Sentencing Council

Sentencing Council meeting:	**12 May 2023**
Paper number:	**SC(23)May08 – Miscellaneous amendments**
Lead Council member:	**Jo King**
Lead official:	**Ruth Pope** **ruth.pope@sentencingcouncil.gov.uk**

1 ISSUE

1.1 This is the first of three meetings to consider items for inclusion in this year's consultation on amendments to sentencing guidelines and supporting material. The consultation will take place in September to November to allow time for consideration of the responses in December and January before publication of the changes in March which will come into effect on 1 April 2024.

1.2 Unlike the last round of changes which were mainly prompted by legislative changes, this year most of the items for discussion have been raised by guideline users often by using the feedback function on guidelines.

1.3 A meeting of the Magistrates' Court Sentencing Guidelines (MCSG) working group was held in March to canvass opinions on some of the suggestions relating chiefly to magistrates' courts and these are reflected in this paper.

2 RECOMMENDATION

2.1 The Council is asked to consider the various matters set out below and decide:

- if any changes to guidelines are required;
- if so, whether the changes should be consulted on; and
- if so, should they be included in this year's miscellaneous amendments consultation.

3 CONSIDERATION

Matters relevant to magistrates' courts

3.1 We have received a query from an MP regarding the Obstruct/ resist a police constable in execution of duty guideline. The query relates to the high culpability factor: 'Deliberate obstruction or interference'. The suggestion is that as the offence is 'wilful obstruction' this factor would apply to all cases.

3.2 The offence is contrary to section 89(2) of the Police Act 1996 which states:

> 'Any person who resists or wilfully obstructs a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding one month or to a fine not exceeding level 3 on the standard scale, or to both.'

3.3 Our response to the MP recognised that they had raised an issue regarding how the guideline will apply to cases of 'obstructing' (though not necessarily 'resisting') a constable which should be considered by the Sentencing Council.

3.4 The CPS have also been in correspondence with the MP and they stated that the CPS guidance addresses obstruction and sets out for prosecutors the relevant principles and law involved. Their guidance does not address resisting. They noted that the statute, the decided cases and the leading practitioner texts are all silent on the point raised, namely the mental element of the "resisting" form of the offence. They concluded that there is a presumption of law that a culpable mental state is required to commit a criminal offence and therefore it is likely, although far from certain, that the act of "resisting" must also be intentional.

3.5 The factors in the guideline are:

Culpability demonstrated by one or more of the following

Factors indicating higher culpability

- Deliberate obstruction or interference
- Use of force, aggression or intimidation
- Group action

Factors indicating lower culpability

- All other cases

Harm demonstrated by one or more of the following

Factors indicating greater harm

- Offender's actions significantly increase risk to officer or other(s)
- Offender's actions result in a suspect avoiding arrest
- Offender's actions result in a significant waste of resources

Factors indicating lesser harm

- All other cases

3.6 The working group discussed whether to recommend removing the factor 'Deliberate obstruction or interference' as being inherent in the offence or replacing it with 'planned

obstruction or interference'. It was suggested that 'wilfully' includes recklessly and therefore there was at least a theoretical possibility that the offence could be committed without falling into culpability A. In the experience of the working group members, most these offences were committed deliberately but were not planned. This is a relatively high volume offence with around 2,000 offenders sentenced per year with fines being the most common disposal. It was noted that this offence has a low statutory maximum sentence (a level 3 fine and/or one month's custody) and that more serious offending would result in other charges. The working group did not come to a firm conclusion, but the general view was to leave the guideline unchanged.

3.7 We may need to justify any decision we make to the MP.

Question 1: Does the Council wish to make any changes to the factor: 'Deliberate obstruction or interference' in the Obstruct/ resist a police constable in execution of duty guideline?

3.8 The MCSG contains tables of very basic sentencing guidelines for minor traffic related offences including seat belt offences. The current guideline reads:

Offence	Maximum	Points	Starting point
Seat belt offences	L2 (adult or child in front) L2 (child in rear)	–	A

3.9 There is no reference to adults in the rear of a vehicle (probably because the guideline was last updated before that was an offence. There are a number of offences under sections 14 and 15 of the Road Traffic Act 1988 relating to seat belts all of which carry a level 2 fine. It is therefore proposed to update the entry to read:

Offence	Maximum	Points	Starting point
Seat belt offences (Road Traffic Act 1988 ss.14 and 15)	L2	–	A

Question 2: Does the Council agree to the proposed change to the guideline for seat belt offences? If so, should this be consulted on or made without consultation?

