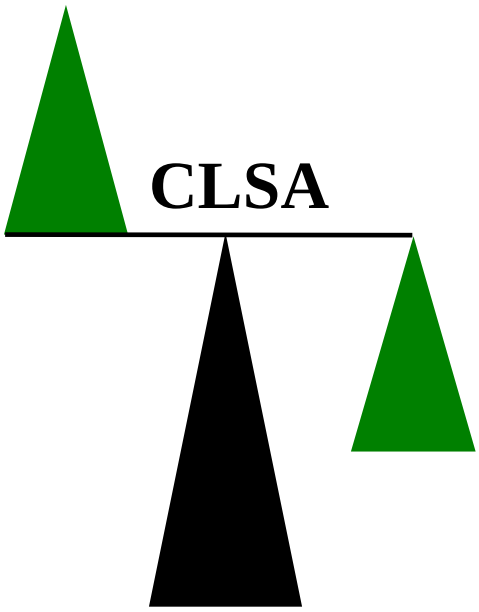

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Response to the SCG Consultation on Breach Offences

The Criminal Law Solicitors' Association is the only national association entirely committed to professionals working in the field of criminal law. The CLSA represents criminal practitioners throughout England and Wales and membership of the Association is open to any solicitor - prosecution or defence - and to legal advisers, qualified or trainee - involved with, or interested in, the practice of criminal law.

Overview

1. The Criminal Law Solicitors Association (CLSA) have prepared this response to the above consultation on behalf of its members. The views contained are those of a representative body of criminal practitioners.

2. In our view there are a number of instances where proposed guidelines will, if implemented, increase the number and length of custodial sentences imposed by the courts. Examples of such are given when dealing with each specific guideline, but a general theme is that it is the apparent view of the Council is that immediate custody is the only effective means of ensuring court orders are complied with. We contest that view.

3. As we have pointed out in other consultation responses, the research published by the MOJ in 2015 has confirmed that short term custodial sentences are less effective in preventing offending than community based sentences. Stating:[1]

   "Research has previously indicated that offenders who receive short term custody of under 12 months are more likely to re-offend than similar offenders who receive a community or suspended sentence order (e.g. Ministry of Justice, 2013). This finding was replicated in the present study, bringing it up-to-date and showing that it is a consistent effect."

4. There are also instances where we believe the resource assessment has failed to properly acknowledge the impact of the increase in custodial sentences that are in our view likely. If the view is to be taken that custodial sentences are a more appropriate means of sentencing these offences, the Council should acknowledge the knock on effect on the prison estate and prison resources.

5. As of 2 December 2016 the prison population was 85897 (81926 male and 3921 female) as against a usable operational capacity of 86975. This is a spare capacity of 1078, i.e 0.012% of the total. A significant proportion of these

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399389/impact-of-short-custodial-sentences-on-reoffending.PDF
para 4.2

prisoners are serving short term custodial sentences. Recent prison disturbances at HMP Birmingham and HMP Swaleside, are a highlight of the implications of this overcrowding.

6. We do not doubt that the breach of any court order is a serious matter that should be dealt with seriously by the Courts. However we do submit that enforcement of such orders does not require the use of custody in the large majority of cases as is proposed under these guidelines. In fact we submit that the use of custodial sentences may well be less effective. We also doubt the capacity of the prison system to cope with the influx of offenders sentenced to custody that will result from these guidelines. The Council should consider whether or not the use of custody to enforce court orders is proportionate to the likely impact upon the prison estate.

Question 1. Do you agree with the proposed approach to the assessment of seriousness of breach of a community order? Please state if there are any other factors which you think should be included in the assessment of seriousness.

7. Many offenders have community orders imposed in order to tackle a specific need for rehabilitation that causes their offending, for example drug treatment and alcohol treatment requirements. In our experience there are many offenders with drug, alcohol or mental health problems which are not solved overnight. They can lead chaotic lifestyles that mean they miss appointments. Such offenders are more likely to breach their orders in the early stages while their abuse or mental health problems are still in treatment. The proximity of the breach to the imposition of the order in their case may be misleading as a consideration of seriousness as it may well reflect substance or mental health issues still being pervasive with the offender rather than the offender wilfully ignoring the order.

