Sentencing Council

Imposition of community and custodial sentences guideline

Consultation response

March 2025

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Contents

Foreword 1

Introduction 2

Applicability of the guideline 3

Summary of analysis and research 4

Impact and resource assessment 5

Summary of Responses 7

Reading this guideline and general comments 8

Reading this guideline 8

Order of the guideline 8

“Offender” 10

Victims 10

Legislation 11

Ethnicity 11

Purposes of Sentencing 12

Thresholds 13

Previous convictions 13

Pre-sentence reports 17

Requesting a PSR 17

PSR Cohorts 18

Indication to the Probation Service 23

Adjournments 25

On committal and sending 25

Effectiveness of sentencing 28

Sentencing young adult offenders **30**

Sentencing female offenders **34**

Sentencing mothers with dependent children, pregnant and post-natal offenders **39**

Imposition of community orders **43**

Fines as an alternative to a community order 43

Determining the length of a community order and Time remanded in custody or on qualifying curfew before imposing a community order 45

Community order levels **46**

Requirements **49**

Suitability 49

Requirements imposed for the purpose of punishment or rehabilitation 50

Fines as an alternative to a requirement for the purpose of punishment 52

Effectiveness of Requirements 53

List of requirements 54

Imposition of custodial sentences **60**

Table of Factors 63

Suspended sentence orders **66**

Determining operational and supervision periods of a Suspended Sentence Order 67

Deferment orders **68**

Flowchart **71**

Equalities **72**

List of respondents **73**

Foreword

On behalf of the Sentencing Council, I would like to thank all those who responded to the consultation on this important guideline. The consultation garnered a large number of mostly very detailed responses and the Council is grateful for the time and effort that was put into these responses. I also extend my thanks to the members of the judiciary who gave their time to participate in the research exercise undertaken to test and inform the development of the guideline.

The Imposition of community and custodial sentences guideline applies in all cases in which a community or custodial sentence is a possibility. The contents of the guideline is very broad, and covers a variety of different elements of the sentencing process.

This guideline provides clarity on important sentencing principles; it stresses the importance of tailoring the sentence to the individual offender and encourages courts to obtain comprehensive information about the circumstances around the offence, the offender and the full breadth of available sentencing options before making a sentencing determination. The Council hopes that the revised guideline will improve the consistency of the application of the principles around sentencing and will result in the imposition of more tailored and suitable community and custodial sentences.

As with all Sentencing Council consultations, the views put forward by all respondents were carefully considered, and the range of views and expertise were of great value in informing the definitive guideline. Changes have been made throughout the guideline as a result of the responses. The detail of those changes is set out within this document.

Lord Justice William Davis Chairman

Sentencing Council

Introduction

The Imposition guideline is the overarching guideline which directs sentencers on when to impose a community order or custodial sentence, including in what circumstances these can be suspended, and also provides other material, such as information on the requirements attached to orders, guidance on requesting pre-sentence reports (PSRs) and a sentencing decision flow chart.

The previous Imposition of community and custodial sentences guideline was issued on 1 February 2017. More than five years after it was brought into force, changes to legislation, new case law and case management guidance, further evidence about the experiences of individual offender groups in the criminal justice system and important sentencing research, alongside a variety of both general and practitioner feedback, led the Council to undertake a comprehensive review of the guideline. This review started in July 2022 and a draft guideline was consulted on between November 2023 – February 2024. The draft guideline included revisions to all the existing sections of the guideline, and the addition of several new sections and sub-sections.

There were 150 official responses submitted to the consultation on the draft guideline. This comprised of a range of interested parties, including magistrates and judges, charities and non-governmental organisations, academics, medical professionals, legal professionals, government and parliamentary, criminal justice professionals and members of the public. In general, almost all of the 150 respondents considered the draft guideline an overall improvement on the current guideline and expressed positive views about most of the amendments and additions. The Justice Committee (Commons Select Committee), who had the benefit of seeing a sample of responses prior to submitting their own response, said:

> "Overall, the Committee considers that the proposed revisions represent a valuable and considered set of changes that will encourage sentencers to consider whether an immediate custodial sentence or a community sentence would best meet the purposes of sentencing in each case." (Justice Committee)

As was expected, responses to the consultation covered a wide range of different viewpoints. Perspectives on sentencing and the experiences of stakeholders across the justice system are extremely varied. Across all the responses, most elements of the guideline had both agreement and disagreement, usually strongly, from different respondents. It is especially clear that the local circumstances and challenges of different sentencers vary significantly across courts and regions. Where respondents expressed strong opinions based on their experience in their particular court or area, in most cases, there was another similarly strong opinion expressing the opposite view from a different local court or area.