3.10 In the Allocation guideline under the heading "Children or young people jointly charged with adults – interests of justice test" there is a non-exhaustive list of examples of

factors to be considered when deciding whether it is in the interests of justice to send the child to the Crown Court for trial:

- whether separate trials will cause injustice to witnesses or to the case as a whole (consideration should be given to the provisions of sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999);
- the age of the child or young person: the younger they are, the greater the desirability that they be tried in the youth court;
- the age gap between the child or young person and the adult: a substantial gap in age militates in favour of the child or young person being tried in the youth court;
- the lack of maturity of the child or young person;
- the relative culpability of the child or young person compared with the adult and whether the alleged role played by the child or young person was minor;
- the lack of previous convictions on the part of the child or young person.

3.11 In 2020 the Chairman (who was then youth justice lead) gave some guidance about the relevance of delay to the interests of justice test during the pandemic. The suggestion is that this guidance is still relevant and should be encapsulated into the appropriate part of the allocation guideline (which is also reproduced in the Sentencing children and young people guideline) in the form of an additional factor about the expected wait time for a trial in the Crown Court. For example:

- the likely delay in trying the youth in the Crown Court as compared to the youth court.

3.12 It appears that the Criminal Procedure Rules Committee is proposing changes to the rules on the procedure for allocation and sending for trial, which includes those relating to under 18s jointly changed with an adult. These proposed changes refer to the interests of justice test, but do not define it or change it and therefore do not affect the sentencing guidelines.

Question 3: Does the Council wish to consult on the proposed change to the Allocation and Sentencing Children and young people guidelines?

Matters relevant to magistrates' courts and the Crown Court

3.13 It has been suggested to us that the failure to surrender to bail guideline could be clearer about the relative powers of magistrates' courts and the Crown Court. Information on the maximum available in each court is provided under the sentence table:

Maximum sentence in magistrates' court – 3 months' imprisonment

Maximum sentence in Crown Court – 12 months' imprisonment

3.14 The working group thought that this information should be repeated at the top of the guideline.

Question 4: Does the Council agree to the proposed change to the Failure to surrender to bail guideline and if so could this be made without consultation?

3.15 Several matters relating to domestic abuse have been raised. We have created a list of all guidelines noting whether and how domestic abuse is referenced. There are broadly two ways in which domestic abuse can be relevant to sentencing:

- As an aggravating factor when the offender is the perpetrator of domestic abuse in circumstances set out in the domestic abuse overarching guideline; or
- As a mitigating factor when the offender has been the victim of domestic abuse.

3.16 There are some guidelines which have a note containing a link to the Domestic abuse overarching guideline in the header but do not contain a domestic abuse aggravating factor. This may cause sentencers to overlook the factor at the relevant point in the sentencing exercise. The proposal is that where domestic abuse (by the offender) could realistically be a factor it should be listed in the aggravating factors.

3.17 Where the factor does appear, the wording used in most guidelines is: 'Offence committed in a domestic context'. There is potential for misunderstanding the factor and it could perhaps be more helpfully phrased. Where the factor appears, there is an expanded explanation which simply provides a link to the Domestic abuse overarching guideline. While the overarching guideline provides detailed information on the types of conduct that amount to domestic abuse, rewording the factor could provide an opportunity to reference coercive or controlling behaviour on the face of all relevant guidelines. Suggestions for rewording the aggravating factor include:

- Offence committed in a domestic abuse context
- Offence committed in the context of domestic abuse which may include coercive or controlling behaviour
- Offence committed in the context of domestic abuse which may include, but is not limited to, coercive or controlling behaviour

3.18 Domestic abuse features as a low culpability factor in the cruelty to a child guideline but otherwise it is not specifically referenced as a low culpability or mitigating factor in adult guidelines. However, in 58 guidelines there is a factor either at step one or step two relating to the offender being subject to coercion, intimidation or exploitation. The Council recently agreed wording in the proposed Perverting the course of justice guideline to specifically reference domestic abuse in this factor: 'Involved through coercion, intimidation or

exploitation or as a result of domestic abuse'. This wording could be considered in all guidelines where it could be relevant.