8. In our submission there should be some acknowledgement within the guidelines recognising this. We suggest an additional fourth factor for courts to consider of "iv) mental health or substance misuse suffered by the Offender where this impacts upon their ability to comply".

9. We also submit that there is a distinction to be drawn between an offender who has breached their order for the first time and an offender who has breached for the second or third time. It is our experience that the courts consistently refer to whether a breach is the first or subsequent breach in announcing its decision which indicates it does regularly affect decision making. While the guideline makes reference to wilful and persistent non-compliance, we submit that for the purpose of clarity the guideline should draw a formal distinction between first and subsequent breaches.

10. It is often the practice of the probation service to offer the re-engagement programme as a means of making a community order more onerous but at the same time encouraging an offender to comply with it. The programme is very frequently offered when it is the first breach. In our experience the Courts are often receptive to the imposition of this programme for a first breach even where the order is in its infancy and there has not yet been time for a high level of compliance. In our submission the guideline should indicate to the court when the re-engagement programme is appropriate, and should indicate that it is appropriate for a first breach even when there has not yet been a high level of compliance.

Question 2. Do you have any general comments on the proportionality of the proposed sentences?

11. Please see the answer to question 1 above – in particular we submit the guideline should set out when the re-engagement programme is a proportionate response to mark the breach of an order.

Question 3. Do you have any general comments on the additional technical guidance included? Is there any further information which should be included?

12. In our experience the courts often resort to suspended sentences as a tactic to increase the seriousness of the penalty for breach of a community order while allowing an offender their liberty. The Council may well wish to eliminate this practice as a point of principle however it should allow for the impact of courts dealing with offenders in alternative ways.

Question 4. Do you have any general comments on the draft guideline for breach of a community order?

13. None additional to the points raised above.

Question 5. Do you agree with the proposed approach to the assessment of seriousness of breach of a suspended sentence order by failure to comply with a community requirement? Please state if there are any other factors which you think should be included in the assessment of seriousness.

14. We repeat the points made at paragraphs 7-10 above.

15. In particular we note the starting point that there should be full activation where there has been a low level of compliance. As stated above, there are number of reasons why breach of an order in its early stages may be due to reasons other than the wilful disregarding of the order by the offender. It is our experience that the court will take this into account when deciding whether or not a suspended sentence should be activated. The guideline should

acknowledge this and in our submission should allow for an alternative to the activation of a suspended sentence order even when it is breached in the early stages of the order.

Question 6. Do you have any general comments on the proportionality of the proposed penalties?

16. We repeat the points made at paragraphs 7-10 above.

Question 7. Do you agree with the proposed approach to the assessment of seriousness of breach of a suspended sentence order by the commission of a further offence? Please state if there are any other factors which you think should be included in the assessment of seriousness.

17. We repeat the points made at paragraphs 7-10 above. We again emphasise that persons who suffer from addiction and mental health problems can appear before the courts for reasons due to their illness rather than a wilful disregard of the court order. This should be recognised in the guideline.

Question 8. Do you agree that the proposed levels of penalty are appropriate?

18. It is our experience that courts will consider declining to activate a suspended sentence even when offending has been similar if there has been a good level of compliance with the order and the new offence is minor. The council has noted this practice in its review and proposed that the guideline is that for similar offending the level of compliance and seriousness of the new offence should be ignored.

19. We submit that it is unjust for these factors not to be taken into consideration. For example an offender whom has a suspended sentence for theft and commits a further theft shortly before the expiry of the order and after a long period of good compliance. In these circumstances we submit that it is not unjust to consider an alternative to activation. The current practice of the courts in taking these factors into account in these circumstances is, in our submission, appropriate and just.

20. We suggest that the guideline allow for consideration of the non-activation of the suspended sentence when there has been a high level of compliance and the new offence does not merit custody *even* when the new offence is similar in nature to the offence for which the suspended sentence was imposed.

