), Professor Gillespie, Council HM Circuit Judges and Treasury Counsel all felt that the starting point in category 3C should be a custodial one, and not a community order- that having a custodial starting point would act as a deterrent and reflect the gravity of this type of offending. Some participants during road testing also mentioned this (page five of **Annex D).** Treasury Counsel said that a significant amount of cases may fall into 3C, and that having a community order as a starting point would be a significant departure from the principle that these offences ordinarily require a prison sentence. It was suggested that the starting point should be three or four months' custody.

3.3 It may be helpful to consider the updated sentencing statistics attached at **Annex E.** In 2021, only four percent of offenders, 20 in total, received a community order. Around 73 per cent of offenders sentenced to immediate custody received a sentence of one year or less, and a further 16 per cent between one to two years- so the vast majority of offenders receive sentences at the lower end. The mean average custodial sentence length (ACSL) was one year. An option would be to increase the ranges slightly so that the range in 3C becomes a high level community order to 9 months custody, with a starting point of six months. This achieves the request by these consultees that 3C should have a custodial starting point. To remove the community orders altogether would necessitate increasing the ranges across the entire table more substantially, as the current ranges in 2C would need to become the ranges in 3C-with everything increased proportionally across the rest of the ranges. This is because the Council has generally avoided putting sentence ranges of 6 months or less in the guidelines.

Question two: Does the Council wish to revise category 3C so that it now has a starting point of 6 months' custody?

3.4 The CPS and the JC felt that given the maximum sentence is life imprisonment there should be additional wording above the sentence range that states 'for cases of exceptional gravity, sentences above the top of the range may be appropriate'. Treasury Council also suggested similar wording. However, the Council has more recently moved away from using this wording, it was removed from the domestic burglary guideline after the consultation stage, for example. The sentencing statistics show that only a tiny fraction of offenders (less than one per cent) in recent years have received sentences over seven years, and at the consultation stage the Council said it was not seeking to change current sentencing for this offence. Therefore, it is recommended that the top of the range stays at seven years and that the additional wording is not added.

Question three: Does the Council agree not to add the additional wording proposed and to not make any other changes to the sentence table for this offence?

3.5 Now turning to the responses on questions on sentence levels within the witness intimidation guideline at **Annex B.** Sentencing data for 2021 at **Annex E** shows that nine per cent received community orders, and 95 per cent of offenders sentenced to immediate custody received sentences of two years or less. The ACSL (mean) was 10 months. The statutory maximum for this offence is five years. There were few responses offering comments on the sentence levels for this guideline, one or two magistrates said they thought some of the ranges were too low, and the CPS as with PTCJ said that the wording 'for cases of exceptional gravity sentences above the top of the range may be appropriate' should be added. Professor Gillespie and the JC thought that the starting point in 3C should increase from a medium to a high level community order and the JCS thought the ranges in 3C should echo the lowest ranges in the current guideline, which has a starting point of 6 weeks, in a range of a medium level community order to 18 weeks custody. The JCS stated that a custodial sentence as a starting point for all offences of witness intimidation is appropriate to have a deterrent effect, and to demonstrate that any attempt to contact a witness is very serious.

3.6 Given the fact that there were few consultation or road testing responses disagreeing with the proposed ranges, it is suggested that the majority of the sentence ranges remain unchanged. If the Council felt it was appropriate to increase the ranges within 3C slightly, the starting point could increase from a medium level community order to a high level community order, and the bottom of the range from a low level community order to a medium level community order. The top of the range would remain at six months custody. As noted above, we have generally moved away from having very short sentences, such as six weeks, within guidelines. If these changes were made and the changes to the ranges in 3C

in PTCJ discussed earlier were made, then the ranges within PTCJ would still be slightly more severe, which seem appropriate given the differences between the offences.

Question four: Does the Council agree with just the modest changes proposed to the sentence ranges for this offence, within 3C?

3.7 Turning now to consider responses on aggravating and mitigating factors, firstly in the witness intimidation guideline at **Annex B**. A small number of respondents including HM Council of District Judges and a Judge during road testing felt that there should be an aggravating factor relating to domestic abuse- stating that it is fairly common for these offences to have a domestic abuse context. Most of the other guidelines do have domestic abuse as an aggravating factor, as so many offences can have a domestic abuse context, not just assault and so on, and the step two factor links to the domestic abuse overarching guideline. It is suggested therefore that it is added to this guideline as well.

Question five: Does the Council agree to add domestic abuse as an aggravating factor within this guideline?

3.8 A small number including the Chief Magistrate, the London Criminal Courts Solicitors' Association (LCCSA), a Judge during road testing and a few magistrates queried the 'use of social media' as an aggravating factor. They said it is too vague, and risks over aggravating the sentence- that social media can be used in many ways, but that presumably what was meant was using it to trace the victim or publishing the threat on social media and using it to intimidate. These seem sensible observations so the factor could be reworded to 'use of social media to facilitate the offence'. The JC felt that there should be an additional factor of threats conducted in the vicinity of a court, as by doing so it makes the offence more serious. There were no substantive points raised on the mitigating factors.

Question six: Does the Council agree to reword the social media factor? And does the Council wish to add an additional factor of threats conducted in the vicinity of the court?

3.9 There were relatively few points raised in relation to step two factors for PTCJ. In terms of mitigating factors, Treasury Counsel suggested that where an offender voluntarily admits their offending behaviour to police, this should be a mitigating factor. It is thought not uncommon that an offender commits the offence in a moment of madness but then quite quickly admits the truth. The JC, the Centre for Women's Justice and a Judge during road

testing felt there should be a mitigating factor of offender being subject to domestic abuse. The Council has already decided to add a reference to domestic abuse to the lower culpability factor at step one. However, the Council could add 'offender subject to domestic abuse at the time of the offence (where not taken into account at step one)' to the mitigating factors, in a similar way to the mitigating factor of 'mental disorder, learning disability (where not taken into account at step one)'.

3.10 There isn't currently an aggravating factor of domestic abuse within this guideline. It is more likely for this offence that offenders commit the offence under pressure from partners or family members so the issues are ones of culpability or mitigation. However it is also possible that other offenders may be committing the offence within a domestic context, in furtherance of a campaign against partners, etc, so there may be a case for adding it as an aggravating factor as well.

Question seven: Does the Council wish to add mitigating factors relating to voluntarily admitting their offending and/or domestic abuse?

Question eight: Does the Council wish to add 'offence committed within a domestic context' as an aggravating factor?

3.11 Now turning to equality and diversity issues. The consultation asked three questions regarding equality and diversity, whether there were any aspects of the guidelines that may cause or increase disparity, whether there were existing disparities within the sentencing of these offences that the guidelines should address, and if there were any other equality and diversity matters that should be addressed. Very few respondents answered these questions. The few that did respond such as the Centre for Women's Justice and Women Against Rape mentioned that women are much more likely than men to be victims of domestic abuse and exploitation that could lead them to be convicted of a PTCJ offence. In addition that Black, Asian migrant and disabled women face additional barriers to accessing support and accessing justice, that young women and girls have distinct experiences, such as trauma that are overlooked. They argue that the guidelines should be amended to ensure equal treatment in relation to race, gender disability and age. As noted above the Council has already added a reference to domestic abuse within the lower culpability factor so that it now reads 'involved through coercion, intimidation or exploitation or as a result of domestic abuse'. Arguably therefore the guideline has been somewhat amended to try to address some of these concerns.

3.12 During road testing sentencers were also asked specific questions relating to equality and diversity (pages six, seven and ten of **Annex D).** Comments generally focused on the

ETBB, although there was no real consensus on anything else these guidelines could provide, one saying that there should be a reference to the ETBB as a step in every guideline, another saying that there should be an overarching guideline for equality and diversity, but another said that there are so many overarching guidelines that its often not clear which one to use. On the first comment, the Council will be aware that there is already a reference to the ETBB at the start of every guideline.

3.13 The updated sentencing data includes the available demographic data on ethnicity, sex and age (**tabs 1.5-1.8, 2.5-2.8 of Annex E).** Looking at sex, a relatively high proportion of offenders sentenced for PTCJ are female (26 per cent in 2021). However, there is no noticeable disparity in sentence outcomes and ACSL. A similar proportion of males and females are given a custodial sentence, but a higher proportion of females receive a suspended sentence, which is in line with other offences.

3.14 In 2021, a similar proportion of Black and White offenders received a custodial sentence for PTCJ. However, a higher proportion of Black offenders were sentenced to immediate custody compared to White offenders – 62 per cent and 48 per cent respectively. This trend has continued from 2020 but in years prior to 2020, similar proportions of Black and White offenders were sentenced to immediate custody. It should be noted that the number of Black offenders sentenced for this offence is much smaller in comparison to White offenders (37 v 290 in 2021) and there is no noticeable difference in ACSL.

3.15 In 2021, the proportion of offenders receiving immediate custody for witness intimidation was higher for Black offenders compared to White (80 per cent and 58 per cent respectively). This trend has been consistent over the last five years, except in 2020 when a similar proportion of Black and White offenders were sentenced to immediate custody. Additionally, a higher proportion of White offenders received an SSO over recent years. However, volumes for Black offenders are much smaller than White (10 v 141 in 2021) and so, these differences should be interpreted with a degree of caution. There is also no noticeable difference in ACSL.