3.19 If the Council wishes to consult on these proposals, a comprehensive list of guidelines and the proposed changes for each one can be produced for consideration at the June meeting. In doing so we will also check that any remaining references in guidelines to 'domestic violence' are changed to 'domestic abuse'.

Question 5: Does the Council wish to reword the aggravating factor relating to domestic abuse? If so, what wording should be used (see 3.16)?

Question 6: Does the Council wish to include an aggravating factor relating to domestic abuse in all relevant guidelines?

Question 7: Does the Council wish to reword the low culpability or mitigating factors relating to coercion? If so, should the wording agreed for the perverting the course of justice guideline be used?

Question 8: Does the Council wish to include a low culpability or mitigating factor relating to coercion and domestic abuse in all relevant guidelines?

3.20 The Suzi Lamplugh Trust has asked the Council to consider adding breach of a Stalking Prevention Order (SPO) under section 8 of the Stalking Protection Act 2019 and breach of a Domestic Abuse Prevention Order (DAPO) under section 39 of the Domestic Abuse Act 2021 to the breach of a protective order guideline. This guideline currently applies to breaches of restraining orders and non-molestation orders. All of the offences have the same maximum penalty (5 years).

3.21 The guideline is worded in a way that means that it could be applied to breaches of SPOs and DAPOs without amendment provided that breaches of these offences are considered to be of the same seriousness. It should also be noted that Domestic Abuse prevention orders are not yet in force but they could be considered for inclusion once they are in force.

Question 9: Does the Council wish to consult on adding breach of an SPO and a DAPO to the breach of a protective order guideline?

3.22 In March MoJ ministers wrote to the Chairman on the subject of supply of controlled drugs to children, asking that the Council amend existing relevant guidelines to make clear that supply of a controlled drug to a child is an aggravating factor. The letter states:

In 2019, Leah Heyes tragically died after taking MDMA, a class A drug, Since Leah's death her mother, Kerry Roberts, and Kevin Hollinrake MP have led a tireless campaign for 'Leah's law' - a new offence of supplying controlled drugs to an under-16. Kevin Hollinrake met the then Policing Minister in May 2022 to request this new offence. However, as it is already illegal under s4 of the Misuse of Drugs Act 1971 to supply a controlled drug to any person, including those under the age of 16 (subject to any applicable exemptions and licences), we do not plan to bring forward a new specific offence. Subsequently, Mr Hollinrake brought forward a Private Members' Bill in October 2022 which seeks instead to introduce a new statutory aggravating factor.

3.23 The letter goes on to acknowledge that supply of a controlled drug to a child is already within scope of existing aggravating factors outlined in sentencing guidelines for these offences. In the Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it to another guideline there are already statutory aggravating factors that relate to under 18s:

- Offender used or permitted a person under 18 to deliver a controlled drug to a third person
- Offender 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when school in use as such or at a time between one hour before and one hour after they are to be used.

3.24 There are also several other existing aggravating factors that reference children but do not specifically refer to sale to children:

- Exploitation of children and/or vulnerable persons to assist in drug-related activity
- Targeting of any premises where children or other vulnerable persons are likely to be present
- Presence of others, especially children and/or non-users

3.25 The letter accepts that they are unable to point to any evidence to suggest that the courts are failing to aggravate sentences where drugs have been sold directly to children, but asserts there is merit in adding further clarity in the interests of aiding public understanding of how courts apply these aggravating factors in relevant cases.

3.26 In a response to MoJ ministers, the Chairman said that the Council would consider such a factor for inclusion in the miscellaneous amendments consultation. It is difficult to know how often there is direct evidence of sale to children – prosecutions for supply are often as a result of test purchases by undercover police officers. Nevertheless, the Council may be persuaded that adding an explicit factor is justified. If so possible wording could be:

- Offender supplies or offers to supply a drug to a person under the age of 18

Question 10: Does the Council wish to consult on adding an aggravating factor relating to supply to children to the supply of controlled drugs guideline?