21. Further the council should recognise that the proposed approach will increase the number of suspended sentences that are activated. The Resource assessment at para 6.5 acknowledges but then states that it is not possible to estimate the potential impact. We submit the potential impact is obvious – there will be an increase in the prison population. As stated in our introduction

there is a scarcity of available prison spaces. The council should consider carefully whether the point of principle it wishes to pursue is proportionate to the impact on prison and probation resources that it will entail.

Question 9. Do you have any general comments on the section relating to the unjust test? Please state if there are other factors which you consider are relevant to the assessment of whether activation would be unjust.

22. There is a disconnect between the penalty levels section and the guidance upon the meaning of "unjust in all the circumstances". Both seek to provide guidance upon when suspended sentences should be activated or not, however they do so in different ways leading to conflicting guidance as to the correct approach. When deciding whether or not to activate a suspended sentence should the court use the guidance as to what the breach involves or the guidance as to the meaning of unjust? An examples of this are in the case studies, see paragraphs 25 and 27 below. In our submission the stages should be amalgamated to provide consistent and clear guidance.

Question 10. Do you have any comments on the structure and presentation of information in the guideline?

23. no

Question 11. Do you consider that the penalty imposed in case study A is appropriate? If you do not agree, please tell us what penalty should be imposed and why.

24. In this instance the court would have the option of imposing a curfew requirement in addition to the unpaid work as a means of making the order more onerous. Is this not a proportionate means of marking the breach and restricting the offender's liberty?

25. The process of considering activating set out highlights the point made at paragraph 22 above. When considering whether or not activation is unjust it is stated that adjustment has already been ruled out. If adjustment has been ruled out at the stage of considering the penalty levels what is the purpose of a further stage considering whether or not adjustment or activation is appropriate?

Question 12. What penalty would you think is appropriate in case study B, and why?

26. Again the example fails to consider whether or not a curfew would be an appropriate means of making the order more onerous. Whether or not either the old or new offence was committed at night would be relevant. The offender has completed nearly ¼ of the unpaid work hours in ¼ of the operational period, on what basis is it said that compliance with the unpaid work has been

low? There is no suggestion that she has been placed in breach by the probation service for failure to attend unpaid work appointments without reasonable excuse. The offender has 9 months remaining of the operational period and there is every reason to believe that she will complete the required number of unpaid work hours in the allotted time.

27. This is also another example of the redundancy of the additional stage considering whether or not it is unjust to activate the suspended sentence- it is not considered unjust to activate on the basis that adjustment has been ruled out at an earlier stage in the sentencing process.

Question 13. Do you have any general comments on the draft breach of suspended sentence order guideline?

28. As stated above the division of sentence consideration into stages of firstly considering penalty levels and then considering whether or not it is unjust to activate is repetitive and contradictory. These stages should be amalgamated into one stage.

Question 14. Do you agree with the proposed approach to the assessment of seriousness of breach of Post Sentence Supervision?

29. We repeat the points made at paragraphs 7-10 above.

Question 15. Do you have any general comments on the proportionality of the proposed sentences?

30. No

Question 16. Is there any other information or guidance which should be included within the breach of PSS guideline?

31. No.

Question 17. Do you agree with the proposed culpability factors?

32. There is a distinction between offences under s6(1) where the offender fails to attend and offences under 6 (2) where the offender has a reasonable excuse and does not surrender within a reasonable period thereafter. This should be recognised within the guideline. We suggest a s6(2) offence is comparable with a breach just short of a reasonable excuse and should be included in culpability C.

Question 18. Do you agree with the proposed approach to the assessment of harm? Please state your reasons if you do not.

33. We agree with the proposed approach to assessment of harm

Question 19. Do you have any general comments on the sentence ranges and starting points?

34. No

Question 20. Are there any aggravating or mitigating factors that should be added or removed?

35. No

Question 21. Do you have any other general comments on the draft guideline for failure to surrender to bail?