3.16 For PTCJ, the mean ACSL for younger offenders (‘18 to 20’ years group) was slightly higher in 2021 compared to other age groups. Offenders aged ‘18 to 20’ received an ACSL of 1 year 9 months, while those aged ‘30 to 39’ received an ACSL of 1 year. However, demographic data for previous years show no noticeable difference between age groups and the number of offenders who were sentenced to immediate custody aged ‘18 to 20’ is much smaller in comparison to those aged ‘30 to 39’ (12 v 108). Therefore, the figures should be treated with a degree of caution.

Question nine: Does the Council have any views or concerns in relation to any equality and diversity issues highlighted during the consultation?

4 IMPACT AND RISKS

5.1 A draft final resource assessment will be produced for the Council's consideration prior to the definitive guidelines being signed off ahead of publication.

Blank page

Sentencing Council

Sentencing Council meeting:	**3 March 2023**
Paper number:	**SC(23)MAR07 – Totality**
Lead Council member:	**TBC**
Lead official:	**Ruth Pope**
	Ruth.pope@sentencingcouncil.gov.uk

1 ISSUE

1.1 The Council consulted on a revised version of the Totality guideline from 5 October 2022 to 11 January 2023. Research with sentencers had shown that they generally found the guideline to be useful and clear and a practical help in sentencing. The scope of the revisions was therefore limited to updating the guideline without changing the essentials of the content.

1.2 This is the first of two planned meetings to discuss the responses to the consultation. The aim is to publish the revised guideline in May to come into force on 1 July 2023.

2 RECOMMENDATION

2.1 That the Council:

- retains the overall structure of the guideline;
- considers whether an opening statement as to applicability should be added;
- makes textual changes to the General principles and General approach sections; and
- agrees that it is not possible to create an objective test for a just and proportionate sentence.

3 CONSIDERATION

3.1 There were 25 responses to the consultation and a response from the Justice Committee is expected in time for discussion at the next Council meeting. In general, the response to the proposals was positive with many helpful suggestions for limited changes or additions. There were also some responses (chiefly from academics) which made more radical suggestions for change. In order to consider the issues raised and the changes suggested in a logical way, at this meeting we will look at the basic outline of the guideline without the drop-down sections. **Annex A** contains the outline of the guideline; the online version can be viewed here.

General principles

3.2 The first question in the consultation related to the proposed changes to the opening section (deletions are shown struck through and additions are in red):

General principles

The principle of totality comprises two elements:

1. All courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence.
2. It is usually impossible to arrive at a just and proportionate sentence for multiple offences simply by adding together notional single sentences. It is necessary to address the offending behaviour with reference to overall harm and culpability, together with the aggravating and mitigating factors personal to the offender ~~as a whole~~.

Concurrent/consecutive sentences

There is no inflexible rule governing whether sentences should be structured as concurrent or consecutive ~~components~~. The overriding principle is that the overall sentence must be just and proportionate.

3.3 Professor Mandeep Dhami commented:

> What is "just and proportionate" ought to be clearly defined at the outset.
>
> It is unclear how sentencers will calculate "overall" harm and culpability.
>
> There is potential for double-counting of personal mitigating factors. In a recent study (Dhami, 2021), I analysed CCSS data in order to compare the penalties received by multiple-offence (MO) cases and similar single-offence (SO) cases. I found that for the large majority offence types examined an offence in a MO case received the same or a less severe penalty than its counterpart in a SO case. This finding took account of the effect of offender gender and age, as well as other sentencing relevant variables such as offence seriousness, number of aggravating factors (including previous convictions) and mitigating factors, and guilty plea reduction. There are several possible explanations for this potentially unwanted outcome, and the totality guideline could be revised to target at least two of these.
>
> First, although personal mitigation is common to both MO and SO cases, it may be considered twice in MO cases. The first opportunity is when an initial sentence is considered for each offence (as per the offence-specific guidelines) and the second is when the totality principle is applied. Therefore, the overarching guideline should not ask sentencers to apply the same set of personal mitigating factors (again). It should either refrain from applying such factors altogether or ask sentencers to apply mitigating factors that pertain to the 'multiple' offence nature of the case and/or the consequences of the sentence. Second, the sentence for one or more of the offences in a MO case may be adjusted downwards if sentences are to be served consecutively, and adjusted upwards if they are to be served concurrently. It may be that the downwards adjustment is too much, and/or the upwards adjustment is too little (especially when considering the aforementioned penalty reducing effects of

> personal mitigation) or that the two adjustments cancel each other out. Therefore, the overarching guidelines ought to include clear guidance on how much downwards adjustment should be made for consecutive sentences made up of different combinations of offences, and how much upwards adjustment should be made for concurrent sentences in these cases.
>
> Finally, by saying “There is no inflexible rule governing whether sentences should be structured as concurrent or consecutive”, and then later in the guidelines providing examples of when sentences should be concurrent or consecutive, the Council is undermining the latter guidance and presenting a mixed (confusing) message.

3.4 The Council may feel that defining ‘just and proportionate’ at the outset is not a practicable suggestion. The point about it not being clear about how sentencers will calculate overall harm and culpability was not repeated by any other respondents. Indeed, Dr Rory Kelly in his response welcomed this addition:

> The Council proposes adding reference to harm and culpability in the General Principles section of the Totality Guideline. This is an important and positive step. Consideration of harm and culpability may help the sentencing judge to frame the overall seriousness of a series of offences, and to avoid the risk of double counting where the offences have overlapping harm and/or culpability factors.

3.5 The West London Magistrates’ Bench was among those who approved of the reference to harm and culpability, stating: ‘The addition of text that mentions overall harm and culpability is a good idea, as that is where sentencing should start in categorising the seriousness of an offence’.

3.6 In contrast the Justices’ Legal Advisers and Court Officers’ Service (JCS) said:

> The deletion of the words "as a whole" renders section two redundant. It is a statutory principle of all sentencing that sentences refer to harm, culpability, aggravating and mitigating circumstances, doesn't need repeating here, and now adds nothing. The essential point of section two was that the TOTAL sentence should reflect those factors. If section two doesn't say that, there is no point in it being there. We recommend that "as a whole" is restored.

3.7 Some Council members may recall discussing the study referred to by Professor Dhami above, in January 2022. The chief flaw we identified in the study is that it purports to draw conclusions from a comparison of sentences passed for a single offence and the lead offence where there were multiple offences without identifying whether the other offences were sentenced consecutively or concurrently to the lead offence. It also works on the misconception that the guideline as currently worded requires consideration only of mitigating factors when it refers to ‘factors personal to the offender’. In order to clarify that point we consulted on adding the words ‘aggravating and mitigating’.

3.8 The Council may feel that the objection to the guideline saying there is ‘no inflexible rule’ on the grounds that it is confusing to then give examples later of when sentences

should be concurrent or consecutive, does not stand up to scrutiny. There is no contradiction in saying that there is no inflexible rule and then giving examples of how in different circumstances the court should approach the issue.

3.9 Among those who were supportive of the General principles section there were suggestions for changes. The CPS said:

> Some of the current phrasing may be a little difficult to follow … we wonder whether the principles might address, first, the lack of an inflexible rule and, secondly, the mirror principles of consecutive and then concurrent sentences and what, in outline, totality means in respect of each in terms of downward/upward adjustment.
>
> We offer the following suggested wording for the Sentencing Council's consideration:
>
> **General principles**
>
> When sentencing for more than a single offence, the overall sentence must be just and proportionate. There is no inflexible rule governing whether sentences should be structured as concurrent or consecutive.
>
> 1. If consecutive, it is usually impossible to arrive at a just and proportionate sentence for more than a single offence simply by adding together notional single sentences. Ordinarily some downward adjustment is required.
> 2. If concurrent, it will often be the case that the notional sentence on any single offence will not adequately reflect the commission of more than a single offence. Ordinarily some upward adjustment is required.

3.10 HM Council of District Judges (Magistrates' Courts) suggested rewording:

> It is necessary to address the offending behaviour with reference to overall harm and culpability, together with the aggravating and mitigating factors personal to the offender.

As:

> It is necessary to address the offending behaviour with reference to overall harm and culpability, together with the aggravating and mitigating factors relating to the offences and those personal to the offender.

3.11 The Attorney General's Office (AGO) observed "that judges at the Crown Court are routinely passing concurrent sentences when consecutive sentences would have been more appropriate". They suggested adding the words in red:

> There is no inflexible rule governing whether sentences should be structured as concurrent or consecutive. The overriding principle is that the overall sentence must be just and proportionate, taking into account the aggregate effect of all offending. A sentence that is just and proportionate would generally reflect whether the multiple offending had arisen out of the same facts and incidents, or not.

3.12 The Sentencing Academy suggested the following alterations:

> (1) The final sentence in the first element would seem better placed in the section 'Concurrent / Consecutive Sentences'. The general principle here is simply that the

sentence imposed is just and proportionate with regards to all the offending behaviour.

(2) The second principle builds on this by stating that a sentence should consider 'overall harm and culpability' in determining a proportionate sentence (as well as aggravating and mitigating factors if relevant). It would be worth stating that harm includes intended harm or harm that might foreseeably have been caused (s.63 Sentencing Act 2020).