3.27 A recorder has commented on the difficulties of a sentencing exercise involving an organisation which went into administration shortly before it was sentenced for a health and safety offence. He suggested:

> The guidance could helpfully be modified to include the approach to the sentencing of companies who have gone into liquidation or administration, and of any steps which can be taken should it be suspected any voluntary administration was entered into to avoid the financial penalty to be imposed for the offence.

3.28 The Organisations: health and safety guideline (and other guidelines for sentencing organisations) contain the following guidance:

> **Obtaining financial information**
> The offender is expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case, **which may include the inference that the offender can pay any fine**.
>
> Normally, only information relating to the organisation before the court will be relevant, unless exceptionally it is demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account.

3.29 When the environmental and health and safety guidelines were developed, the Council gave consideration to what, if anything, could be said about piercing the corporate veil and the highlighted sentence above was as far as the Council felt it could go in that regard.

3.30 Clearly a court can only sentence the offender before it and can only sentence the offences for which the offender has been convicted. The guideline sets out that the court must, in accordance with section 125 of the Sentencing Code, set a fine that reflects the seriousness of the offence and takes into account the financial circumstances of the offender. If there are suggestions of any impropriety regarding the process of going into liquidation or administration presumably these would need to be investigated by the relevant body and if an offence had been committed separate charges brought. It is difficult to see what further guidance the guidelines could give.

Question 11: Does the Council consider that any further guidance can be given on sentencing organisations that have gone into administration or liquidation?

3.31 Sian Jones, Head of Legal and Professional Services in the Legal Operations Team at HMCTS has queried the wording at step 3 in the Common assault guideline:

> The sentencer should state in open court that the offence was aggravated by reason of the victim being an emergency worker, and should also state what the sentence would have been without that element of aggravation.

3.32 She states:

> That is a quote from s. 67 of the Sentencing Act, however common assault is not one of the offences to which s. 67 applies.
>
> I think the decision making process (first work it out as a common assault and then uplift) is a good one, but requiring that pronouncement is wrong and confusing. It gives rise to complaints of double counting, as it sounds as if the sentence has been uplifted twice. It also sounds as if the court has misapplied the law.

3.33 The same wording is used in guidelines for all offences with an aggravated version (and in the racially or religiously aggravated section in the common assault guideline). It is not required by statute but it could be considered good practice. The wording is not new, in 2017 the MCSG contained guidance which said:

> When sentencing any offence where such aggravation is found to be present, the following approach should be followed. This applies both to the specific racially or religiously aggravated offences under the Crime and Disorder Act 1998 and to offences which are regarded as aggravated under section 145 or 146 of the Criminal Justice Act 2003:
>
> - sentencers should first determine the appropriate sentence, leaving aside the element of aggravation related to race, religion, disability, sexual orientation or transgender identity but taking into account all other aggravating or mitigating factors;
> - the sentence should then be increased to take account of the aggravation related to race, religion, disability, sexual orientation or transgender identity;
> - the increase may mean that a more onerous penalty of the same type is appropriate, or that the threshold for a more severe type of sentence is passed;
> - the sentencer must state in open court that the offence was aggravated by reason of race, religion, disability, sexual orientation or transgender identity;
> - the sentencer should state what the sentence would have been without that element of aggravation.

3.34 The requirement to state the unaggravated sentence may give rise to practical difficulties in some cases, but we have not been made aware of any problems or suggestions of double counting and therefore it is not proposed that any change is made.

Question 12: Does the Council agree that the wording on stating what the sentence would be for the unaggravated offence should remain in all guidelines for aggravated offences?

4 EQUALITIES

4.1 Once the Council has taken a preliminary view on the matters to be included in the consultation, work can be done to explore any equalities impacts.

5 IMPACT AND RISKS

5.1 By their nature the matters that are included in the miscellaneous amendments are unlikely to have a significant impact on correctional resources. An assessment of each proposed change will be made and included in the consultation document.

5.2 There are a number of matters that could be included in this year's consultation that may need careful stakeholder handling. Once the full scope of the consultation is known these potential issues will be explored more fully.