36. No

Question 22. Do you agree with the proposed approach to the assessment of culpability?

37. The current guidelines make a distinction between breaches that involve the use of violence or the cause of physical or psychological harm and those that do not. Offences that involve the use of violence or causation of harm cross the custodial threshold and those that do not. Even where there is more than one breach the starting point is a community order if there is no violence/harm. (The resource impact assessment suggests (para 6.1) that the current guidelines do not take account of the culpability of the offender – this is not correct, they take account of whether violence was used or threatened).

38. The proposed guidelines represent a significant shift in the current approach. The assessment of culpability is based upon whether there was a deliberate intention to disregard the order of the court. The resource impact assessment makes clear it is the Council's intention that the custodial threshold should be crossed even when no violence has been used or harm has been caused (see Resource assessment para 6.6). Indeed the guideline and resource assessment anticipates that in circumstances where a couple resume a relationship where the protected party is willingly in contact the starting point in sentence is a 3 month custodial sentence.

39. The resource impact assessment acknowledges that the new guideline increases the starting point in such cases from a community order to a 3 month custodial sentence. It states that "it is not possible to estimate the number of breaches which may fall into this category, due to a lack of data. However, a review of transcripts suggests the numbers are not likely to be large". A review of Crown Court transcripts is unlikely to revel the true extent of such cases as the current starting point is a community order and as such the overwhelming majority of such cases are dealt with in the Magistrates' court.

40. It is our experience that such cases are very common. The nature of breaches of protective orders is such that it is very difficult to commit such an offence

negligently or recklessly. The vast majority of orders prevent contact with the protected person and/or entering prohibited areas or attending prohibited places. Breaching such prohibitions almost inevitably involve a deliberate decision to do so. As such under the proposed guideline it will be very difficult for a case to do anything other than fall in to Culpability category A and therefore achieve at the very least a starting point of 3 months custody.

41. The proposed guideline will therefore result in the starting point of a 3 month custodial sentence in the overwhelming majority of cases. Figures 2 and 3 of the resource assessment show that currently 46% of cases result in either immediate custody or suspended sentences (31% immediate custody and 15% suspended sentences), and of the custodial sentences imposed the most common was a sentence of less than three months (before plea credit). The Council must recognise that there will be a significant increase in the number of short custodial sentences imposed. The suggestion in the resource assessment (para 6.2) that there will not be any impact on prison and probation resources is highly unrealistic.

42. We acknowledge that the Courts should take seriously the breaching of a court order, hence such offences should be prosecuted even when the protected person may not support any prosecution. However we strongly take issue with the concept that short term custodial sentences should be imposed in absence of any use of violence or any harm caused to the victim. We also question how effective the threat of custody will be to a defendant who is contemplating re-uniting with their partner with their partner's willing consent. We have referred to in our opening the evidence that short term custodial sentences are less effective in reducing reoffending.

43. We have referred in our opening remarks to the current issues with prison spaces. In our submission custody should be reserved for the most serious cases – a couple resuming a relationship, in which the protected person is a willing participant, is not such a case. Custody is not the only means of re-enforcing on a defendant the importance of a court order. We submit that the Council should consider very carefully the wisdom of resorting to the use of short term custodial sentences in this regard.

44. We suggest that the culpability assessment should make a distinction between offences which involve the use of violence and those that do not (the current guidelines approach of using harm as a factor can properly be reflected in the assessment of harm which we deal with below). We suggest the following categories of culpability

A – Breaches involving the use or threat of violence

B – Deliberate or persistent breach

C – Minor Breach, breach just short of a reasonable excuse.

Question 23. Do you agree with the proposed approach to the assessment of harm?

45. We agree with the proposed approach to the assessment of harm as it properly distinguishes between offences that cause harm or distress and those that do not. The proposed guideline suggests very serious harm or distress as category 1 and little or no harm or distress in category 3. We suggest that Category 2 could be "some harm or distress" so as to provide a more precise definition rather than category 2 simply being for cases which do not fall into 1 or 3.