3.13 The Academy go on to say, "sentencing guidelines have multiple audiences and we can see value in providing an example of both concurrent and consecutive sentencing in this section. This would reiterate the fact that concurrent sentences would usually be longer than a sentence for a single offence"**.**

3.14 A circuit judge agreed with the proposed wording but suggested a stylistic changes:

When sentencing for more than a single offence, sentences can be structured as concurrent or consecutive. There is no inflexible rule as to this.

However such a sentence is structured, the court must apply the principle of totality.

The overriding principle is that the **overall** sentence must be just and proportionate.

Accordingly, all courts must pass a sentence which:

- Reflects **all** the offending behaviour before it; AND
- Is just and proportionate.

When considering what is just and proportionate, note:

- Concurrent sentences will ordinarily be longer than a single sentence for a single offence.
- Consecutive sentences will rarely involve simply adding together notional single sentences. Address the offending behaviour with reference to **overall** harm and culpability, together with the aggravating and mitigating factors personal to the offender.

3.15 Looking at the guideline as a whole, there may be scope for spelling out more explicitly than is currently the case that:

- where consecutive sentences are passed some or all of them will usually need to be reduced to achieve a proportionate overall sentence; and
- where concurrent sentences are passed the lead sentence will usually need to be increased to achieve a proportionate overall sentence.

3.16 The Council may feel that the suggestions at 3.9 and 3.14 above have merit but both have the disadvantage that they omit the reference to harm and culpability etc that the Council was keen to introduce and was explicitly welcomed by some respondents. A suggested alternative building on all the suggestions is:

General principles

When sentencing for more than one offence, the overriding principle of totality is that the overall sentence should:

- reflect all of the offending behaviour with reference to overall harm and culpability, together with the aggravating and mitigating factors relating to the offences and those personal to the offender; and
- be just and proportionate.

Sentences can be structured as **concurrent** (to be served at the same time) or **consecutive** (to be served one after the other). There is no inflexible rule as to how the sentence should be structured.

- If consecutive, it is usually impossible to arrive at a just and proportionate sentence simply by adding together notional single sentences. Ordinarily some downward adjustment is required.
- If concurrent, it will often be the case that the notional sentence on any single offence will not adequately reflect the overall offending. Ordinarily some upward adjustment is required.

3.17 One further issue that was not raised by any respondents, but which might be worth considering is that the General principles section refers only to sentencing for more than one offence, it makes no mention of the other situation to which the guidelines applies, namely when sentencing an offender who is already subject to a sentence. Every offence specific guideline includes a step:

> If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Totality guideline.

3.18 There is an 'Applicability' dropdown at the beginning of the existing guideline which states:

> In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all offenders, whose cases are dealt with on or after 11 June 2012.
>
> Section 59(1) of the Sentencing Code provides that:
>
> "Every court -
>
> a. must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender's case, and
> b. must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,
>
> unless the court is satisfied that it would be contrary to the interests of justice to do so."
>
> This guideline applies when sentencing an offender for multiple offences or when sentencing an offender who is already serving an existing sentence. In these situations, the courts should apply the principle of totality.

3.19 The Council may consider that this is sufficient. Alternatively an opening paragraph could be added to the face of the guideline stating:

> The principle of totality applies when sentencing an offender for multiple offences or when sentencing an offender who is already serving an existing sentence.

Question 1: Should an opening paragraph be added?

Question 2: What changes should be made to the General principles section?

General approach

3.20 The next question in the consultation related to the proposed 'General approach' section (deletions are shown struck through and additions are in red):

General approach (as applied to determinate custodial sentences)

1. **Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.**
2. **Determine whether the case calls for concurrent or consecutive sentences. When sentencing three or more offences a combination of concurrent and consecutive sentences may be appropriate.**
3. **Test the overall sentence~~(s)~~ against the requirement that ~~they be~~ the total sentence is just and proportionate to the offending as a whole.**
4. **Consider ~~whether~~ and explain how the sentence is structured in a way that will be best understood by all concerned ~~with it~~.**

Concurrent sentences will ordinarily be appropriate where:

a. offences arise out of the same incident or facts.

Examples include: [dropdown]

b. there is a series of offences of the same or similar kind, especially when committed against the same person.

Examples include: [dropdown]

Where concurrent sentences are to be passed the sentence should reflect the overall criminality involved. The sentence should be appropriately aggravated by the presence of the associated offences.

Concurrent custodial sentences: examples [dropdown]

Consecutive sentences will ordinarily be appropriate where:

a. offences arise out of unrelated facts or incidents.

Examples include: [dropdown]

b. offences that are unrelated because while they were committed simultaneously they are distinct and there is an aggravating element that requires separate recognition.

Examples include: [dropdown]

c. offences that are of the same or similar kind but where the overall criminality will not sufficiently be reflected by concurrent sentences.

Examples include: [dropdown]

d. one or more offence(s) qualifies for a statutory minimum sentence and concurrent sentences would improperly undermine that minimum

Examples include: [dropdown]

However, it is **not** permissible to impose consecutive sentences for offences committed ~~at the same time~~ **in a single incident** in order to evade the statutory maximum penalty.

Examples include: [dropdown]

Where consecutive sentences are to be passed, add up the sentences for each offence and consider if the aggregate length is just and proportionate.

3.21 The AGO suggested some additions to the four steps in this section in part to address their experience that judges often categorise correctly and adopt an appropriate starting point for a lead offence but fail to make uplift for totality (additions in red):

1. Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.
2. Determine, following the guidance provided below, whether the case calls for concurrent or consecutive sentences. When sentencing for more than two offences, a combination of concurrent and consecutive sentences may be appropriate.
3. Test the overall sentence against the requirement that the total sentence is just and proportionate to the offending as a whole, aggravating the lead offence where appropriate.
4. Consider and explain how the sentence is structured in a way that will be best understood.

3.22 Dr Kelly suggested adding a reference to harm and culpability to step 3 to link the General principles section to the General approach section suggesting:

3. Test the overall sentence(s) against the requirement that the total sentence is just and proportionate to the offending as a whole noting that that the relevant offences may have distinct or overlapping harm and culpability factors.

3.23 Kelly goes on to explain:

> The sentencing judge considers the relevant offence specific guidelines independently at part one of the General Approach. At part three they then have an important and complex task in bringing together this information to arrive at a just and proportionate overall sentence. At part one the sentencing judge may rely on the same factor more than once when reaching initial sentences for each individual offence. Take an attack on V where V is badly beaten, and their watch is broken. When sentencing the criminal damage, the judge may, for example, have considered the intention to create a high risk of injury, which would also affect the sentencing of a s. 20 offence. An explicit reminder that harm and culpability factors may overlap at part 3 then would give the judge a test by which to assess overall proportionality in difficult cases as opposed to this being instinct lead.

3.24 Professor Dhami states:

> … in point 3, it is unclear what the Council means by "Test the overall sentence against the requirement that the total sentence is just and proportionate to the offending as a whole." Specifically, what is the so-called "test"? It appears that the Council is simply asking sentencers to use their own judgment to test if their own judgment meets the requirement. This is an inadequate test. The Council ought to provide a clear and objective test that all sentencers can apply and which can be used by others when reviewing the sentences meted out in multiple-offence cases.

3.25 This reflects her point made earlier that 'just and proportionate' should be defined. The obvious difficulty here is how to define an overarching objective test that could be applied. It is not clear what (if anything) Dhami envisages.

3.26 Professor Dhami welcomes the reference to explaining how the sentence is structured and suggests that the Council should "monitor the extent to which the explanations given are useful". She goes on to say that "the Council ought to consider the extent to which reminding sentencers of their obligation to provide reasons for their decision might alter the decision/judgment process they apply in cases, and consequently the decision (outcome) itself."

3.27 This is not something that we will be able to do. As we set out in the resource assessment published with the consultation, the Ministry of Justice does not publish figures on multiple offences and the Council does not currently have access to extensive information on secondary or non-principal offences nor the sentences imposed for them.

3.28 Dr Kelly also welcomed the addition of a reference to explaining the sentence in step 4 and the JCS suggested that it would be clearer to have this as a distinct step:

4. Check that the sentenced is structured in a way that will be best understood by all concerned with it.
5. Consider how to explain the sentence clearly.

3.29 The CPS also welcomed the emphasis on explaining how the sentence is structured and suggested taking it slightly further to promote greater clarity and transparency, particularly in complicated sentencing exercises, saying:

- Where consecutive sentences are imposed, is it good practice to identify and explain in open court what the notional sentence on each count is, and then indicate where any downward adjustment has been made and to what extent, so that the application of totality is clear?
- Where concurrent sentences are imposed, is it good practice to identify and explain in open court what sentence would have been imposed for a notional single offence, and what upward adjustment and to what extent has been made to reflect the commission of more than a single offence?

3.30 Regarding the wording:

Where concurrent sentences are to be passed the sentence should reflect the overall criminality involved. The sentence should be appropriately aggravated by the presence of the associated offences.

HM Council of District Judges (Magistrates' Courts) suggested rewording the second sentence to read: "the sentence should appropriately reflect the aggravating feature of the presence of the associated offences".

3.31 The CPS suggested making the need to uplift the sentence clearer:

Where concurrent sentences are to be passed the sentence should reflect the overall criminality involved. Consideration should be given to what increase in sentence is appropriate to reflect the commission of more than a single offence. The increase may be none, minimal or significant, depending on what is required in each individual case to reflect properly the commission of more than a single offence. In some cases a significant uplift is required to reflect properly the offending in its totality.