Question 24. Do you have any general comments on the sentence ranges and starting points?

46. We repeat our submissions that the custodial threshold should not be crossed unless there has been the use or threat of violence or serious physical or emotional harm.

47. However we submit that the error of the guideline is to fail to make such a distinction in the assessment of culpability rather than the proposed starting points and ranges. If the assessment of culpability was formulated in the manner we have suggested in paragraph 44, we would have no difficulty with the proposed starting points and ranges.

48. If the assessment of culpability is not amended then the starting points would require amendment to reduce the starting point of 3 months custody for offences which do not involve the causation of harm but even where there is a deliberate breach (ie A3 offences). Such offences should not pass the custodial threshold. The preferable option is to amend the assessment of harm.

Question 25. Are there any aggravating or mitigating factors that should be added or removed?

49. We submit that it is relevant to sentence that a protected person does not support or actively opposes the prosecution.

Question 26. Do you have any other general comments on the draft guideline for breach of a protective order?

50. No

Question 27. Do you agree with the proposed approach to the assessment of culpability?

51. Again the resource assessment misstates the content of the current guidelines, in suggesting that the current guideline makes no assessment of the culpability of the offender. This is not correct. The current guideline distinguishes cases on the basis of the level of harassment alarm or distress caused *or intended* (our emphasis). The intention of the offender, and therefore their culpability is a relevant factor in assessing the category of the offence.

52. Under the proposed guideline a breach will fall into category A culpability if it is intentional regardless of whether or not any harassment alarm or distress is caused or intended. All category A offences have a starting point of custody meaning that all cases involving an intentional breach now pass the custodial threshold regardless of whether any harm has been caused or intended. This is a significant increase in sentence starting point from the current guideline.

53. As with protective orders, the nature of the prohibitions contained in criminal behaviour orders is such that it will be a rare case that a breach does not involve a deliberate decision by the offender. As such under the proposed guidelines the vast majority of cases will the custodial threshold.

54. The resource assessment fails to acknowledge the impact of this. At present only 38% of cases result in immediate custody 11% in suspended sentences (resource assessment figure 5). Of the sentences of immediate custody over 700 were for less than 3 months adjusted for credit. This is over half of the 1200 sentences of immediate custody imposed. The minimum starting point for a category A offence is 3 months. Thus the proposed guideline will not only result in more custodial sentences but also longer custodial sentences. This impact should be acknowledged.

55. We repeat the submissions made above regarding the suggestion that a cases should pass the custodial threshold simply by it being a deliberate breach of a court order. In our experience a large majority of the persons whom are subject to criminal behaviour orders have complex mental health, substance abuse, housing and other problems which often overlap. These problems are not solved by the imposition of a court order. The imposition of custody for breaching such orders is unlikely to solve them either. We again cite the statistics regarding re-offending after short term custodial sentences and other sentences.

Question 28. Do you agree with the proposed approach to the assessment of harm?

56. We agree with the proposed assessment of harm as it focuses on the harm or distress caused to the victim.

Question 29. Do you have any general comments on the sentence ranges and starting points?

57. As with the breach of protective orders, our difficult is with the proposed assessment of culpability rather than the starting points and ranges themselves. If this difficulty is not resolved we submit the guideline should allow for community level starting point even when there is a deliberate breach of an order which cause no harm (i.e Category A3).

Question 30. Are there any aggravating or mitigating factors that should be added or removed?

58. No

Question 31. Do you have any other general comments on the draft guideline for breach of a criminal behaviour order?

59. No

Question 32. Do you agree with the proposed approach to the assessment of culpability?

60. As elsewhere, this guideline indicates the highest level of culpability for deliberate breaches of an order regardless of any other factor. Thus the vast majority of cases will pass the custodial threshold as they will fall into culpability A.

61. However, in relation to breaches of SOPO and SHPO it is our experience that it is current sentencing practice for the custodial threshold to be crossed in the vast majority of cases even where there is no harm caused or intended. Our experience is reflected in the resource assessment statistics that 73% of cases involve a judicial assessment that the custodial sentence has been crossed (57% immediate custody 16% suspended sentence). As such the proposed guideline will not make a radical difference to our understanding of current sentencing practice.

62. Breaches of such orders necessarily involve the risk of sexual harm. An order would not have been imposed were it not for such a risk. In view of this we do not dissent from the proposition that breach of such an order will pass the custodial threshold in the majority of cases.

Question 33. Do you agree with the proposed approach to the assessment of harm?

63. Yes

Question 34. Do you have any general comments on the sentence ranges and starting points?

64. No

Question 35. Are there any aggravating or mitigating factors that should be added or removed?

65. No

Question 36. Do you have any other general comments on the draft guideline for breach of a sexual harm prevention order?

66. No

Question 37. Do you agree with the proposed approach to the assessment of culpability?

67. Yes. Unlike other guidelines contained within this consultation, this guideline does distinguish between deliberate breaches, and other more serious breaches. We are therefore in agreement with it.

68. The current guideline makes no reference to negligent or inadvertent breaches. We submit it is proper for Culpability C to include such breaches and we submit that Category C should include these examples of behaviour.

Question 38. Do you agree with the proposed approach to the assessment of harm?

69. Yes.

Question 39. Do you have any general comments on the sentence ranges and starting points?

70. No.

Question 40. Are there any aggravating or mitigating factors that should be added or removed?

71. No

Question 41. Do you have any other general comments on the draft guideline for breach of a notification requirement?

72. No.

Question 42. Do you agree with the proposed approach to the assessment of culpability?

73. The Council appears to adopt the positon that a deliberate breaching of such an order amounts to a flagrant breach. It is difficult to imagine how a disqualification can be breached in any other way than is deliberate. As such

dividing cases into flagrant breaches and other cases becomes somewhat meaningless as virtually all cases will fall within category A.

Question 43. Do you agree with the proposed approach to the assessment of harm?

74. Yes

Question 44. Are there any aggravating or mitigating factors that should be added or removed?

75. No

Question 45. Do you have any other general comments on the draft guideline for breach of a disqualification from acting as a director?

76. We note that the starting point for a Category A3 offence is 12 weeks custody. As submitted above, virtually all offences will fall into culpability A. Harm Category 3 cases reflect there being little or no risk of financial loss. Should the custodial threshold be passed in such circumstances? We repeat our submissions made above that custody should be reserved for the most serious offending, and that there are other means of punishing offenders to enforce the importance of court orders.

Question 46. Do you agree with the proposed approach to the assessment of culpability?

77. As with director disqualifications, the Council appears to adopt the positon that a deliberate breaching of such an order amounts to a flagrant breach. It is difficult to imagine how an animal disqualification can be breached in any other way than is deliberate. As such dividing cases into flagrant breaches and other cases becomes somewhat meaningless as virtually all cases will fall within category A.

Question 47. Do you agree with the proposed approach to the assessment of harm?

78. Yes

Question 48. Are there any aggravating or mitigating factors that should be added or removed?

79. No

Question 49. Do you have any other general comments on the draft guideline for breach of a disqualification from keeping an animal?

80. No

Question 50 Do you agree with the proposed list of analogous breaches and the approach to dealing with these, and that they should be included within the definitive guideline?

81. No. Such offences should have their own guideline.

82. The breaches included in this section have different maximum penalties. Parliament has decided that such offences are less serious than breaching a criminal behaviour order. These orders also have very different criteria for making them, for example the test for imposing a football banning order is much lower than that of a criminal behaviour order. As such the nature and seriousness of breaching such an order is very different.

83. To sentence such offences under the guideline for breaching criminal behaviour orders involve the Court assessing the starting point but then making a reduction to reflect the fact that breaching such orders is less serious. Such a process is cumbersome and likely to result in inconsistency in sentencing.

Question 51. Do you agree with the breaches not included in the draft guideline and the rationale for not including them? Please give your reasons if you do not.

84. We agree.

Question 52. Are there any equality and diversity issues that the guideline does not take into account?

85. No.