3.32 The CPS questioned the helpfulness of adding: "When sentencing three or more offences a combination of concurrent and consecutive sentences may be appropriate". Their concern being that "it may give the impression that it is more likely to be appropriate to use a combination". The Sentencing Academy, by contrast, welcomed this addition noting that it will be particularly important were this applies that the sentence is explained "as it may not be apparent to defendants, victims and the public why offences are being treated in different ways".

3.33 In relation to:

Where consecutive sentences are to be passed, add up the sentences for each offence and consider if the aggregate length is just and proportionate.

The CPS suggested it would be more consistent with the general principles section to say: "add up the sentences for each offence and consider the extent of any downward adjustment required to ensure the aggregate length, looked at in totality, is just and proportionate."

3.34 The AGO suggested rewording point d. under consecutive sentences to read:

d. one or more offence(s) qualifies for a statutory minimum sentence and concurrent sentences would result in an overall sentence that undermines the statutory minimum sentence.

3.35 A suggested revised version taking account of the responses (changes highlighted):

General approach (as applied to determinate custodial sentences)

1. **Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.**

2. **Determine following the guidance provided below, whether the case calls for concurrent or consecutive sentences. When sentencing more than two offences, a combination of concurrent and consecutive sentences may be appropriate.**
3. **Test the overall sentence against the requirement that the total sentence is just and proportionate to the offending as a whole.**
4. **Consider and explain how the sentence is structured in a way that will be best understood by all concerned.**

Concurrent sentences will ordinarily be appropriate where:

a. offences arise out of the same incident or facts.

Examples include: [dropdown]

b. there is a series of offences of the same or similar kind, especially when committed against the same person.

Examples include: [dropdown]

Where concurrent sentences are to be passed the lead sentence should reflect the overall criminality involved. The sentence should appropriately reflect the aggravating feature of the presence of the associated offences.

Concurrent custodial sentences: examples [dropdown]

Consecutive sentences will ordinarily be appropriate where:

a. offences arise out of unrelated facts or incidents.

Examples include: [dropdown]

b. offences that are unrelated because while they were committed simultaneously they are distinct and there is an aggravating element that requires separate recognition.

Examples include: [dropdown]

c. offences that are of the same or similar kind but where the overall criminality will not sufficiently be reflected by concurrent sentences.

Examples include: [dropdown]

d. one or more offence(s) qualifies for a statutory minimum sentence and concurrent sentences would result in an overall sentence that undermines the statutory minimum sentence.

Examples include: [dropdown]

However, it is **not** permissible to impose consecutive sentences for offences committed **in a single incident** in order to evade the statutory maximum penalty.

Examples include: [dropdown]

Where consecutive sentences are to be passed, add up the sentences for each offence and consider the extent of any downward adjustment required to ensure the aggregate length is just and proportionate.

Question 3: Does the Council wish to make the suggested changes to the General approach section?

Reaching a just and proportionate sentence

3.36 The next section of the draft guideline reads:

Reaching a just and proportionate sentence

There are a number of ways in which the court can achieve a just and proportionate sentence. Examples include:

- when sentencing for similar offence types or offences of a similar level of severity the court can consider:
    - whether all of the sentences can be proportionately reduced (with particular reference to the category ranges within sentencing guidelines) and passed consecutively
    - whether, despite their similarity, a most serious principal offence can be identified and the other sentences can all be proportionately reduced (with particular reference to the category ranges within sentencing guidelines) and passed consecutively in order that the sentence for the lead offence can be clearly identified
- when sentencing for two or more offences of differing levels of seriousness the court can consider:
    - whether some offences are of such very low seriousness ~~in the context of the most serious offence(s)~~ that they can be recorded as 'no separate penalty' (for example technical breaches or minor driving offences not involving mandatory disqualification)
    - whether some of the offences are of lesser seriousness such that they can be ordered to run concurrently so that the sentence for the most serious offence(s) can be clearly identified.

3.37 Professor Dhami comments:

> The examples that the Council provides for when sentences may run consecutively versus concurrently suggests that some multiple-offence offenders may face longer/harsher penalties than their single-offence counterparts (i.e., an offender whose single offence is the same as the principal offence in the multiple-offence case), whereas other multiple-offence offenders may actually face shorter/less severe penalties than their single-offence counterparts. Specifically, based on the Council's examples, one could predict that multiple-offence offenders sentenced for "similar offence types or offences of a similar level of severity" will face longer/harsher penalties than their single-offence counterparts, whereas multiple-offence offenders sentenced for "two or more offences of differing levels of seriousness" will face shorter/less severe penalties than their single-offence counterparts. Clearly, this would be unjust. [It is also unclear if the Council is referring to different or same offence types in the latter example].

3.38 It is difficult to follow the logic of her argument – the conclusions she draws as the relative severity of sentences does not follow from the examples given in the guideline.

3.39 The Sentencing Academy makes a related point:

> The Academy understands why the revised guideline has a bespoke section to emphasise the central aim of achieving a just and proportionate sentence. Inevitably

though there are questions of placement and potential overlap (much of the previous section relates to reaching a just and proportionate sentence in that it considered issues relating to culpability and harm).

The consultation paper is focussed on design and on improving the guideline's practical usefulness. This is indeed an important objective, but a prior question is on what basis the court should decide whether a particular sentence for a multiple offender is 'just and proportionate'. The question 'proportionate to what?' is usually answered by saying 'proportionate to the total offending for which the court is passing sentence'. But as soon as the curtain is drawn back, the complexities are revealed.

…[examples are given from the fines section of the guideline]

All of this is to be seen in the context of general principle (2) stated at the beginning of the Consultation Paper:

> It is usually impossible to arrive at a just and proportionate sentence for multiple offences simply by adding together notional single sentences. It is necessary to address the offending behaviour with reference to the overall harm and culpability together with the aggravating and mitigating factors personal to the offender.

This general principle is important, but yet again it does not spell out exactly what factors go to make up 'proportionality' in this context. The various offence guidelines created by the Sentencing Council indicate what proportionality means for a single offence, and for comparisons between single offences. But nowhere, in the Council's documents or the Court of Appeal's judgments, is there any guidance on what a court should do, once it departs from the simple cumulation of sentences. General principle (2) states bluntly that 'it is usually impossible to arrive at a just and proportionate sentence … by adding together notional single sentences.' But what criteria should guide the court? Often the format will be to identify the most serious offence and then to make some modest increase in the sentence to reflect the other offences. The choice of concurrent or consecutive sentences is largely presentational. But how is the size of the increase to be calculated? Reference to 'overall harm and culpability' and to 'aggravating and mitigating factors' is all very well, but offers no specific guidance to the sentencer.

The proposed text starts by presenting alternatives for situations where (a) the offences are of a similar type or severity (b) the offences are of a differing level of seriousness. This could come earlier in the guideline – perhaps even in the general principles – as it presents the options available. Guidance on the operation of these principles is largely found in the preceding section. Questions can arise about whether offences are of a similar type (e.g. in the context of property offences) or severity, but, particularly with regards to the latter, sentencers will follow offence-specific guidance which typically detail factors which are to be taken into account in assessing offence-severity.

3.40 Rory Kelly makes a similar comment:

The relationship of this new section to the General Approach section could be made clearer. Part three of the General Approach requires the judge to "Test the overall sentence(s) against the requirement that the total sentence is just and proportionate to the offending as a whole." The new section has been taken out of the General Approach section because it is "key and by giving it a separate section it will give it more prominence". A risk may be that it is overlooked if the judge focuses on the earlier requirement in the General Approach. It may then be safer to re-join this section with the previous one, or at least to include a cross-reference.

The new section provides numerous ways for a court to reach a proportionate sentence to include proportionate reductions across similar offences and imposing no further penalty for very low serious offences. The Council though could do more to explain how a judge is to know whether the overarching sentence is proportionate. If the section is to be retained, the following text may usefully be added between the section heading and the current first sentence:

> "The judge should assess whether the overall sentence is just and proportionate with reference to the overall seriousness of the offences committed. Overall seriousness may be assessed through reference to the offender's culpability in committing the offences and any harm the offences caused, were intended to cause, or might foreseeably have caused."

3.41 The AGO welcomed this section but suggested elaborating further, to remind judges that reaching a just and proportionate sentence can include upwards as well as downwards adjustments. They considered that as currently drafted there is a greater emphasis on the reduction of an overall sentence to reflect totality than on the need to accurately reflect the level of criminality. They refer to examples where the sentence on a lead offence was not aggravated sufficiently to reflect the overall criminality of the multiple offending or the severity of the other offences. They suggested adding a requirement for judges to detail how the sentence has been aggravated for totality, to ensure that it is a just and proportionate sentence and proposed changing the opening paragraph to read:

> There are a number of ways in which the court can achieve a just and proportionate sentence. Greater clarity may be achieved by explaining the effect of totality on the notional sentence(s).

3.42 Conversely, a magistrate commented that it would not be helpful to have to announce in court what each element of the sentence should be.

3.43 The Magistrates' Association (MA) agreed with the content of this section but suggested it should come before the General approach section.

3.44 A circuit judge commented:

> I like the principle. The matter that concerns the Judiciary is how much extra to sentence a Defendant to in cases where there are multiple victims, for example Death by Dangerous Driving, or multiple offences against the same victim, for example domestic context rapes. It would be helpful to have a guide as to how much extra for 2 rapes, 3 rapes etc.

3.45 The JCS disagreed with the changes to the wording in the existing guideline:

- whether some offences are of such low seriousness in the context of more serious offences that they can be recorded as 'no separate penalty'

Arguing:

> For example it is common for offenders to commit a number of road traffic offences, which are of only slightly differing seriousness, e.g. defective tyre, no insurance, no MOT certificate. Under the old guideline one offence (probably the defective tyre or no insurance) would bear the fine and the rest No Separate Penalty. But since none of these offences are of VERY low seriousness, it would imply that in future each

should bear a fine, which would not have been the case before. We also think that the removal of the words "relative to each other" has the same tendency. It means that the only offences which would receive a No Separate Penalty would be offences which are in absolute terms of very low seriousness. But for example, while careless driving may seem relatively minor when committed in conjunction with a GBH assault, and might justify NSP, it would not when committed in conjunction with a defective windscreen wiper. We think the old wording should be restored.

3.46 RoadPeace also had concerns about this wording:

> We would prefer to see clarity on "technical breaches" and what exactly is considered to be a "minor" driving offence when sentencing. RoadPeace's opinion is that the judicial system is too accepting of unacceptable driver behaviour and that sentencing should always reflect a zero tolerance of offences that challenge Road Danger Reduction (safety) or working towards Vision Zero.

3.47 Leaving aside issues of drafting, there are two points that arise from these comments: firstly what is the relationship between this section and the references to reaching a just and proportionate sentence earlier in the guideline, and secondly, could or should the guideline give a more precise indication of how to identify if a sentence is 'just and proportionate'?

3.48 As to the first point, respondents are right to point out that there is a degree of overlap between the different sections and there is no clear logic as to what information is in each section. One way of restructuring the information would be to place the first two examples (which relate to consecutive sentences) at the end of the consecutive sentences part of the 'General approach' section and the second two examples (which relate to concurrent sentences) at the end of the concurrent sentences part of that section. The reason 'Reaching a just and proportionate sentence' was given its own section was that in the existing guideline it appears to be included in the consecutive sentences part and it does not really fit there. It is worth noting that the General approach section applies to determinate custodial sentences whereas the example relating to no separate penalty in the 'Reaching a just and proportionate sentence section' could be applied to non-custodial sentences. Having said that (bearing in mind the response from the JCS) it could be preferable to restrict the content to considerations of custodial sentences.

3.49 A revised version of the guideline incorporating the changes suggested elsewhere in this paper and a restructuring of the information is provided for consideration at **Annex B.**

3.50 As to giving a more precise indication of how to reach a just and proportionate sentence, it is noticeable that it is primarily academics rather than sentencers or other guideline users who have raised this issue. It is certainly arguable that the more room the guideline leaves for sentencer discretion the more chance there is of bias or uncertainty of outcome. However, if more certainty is desirable, it is by no means clear how to achieve this.

There can be no precise mathematical formula and even employing a ‘rule of thumb’ would be problematic. For example, the number of charges that an offender faces for a course of conduct could vary depending on prosecutorial decisions. The number of permutations of related and unrelated maters of varying seriousness that a particular sentencing exercise can involve are too great to devise an objective test for what is ‘just and proportionate’.

Question 4: Should the information in the Reaching a just and proportionate sentence section be moved?

Question 5: Does the Council agree that it is not possible to create an objective test for a just and proportionate sentence?

Question 6: Should any of the other suggestions be incorporated, for example adding a further reference to harm and culpability?

4 IMPACT AND RISKS

4.1 As anticipated, the limited nature of the revisions to the guideline has attracted some criticism from academics. However, overall responses have been positive.

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 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 referred to at 3.27 above a narrative resource assessment was published with the consultation, rather than a statistics based one.

4.3 To cover some of the gaps in data, we have added a small number of questions to our ongoing data collection to capture information on whether offences have been adjusted to take account of totality and if so in what way.

4.4 The responses to the consultation relating to impact and to equality issues will be discussed at the next meeting

Sentencing Council

Sentencing Council meeting:	**3 March 2023**
Paper number:	**SC(23)MAR07 – Environmental offences**
Lead Council member:	**n/a**
Lead official:	**Ruth Pope** **Ruth.pope@sentencingcouncil.gov.uk**

1 ISSUE

1.1 In 2021 and 2022 the Council discussed requests from the Herts Fly Tipping Group to make changes to the Environmental offences guideline specifically in relation to the way it operates in sentencing fly tipping cases.

1.2 The Council rejected the bulk of their arguments but did think that the way in which the guideline emphasises fines over community orders might be worth reconsidering. This paper considers whether and how this should be done.

2 RECOMMENDATION

2.1 That the Council agrees to consider some minor changes to the Environmental offences guideline for individuals as part of the next miscellaneous amendments consultation.

3 CONSIDERATION

Background

3.1 The Environmental offences guidelines came into force on 1 July 2014. There are two guidelines: one for individuals and one for organisations. The guidelines apply to offences covered by the Environmental Protection Act 1990, s.33; the Environmental Permitting (England and Wales) Regulations 2010, regulations 12 and 38(1), (2) and (3); and the Environmental Permitting (England and Wales) Regulations 2016, regulations 12 and 38(1), (2) and (3). The statutory maximum sentence for an individual is five years' custody and the guideline offence range is a discharge to three years' custody. The statutory maximum sentence for an organisation is an unlimited fine and the guideline offence range is £100 fine – £3 million fine.

3.2 The correspondence regarding fly-tipping cases follows on from various representations since 2016 including from Defra suggesting that the fines imposed on individuals are deemed to be too low to reflect both the costs avoided by the offender and the costs of clearing up; as well as being inadequate as a deterrent.

3.3 In response, we have drawn attention to the fact that the guideline does require sentencers consider awarding compensation and to take account of costs avoided and that the law requires courts to take into account the financial circumstances of the offender in setting the amount of a financial penalty.

3.4 The one aspect of the guideline for individuals that we thought could be usefully revisited is the extent to which it steers sentencers away from community sentences in favour of fines.

3.5 In a response to the Herts Fly tipping group in July last year we said:

> The Council has looked again at the refences to community orders in the guideline and recognises that while community sentences are available, the guideline does emphasise fines over community orders. While it is not possible to know whether an increased use of community orders would be more effective than financial penalties in deterring offending, the Council felt that there could be some merit in reconsidering this point as part of some wider work it is undertaking into guidance given to courts on the use of community orders.

3.6 The 'wider work' referred to above is the revision of the Imposition guideline. Currently the Imposition guideline contains the following statements in the general principles section on community orders:

> A community order must not be imposed unless the offence is 'serious enough to warrant the making of such an order'.
>
> Sentencers must consider all available disposals at the time of sentence; even where the threshold for a community sentence has been passed, a fine or discharge may be an appropriate penalty. In particular, a Band D fine may be an appropriate alternative to a community order.

3.7 This aspect of the Imposition guideline has not yet been discussed by the Council but there are no proposals to make significant changes. The issue is with the wording in the Environmental guideline which goes further:

> Where the range includes a potential sentence of a community order, the court should consider the community order threshold as follows:
>
> - has the community order threshold been passed?
>
> **However, even where the community order threshold has been passed, a fine will normally be the most appropriate disposal.** Where confiscation is not applied for, consider, if wishing to remove any economic benefit derived through the commission of the offence, combining a fine with a community order.

3.8 This was a deliberate policy by the Council when the guideline was developed – the idea being that the offending was often financially motivated and so financial penalties were most appropriate.

3.9 What is contemplated is a modest change to bring it into closer alignment with the Imposition guideline and to give less emphasis to fines over community orders, such as:

Where the range includes a potential sentence of a community order, the court should consider the community order threshold as follows:

- a community order must not be imposed unless the offence is serious enough to warrant the making of such an order (section 204 of the Sentencing Code)

Where the community order threshold has been passed, a fine may still be the most appropriate disposal. Where confiscation is not applied for, consider, if wishing to remove any economic benefit derived through the commission of the offence, combining a fine with a community order.

3.10 Also in the sentence tables where a fine and community order are listed as alternatives, the order could be reversed and where a fine is given as a starting point this could be changed to a community order, so that rather than as currently:

Offence category	**Starting Point**	**Range**
Category 1	18 months' custody	1 – 3 years' custody
Category 2	1 year's custody	26 weeks' – 18 months' custody
Category 3	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Category 4	Band E fine	Band D fine or low level community order– Band E fine

It could say:

Offence category	**Starting Point**	**Range**
Category 1	18 months' custody	1 – 3 years' custody
Category 2	1 year's custody	26 weeks' – 18 months' custody
Category 3	High level community order	Medium level community order or band E fine – 26 weeks' custody
Category 4	Medium level community order	Low level community order or band D fine – Band E fine

3.11 Any such changes would not greatly alter the sentencing severity, but are sufficiently significant to require consultation. The suggestion is, therefore, that proposals could be included in this year's miscellaneous amendments consultation.

Question 1: Does the Council agree to include consideration of proposals for minor changes to the Environmental guideline for individuals in the next miscellaneous amendments consultation?

4 IMPACT AND RISKS

4.1 The number of adult offenders sentenced for offences under s 33 EPA 1990 (which would include fly-tipping):

Court	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Magistrates	662	560	545	538	637	598	671	752	641	311	527
Crown	41	22	27	30	25	26	32	26	53	10	23
Total	**703**	**582**	**572**	**568**	**662**	**624**	**703**	**778**	**694**	**321**	**550**

4.2 Not all of these offences will be fly-tipping, but what the figures show is (with the exception of 2020) volumes of prosecutions have been fairly stable for many years. Figures from 2020 onwards may reflect the impact of the pandemic on court processes and prioritisation and the subsequent recovery, so should be treated with caution.

4.3 Sentence outcomes for adult offenders sentenced for offences under s 33 EPA 1990:

Outcome	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Discharge	147	141	111	95	86	76	49	65	47	26	37
Fine	468	377	380	411	484	463	503	572	497	233	418
Fines as a proportion	67%	65%	66%	72%	73%	74%	72%	74%	72%	73%	76%
CO	54	43	43	40	48	46	55	62	57	28	38
SSO	9	10	15	8	22	15	37	20	53	6	21
Immd custody	17	4	12	5	11	7	26	10	18	4	5
Other	8	7	11	9	11	17	33	49	22	24	31
Total	**703**	**582**	**572**	**568**	**662**	**624**	**703**	**778**	**694**	**321**	**550**

4.4 Fines appear to have been imposed in around three-quarters of cases since the guideline came into force. Prior to that the proportion of fines was slightly lower and the proportion of discharges higher (although due to a data processing issue, offenders sentenced to a fine of over £10,000 in magistrates' courts during the period 2011 to 2015 may have been excluded from the data and therefore volumes shown for this period may be lower than the actual number sentenced; however, it is likely that the number of missing records is low).

4.5 Median fine amounts received by adult offenders sentenced for offences under s 33 EPA 1990:

	2015	2016	2017	2018	2019	2020	2021
Median fine amount	£250	£300	£320	£300	£320	£320	£320

4.6 As the guideline applies not only to offences under s 33 EPA 1990 but also to offences under the Environmental Permitting (England and Wales) Regulations there is a possibility that any changes to the guideline could have an effect on sentencing for those offences as well. Fines represent a lower proportion of sentences for these offences (around 58% on average for the years 2011-2021) and community orders a slightly higher proportion compared to s.33 EPA 1990. The volumes of offenders sentenced under the regulations are much lower (55 cases in 2021). We would need to consult with the Environment Agency to clarify if there is a likelihood of unintended consequences from any change, but none are apparent at this stage.

Blank page

Sentencing Council

External communication evaluation

January 2023

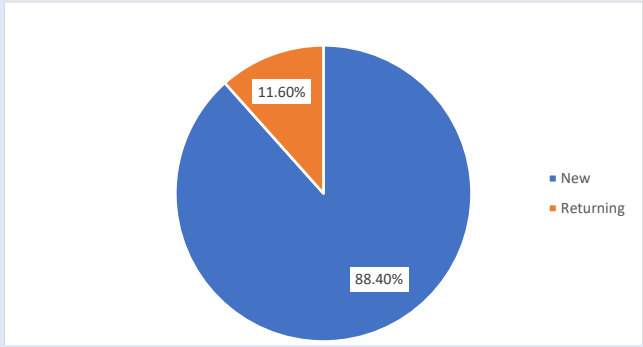
Visits to www.sentencingcouncil.gov.uk

	This month	Last month
Users*	461,862	405,934
Sessions per user	1.31	1.29
Pages per session	2.82	2.59
Ave time on site	02:20	02:06
Bounce rate**	55.0%	57.3%

Announcements

9th	Council vacancy: non-judicial member promoting the welfare of victims of crime
10th	External research on equality and diversity in the work of the Sentencing Council published

Visitors: new and returning



*Users: Number of people who have visited the website at least once within the date range
**Bounce rate: Percentage of people who land on a page on the website, then leave

Sentencing Council

sentencingcouncil.gov.uk

Most visited pages	Pageviews	Unique Pageviews
Magistrates' court guidelines search page	280,261	108,961
Crown Court guidelines homepage	62,270	32,893
Website homepage	53,735	31,176
Magistrates' court homepage	48,714	24,506
/fine-calculator/	41,169	19,174
/offences/magistrates-court/item/common-assault-racially-or-religiously-aggravated-common-assault-common-assault-on-emergency-worker/	35,791	20,356
/offences/magistrates-court/item/excess-alcohol-driveattempt-to-drive-revised-2017/	27,568	15,265
Common offence illustrations	26,457	11,995
Common offence illustrations /assault/	22,889	13,898
/offences/magistrates-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/	22,802	13,855

Most visited guidelines

Magistrates	Common assault / Racially or religiously aggravated common assault/ Common assault on emergency worker
Crown Court	Causing grievous bodily harm with intent to do grievous bodily harm / Wounding with intent to do GBH

Top searches

Theft
Assault
Burglary
Dangerous driving
Speeding

* Outlines: offence descriptions on the public-facing pages of the website: www.sentencingcouncil.org.uk/outlines/

Sentencing Council

YouTube

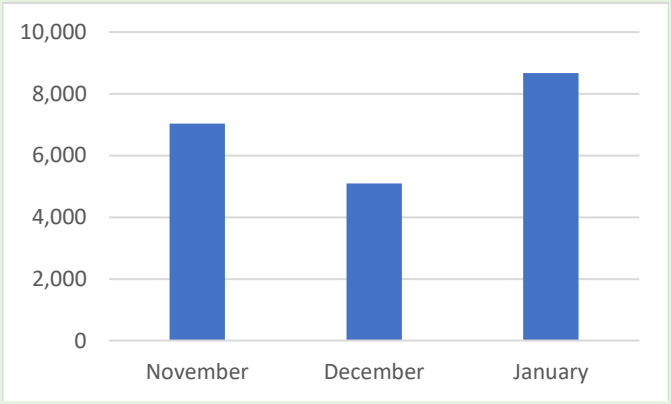
Subscribers

+27 = 1,251

Most watched video

How offenders are sentenced in England and Wales

Video views per month



Watch time average

02:36

Impressions*

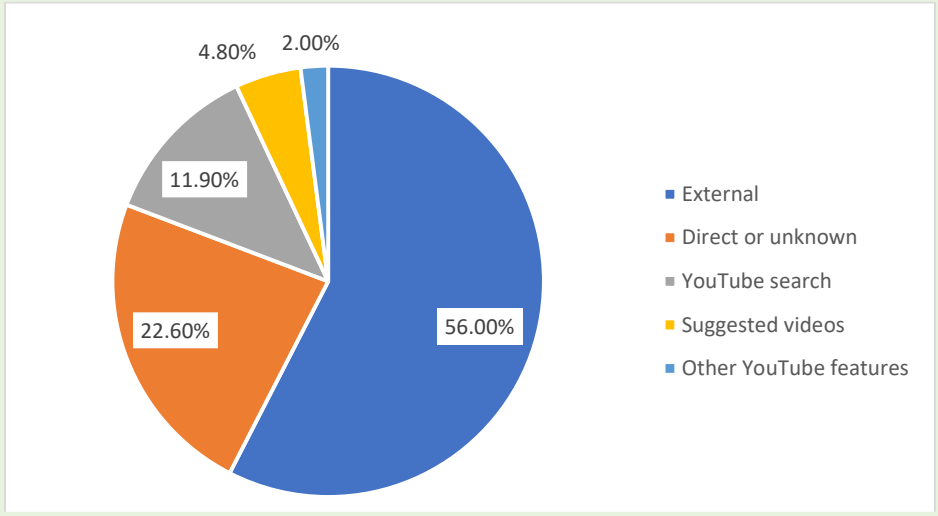
23,895

* Impressions: Number of times our video thumbnails are shown to viewers on YouTube

Sentencing Council

YouTube

How viewers find our videos



YouTube search: terms used

1	How offenders are sentenced
2	Sentencing
3	Magistrates court UK
4	Crown Court
5	UK court sentencing

- External: Traffic from websites and apps embedding or linking to our videos on YouTube (60% www.sentencingcouncil.org.uk)
- Direct or unknown: using direct link or bookmark to our YouTube channel or unknown
- Suggested videos: suggested to users viewing other videos on YouTube

Sentencing Council

Subscription email bulletin

Subscribers

+252 = 5,506

All bulletins

Sent	4
Delivered	20,473
Opened	32.7%
Engagement rate*	5.8%

Highest engagement*

Minutes of Council meeting: December 2022

- Engagement rate: % of recipients clicking through at least one link in the bulletin(s)
- Highest engagement: topic of most “clicked through” bulletin

Sentencing Council

Twitter

Followers

+40 = 6,068

Highlights

	Tweets	Impressions	Mentions	Profile visits
This month	19	18,700	*	*
Last month	3	1,633	82	780

(*these figures are no longer available in Twitter)

Top tweet

Do you have experience of promoting the welfare of victims of crime? We're recruiting a new member of the Sentencing Council to represent the interests of victims. Applications due 24 Jan:

Impressions: 2,052	Total engagements: 51

Top mention

@AndyCoxDCS We spoke about this a few months back. Enough is enough and @SentencingCCL need to stop allowing 'exceptional hardship'. There's people legally driving in the UK with more than 50 points on their licences. It's pathetic how lenient the UK is with issues like this.

Michael B Gambin @NumeroUnouk

Approved Driving Instructor, Disability Specialist, DM Medical Assessor, Instructor Trainer, Fleet Assessor, Track & Evasive Instructor. Road safety advocate. 154 followers

- Impressions: number of times a tweet has been seen
- Mentions: mentions of the Council in other people's tweets
- Profile visits: number of times people have clicked through our tweets to see the Council's twitter profile
- Engagements: number of time someone has liked, retweeted, opened or clicked a link in a tweet or viewed our profile

Blank page

Sentencing Council

Sentencing Council Governance subgroup
Monday 30th January 2023
MINUTES OF MEETING

Attendees:

Beverley Thompson (BT; Sentencing Council; Chair)
Juliet May (JM; Sentencing Council)
Richard Wright (RW; Sentencing Council)
Steve Wade (SW; Office of the Sentencing Council, Head of Office)
Ollie Simpson (OS; Office of the Sentencing Council, Governance secretary)
Lauren Maher (LM; Office of the Sentencing Council, Finance lead)

Apologies: Elaine Lorimer (EL; Revenue Scotland)

1. Minutes and action points

The minutes of the october2022 meeting were agreed. Two action points were outstanding, both related to risk and OS would discuss these as part of the risk discussion.

2. General update

SW gave an update on various issues relating to governance. The draft MoJ-Sentencing Council Framework Document remained with MoJ. There was a general question surrounding the status of the chief executives/heads of office of arms length bodies that MoJ was tackling.

SW said that despite various restructures in MoJ, the Council still sat for sponsorship purposes under James McEwan and the Governance, Risk and Assurance Directorate.

One potential call on office resource may be a contribution to the Hallett public inquiry on covid. Legal advice might need to be sourced externally, as MoJ lawyers were likely to be focused on the MoJ HQ response. RW declared an interest as a counsel to the inquiry, though not on criminal justice matters. It was likely that any requests from the inquiry could be in up to 2-3 years' time.

BT said that we should consider what this future work might mean for staffing/resource.

3. Finance

LM gave an overview of the current projected spend for 2022/23.

With a budget of £1.789m and a projected spend of £1.65m there was an underspend predicted of about £140k. Staffing costs were over what had been allocated due in large part

to maternity cover etc. An amount of underspend in the A&R allocation was used to cover this.

A major contribution to the overall underspend was a £107,495 underspend in the Comms allocation, largely down to the fact that You Be The Judge has had to slip back to the Financial Year 2023/24. SW explained that this was because of the difficulty of finding court space with enough advance notice for the Design 102 filming crew to be able to set up.

BT asked whether filming could be done at weekends or after hours. After hours were difficult because of the time needed to set up and the costs of filming would be double at weekends. There may be options for using former courts, or court-like sets, BT asked if the formal could be altered. SW explained that the filmed sections had been received well in the existing tool, but that depending on progress in the new financial year, there might need to be an assessment of alternatives.

SW did not believe this in itself would affect the Council's 2023/24 allocation and BT noted it was a very important strand in the Council's public confidence work. In terms of next year, the Council had been asked to model a "stretch" target of a 1.5% reduction for 2023/24 and a 2.5% reduction for 2024/25. As a working assumption these were the reductions we should expect to see, but they were manageable and we would still be able to continue with projects like You Be The Judge and additional analytical work committed to as part of the five year strategy.

4. Risk Register

OS presented the current risk register. The risks on quality evidence (risk 3) and communications and confidence (risk 5) had been redrawn in line with the wording of the relevant strategic objectives. As it was still being built up following last year's refresh it needed target dates (i.e. the point at which we wanted to see risks managed to their target levels)

Action: OS to insert target dates for consideration by risk owners.

The highest risks related to appointments to the Council (risk 4), staff resource (risk 1) and financial resource (risk 2). The latter two were for review in April when a clearer picture of the 2023/34 settlement might be in sight (if not known till later in the year).

SW talked to the challenges surrounding appointments. Whilst there was a good field of candidates to replace Rebecca Crane, there were greater difficulties finding replacements to the police and victims representatives (both Lord Chancellor appointments). Substitutes may be possible pending the formal appointment of permanent successors. But even on the current timetable these would not be in place until the summer at the earliest.

RW pointed out it was regrettable to be losing both representatives at one go given the unique perspectives they brought to Council discussions. JM agreed that asking the current postholders for suggestions for replacements might be fruitful. BT said there may be benefit in asking other members of the Council to consider.

On risk 3 (quality of evidence) JM asked whether the question of reliance on outdated data should be explicitly reflected. SW explained that we now had various more recent data gathered from bespoke collections post the Crown Court Sentencing Survey. Nonetheless, OS agreed to discuss with Emma Marshall (EM) as to whether it could be reflected in the overall risk register or at least in the Analysis and Research sub group's dedicated risk register.

Action: OS and EM to consider how best to capture the problem of outdated evidence in the risk registers.

In relation to risk 8 on data protection, the Analysis and Research sub group was considering what protective marking to put on council papers. The Business Continuity Plan (BACP) was mentioned in relation to the guidelines becoming unavailable to the courts and loss of access to IT systems for the office. OS had an outstanding action to make sure the BACP was reflected in the risk register, and this appeared to satisfy this although he would check whether the BACP was relevant to any other risks

Action: OS to go through business continuity plan with the office lead to see where else (if anywhere) it should be mentioned.

BT questioned why risk 11 on equality and diversity work had gone from very high to medium. OS explained that we had done a considerable amount of work in this space, so it was felt that the impact on the Council of discrepancies would not be the greatest because we were leading the way in investigating the potential (the University of Hertfordshire publication and the recent academic conference demonstrating this). BT asked whether there was more we could be doing (for example in relation to neurodiverse and other groups) and there was agreement that we should always be considering this question as broadly as possible.

5. AOB

None.

The next meeting (which will look at the annual business plan and the risk to be presented to full Council) will be on Thursday 23 March at 16:30-18:00

Blank page

Sentencing Council

ANALYSIS AND RESEARCH SUBGROUP MEETING
26 JANUARY 2023
MINUTES

Members present: Bill Davis
Rebecca Crane
Elaine Freer
Jo King
Mark Wall

Members of Office in attendance: Charlotte Davidson
Amber Isaac
Alice Luck-Scotcher
Nic Mackenzie
Lauren Maher
Emma Marshall
Harriet Miles
Sharmi Nath
Caroline Kidd

1. WORK UPDATES

Social Research team

1.1 Nic Mackenzie updated the subgroup on the current work of the team, including the recent publications of externally commissioned research: evidence on the effectiveness of sentencing (September 2022), Public confidence in sentencing and the criminal justice system (December 2022) and the report on Equality and diversity in the work of the Sentencing Council which was published in January of this year. The Behavioural Insights Team (BIT) have been commissioned to conduct research on user testing of digital guidelines.

1.2 On internal work, the subgroup was updated on recent road testing exercises which had been completed: to support the Perverting the course of justice and witness intimidation guideline, as well as the Motoring guideline. A bespoke data collection exercise has also recently been launched in all magistrates' courts and locations of the Crown Court. The survey will run until the end of June. Work is underway on a review of expanded explanations, an evaluation of the Breach guideline, as well as exploring how externally facing outputs that we produce can be made more accessible for users.

1.3 Nic Mackenzie added the team has begun to explore the possibilities of conducting research on lived experience, an issue raised in the equality and diversity report and also mentioned at the recent sentencing seminar.

Statistics team

1.4 Amber Isaac updated the subgroup on current work in the team regarding guideline development: work is underway on producing statistics for the draft guideline for Immigration offences and the definitive guideline for Motoring offences. Evaluations are underway on the guidelines for Bladed articles and offensive weapons and Intimidatory offences, and we are close to signing off the evaluation of the Imposition guideline.

1.5 We have started work on publishing the dataset from our bespoke data collection for robbery offences, as we did with theft from a shop or stall and drug offences. We are also currently working with the Ministry of Justice (MoJ) to prepare for upcoming changes in the Court Proceedings Database (CPD) that we draw on for our work, along with changes to the coding language we use. In addition, the team is working on a review of our official statistics and exploring ways in which we can improve the accessibility of our documents.

1.6 On staffing, Amber Isaac confirmed that Charlotte Davidson's contract has been extended until the end of March 2024; Charlotte will be leading on the team's data strategy.

2. RISK REGISTER AND TERMS OF REFERENCE FOR THE SUBGROUP

2.1 Emma Marshall talked the subgroup through changes to the risk register. Changes have been made and it now encompasses some broader risks that are applicable to all office/ corporate work. Discussion focussed on the controls, actions, and risk ratings.

2.2 There are now two main risks to consider from an analytical perspective. The first risk amalgamates several previously listed risks and covers the risk that guidelines are not informed by evidence and that the impact to guidelines is unknown. The team are currently pursuing the possibility of collecting data via the Common Platform in the future. We have made an application to add a link to the platform that will allow us to have a pop-up shown to sentencers that would take them to a landing page where they then complete and submit sentencing information that we can use for analysis. We hope this will be possible this financial year, but this is not confirmed and there are potential budgeting issues. We also have road testing exercises and evaluations built into our workplan. Subgroup members were content with this risk.

2.3 The second risk concerns data protection breaches. The impact of such breaches could potentially be high, but many actions have already been taken to minimise this risk and bring it down to an overall ‘low’ rating. Actions include staff training, putting in place a data retention policy, and updating our privacy policy. The contracts we use for commissioned research are clear on data protection expectations and where relevant, we have data sharing agreements in place. Council members will shortly be sent a reminder of their obligations in this area. Subgroup members were content with this risk, although Jo King asked that we consider including security markings on Council papers and include how to handle papers as part of the reminder that will be sent out to Council members.

2.4 Emma Marshall also outlined the key parts of the subgroup’s terms of reference for the benefit of new members. The subgroup was content with these.

Action: Emma Marshall to explore the best way to add protective markings onto documents and to include issues relating to the handling of papers in the forthcoming Council data protection/data security reminder.

3. UPDATE ON THE DATA COLLECTION

3.1 Harriet Miles updated the group on the latest data collection that is currently underway in all magistrates' courts and all locations of the Crown Court, and that covers 13 specific offences. This was launched on 9 January and will be running for six months until the end of June.

3.2 The data collection has been publicised on the judicial intranet and in Magistrates' Matters. A point of contact has been secured within each court or local justice area and we have worked with contacts in MoJ and HMCTS to provide additional avenues through which to access the collection in order to ensure a successful collection. We would also like to thank Bill Davis for putting his name to the note that was sent out to try and raise engagement with the survey at its launch.

3.3 The data collection is online only. In addition to general questions in relation to the stepped guideline process and the factors taken into account when deciding on individual sentences, some forms are also collecting data on specific areas of interest, such as whether it was committed in a domestic context. The data collection will provide information to help evaluate guidelines and will also help produce data to feed into work to address some of the University of Hertfordshire's recommendations in the equality and diversity research.

3.4 As of this week we have received around 1,200 forms, with a good spread across all offences. We will be monitoring response rates throughout to ascertain if there are any individual courts that may benefit from increased support, and we have been monitoring our email inbox for any feedback. We are grateful to Rebecca Crane and Jo King for their feedback so far on the forms and we will be making some amendments to the form imminently in response to their helpful points.

3.5 Rebecca Crane also commented that the 'single most important factor' field on the form is often very difficult to answer and asked for the rationale behind it. Amber Isaac clarified that in past data collections we have been able to pick out patterns within this variable which have informed our understanding of the impact of the guideline, for example in the theft data collection it was found that previous convictions were very prevalent in responses about the single most important factor, which was confirmed to be significant by further analysis. Elaine Freer asked whether there was a risk that including this box would deter people from responding, but it was felt that as this is the last question, and it is not marked as compulsory, the risk of this is likely to be low.

3.6 Jo King raised a concern about the number of compulsory questions in the form and that this might deter respondents from participating. The date fields in the form (e.g. date of commission of offence, date of sentence, data of birth), were raised as being particularly problematic, as these appear early in the form and often sentencers may not have these dates to hand. Charlotte Davidson explained that it is necessary to collect date of birth and date of sentence in order to permit the record to be linked to the Court Proceedings Database (CPD) to obtain other information (e.g. the offender's ethnicity). Unfortunately we do not have data on the number of survey forms which have been abandoned part way through. However, we are currently reviewing which questions are obligatory and whether any can become optional, and

are carefully considering the minimum amount of data required for a single form to be useful. We will therefore make any necessary changes to ensure we can reduce burdens on sentencers.

3.7 Jo King raised the issue of maintaining engagement throughout the duration of the collection and Harriet Miles confirmed that we would be approaching Bill Davis in the future for a message to cascade to thank everyone for their hard work and to encourage them to carry on completing forms. There is also the possibility of sending out a mini 'roundup' document in the future to give examples of concrete ways in which the data collection has benefitted the Council and the guidelines, so that sentencers can see their efforts are worthwhile.

4. ACCESSIBILITY ISSUES

4.1 Alice Luck-Scotcher and Sharmi Nath updated the subgroup on the measures the team is taking to ensure the Office of the Sentencing Council meets its legal obligations regarding accessibility requirements. These legal requirements were introduced in 2018 and are primarily concerned with digital accessibility. It is required that all our publications are fully accessible to the public, which includes ensuring our publications are produced in accessible formats that assistive technologies, such as screen readers, can use.

4.2 The changes that will affect the documents, in particular analytical documents, will include: ensuring alternative accessible formats of documents and spreadsheets are available; no longer using footnotes in documents; and modifying the design of tables to ensure they are more compatible with assistive technology. Some of the stylistic changes have already been implemented, while the re-design of accessible tables is a more involved piece of work that is underway. In the future, we aim to publish our documents in HTML.

4.3 Jo King raised concerns about whether the accessible formats of the documents would still meet the needs of the Council, and asked that before final decisions are made, the Council may be able to review these changes. It was confirmed that we wouldn't necessarily be looking to replace existing formats e.g. Council documents are currently in a PDF format, but instead we are looking to ensure that in addition to these we do have an accessible format readily available. However, if there are changes made, these will be circulated to the Council for information/comment.

Action: When completed, the Office to provide the Council with the accessible forms of documents/spreadsheets for review.

5. UPDATE ON REVIEW OF THE EXPANDED EXPLANATIONS

5.1 Alice Luck-Scotcher gave an overview of work underway to scope out a review of the expanded explanations. The need for this work was included as an action in the Council's strategic objectives and links with recommendations in the recent equality and diversity report. The main research questions for the work were outlined for the group, which include how expanded explanations are interpreted and applied and the potential impact on sentencing outcomes. The research design was also outlined. This will involve two phases of research using interviews with sentencers to look at existing and amended explanations, and then focus groups to look at new expanded explanations. Work is underway to draft discussion guides for the interviews and members of the group were asked for their support with piloting these materials.

5.2 Discussion focused on whether this research will ask sentencers if they are aware of expanded explanations. It was noted that this work will focus on the content, wording and interpretation of the expanded explanations themselves, complementing and building on the current user testing research which is focusing on whether sentencers are aware of them and how they access them. There are also related questions included in the current data collection.

6. UPDATE ON THE OFFICIAL STATISTICS REVIEW

6.1 Amber Isaac and Charlotte Davidson gave a brief overview of a review of the Council's official statistics and other statistical products which is currently being undertaken. When producing statistical outputs, the Statistics team follows the Code of Practice for Statistics, which sets the standards that producers of official statistics should commit to. The Code provides a framework based on three pillars: Trustworthiness, Quality, and Value, and together, these pillars support public confidence in statistics.

6.2 Amber Isaac explained that the Sentencing Council publishes several different types of publications that include statistics, some of which are purely official statistics publications, while some are hybrid (including a mix of statistical and non-statistical analysis and research). Others are not strictly considered to be official statistics at all. Charlotte Davidson explained that where the official statistics label is not appropriate, statistics producers can still commit to voluntary application of the Code of Practice to be open and transparent to their users.

6.3 The team have conducted a review of our publications and we are now looking to write a statement of compliance. This will set out how we as an organisation are going to demonstrate to our users that we are committed to these principles in our work, where it would be practical to do so. For those areas where full compliance is not possible, we will be transparent about the reasons why and ensure our users are fully informed about the intended use of our outputs. This statement will be published on the Council website and will also be accessible from the Office for Statistics Regulation's website page on voluntary application.

Blank page

Sentencing Council

Confidence and Communication subgroup

Minutes of meeting 17 January 2023

Present:	Rosa Dean, Chair
	Diana Fawcett
	Stephen Leake
OSC:	Phil Hodgson
	Kathryn Montague
	Gareth Sweny
Apologies:	Nick Ephgrave

1. Updating the Confidence and Communication strategy and work plan

Phil presented the findings and recommendations from the recently published research reports on equality and diversity and public confidence in the criminal justice system and sentencing. She set out the implications of these findings for the Confidence and Communication Strategy and work plan.

Members agreed with this approach to revising the strategy and that Phil should bring back to the March meeting a revised strategy, identifying priority audiences and actions, and a work plan. They also suggested some actions for inclusion in the work plan.

In the meantime, members asked the communication team to prioritise work identified in relation to disparities in sentencing outcomes.

Action

Phil to revise the Confidence and Communication strategy and work plan for consideration at the March 2023 meeting.

2. Referring to respondents in consultation response documents

Members considered the paper prepared by Vicky Hunt on how we should refer to consultation respondents in response papers.

Members selected option 4 – a hybrid approach, to name all organisations or those responding in a professional capacity, with an option to opt out, and allow individual members of the public the option to opt in.

Action

Phil to report the subgroup's decision to Vicky Hunt and the policy team.

3. Risk

Members reviewed the controls and actions we have put in place to mitigate risk 5 (Lack of confidence in sentencing and the work of the Council) and recommended inclusion of:

Controls: Monitoring social media; daily news items bulletin

Actions: Periodically revisit equality and diversity and public confidence research

Action

Phil to update the risk register and forward to the governance subgroup.

AOB

Phil notified members that:

- the subgroup will meet in March, July and October. Gareth will circulate potential dates once the governance subgroup have set their dates;
- part of her digital role has moved over to the policy team who will in future be managing the maintenance and development of digital guidelines and related tools; and
- Bill will be invited to all future confidence and communication subgroup meetings.