The Council carefully considered all 150 responses to the consultation in finalising the definitive guideline. All sections and almost all sub-sections have been updated following views and suggestions from respondents, many of which were comprehensive.

Applicability of the guideline

The guideline will be in force from 1 April 2025 and will apply to offenders aged 18 and older sentenced on or after that date. General principles to be considered in the sentencing of children and young people are set out in the Sentencing Council's definitive guideline, Sentencing children and young people.

Summary of analysis and research

To support the development of the guideline, small-scale research was conducted with sentencers during the consultation stage to explore the potential impact of the revised guideline on sentencing practice, and how sentencers interpret and use some of the new and revised sections of the guideline. This was done in a two-stage approach, starting with focus groups and following up with interviews. The focus groups allowed for broader discussion to explore sentencers' views of some of the revised sections of the guideline, while the interviews used scenarios to explore how sentencers might apply the revised content in practice.

Focus groups were held with 13 sentencers, including magistrates, district judges, recorders and circuit judges. Focus group topics covered the sections in the draft guideline on pre-sentence reports, purposes and effectiveness of sentencing including the sub-sections on young adult offenders and female offenders, requirements, the imposition of custodial sentences and the flowchart.

Interviews were conducted with 10 sentencers, also including magistrates, district judges, recorders and circuit judges. Interviews asked sentencers to impose a sentence in two scenarios with reference to the draft guideline, the first of which aimed to ascertain how participants sentenced an offender with a high number of previous convictions. The second scenario tested whether the new guidance on rehabilitative requirements affected the volume or length of requirements imposed when considering different levels of offence seriousness on a community or suspended sentence order.

General findings included the draft guideline being described as comprehensive, useful and a "good aide memoire". Some expressed the view that the draft guideline set out what they were already doing or knew to be best practice, though sections were often described as a helpful reminder, and many participants noted that the draft guideline encourages a clear move away from short custodial sentences. The research also led to many helpful findings on each of the sections that were covered.

The results of the research, in combination with consultation responses, led to the changes made throughout the guideline. The Council is grateful to those who spent time participating in this important research.

Impact and resource assessment

A draft resource assessment was published alongside the consultation in November 2023, and a final resource assessment has been published alongside the definitive guideline and this consultation response document. The resource assessment fulfils the Council's statutory duty to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, the Probation Service and youth justice services.

Several consultation responses provided feedback on the potential resource implication of the revised guideline. These generally focused on the impact on Probation Service resources, both in court and in the community, and in particular on the impact of PSRs and supervision of community orders and suspended sentence orders in the community.

Some respondents outlined their perception that the Probation Service is currently under pressure and thought that the guideline would result in an increased demand for pre-sentence reports which they said could lead to further resourcing pressures, and further court delays. Some of these respondents highlighted that this increased demand for PSRs could lead to an increase in the Probation Service needing to manage more community sentences. Some respondents suggested this would be particularly acute for young adults and female offenders, who respondents identified as often having different or more intensive needs and so may require additional resources.

> "[Probation] appear to be overstretched and under manned. We are frequently told that many of the options are unavailable (Unpaid work, Curfew, rehabilitation programmes). I have had a high-level community order that consisted of ten RAR days." (A magistrate)

Other respondents outlined their concerns for the supervision and management of community orders by the Probation Service. These responses generally related to issues already affecting the Probation Service, but that these could be potentially indirectly affected or exacerbated by the revised guideline. These include the capacity of the Probation Service to manage community orders considering the constraints it currently faces and concerns around assuring that there is appropriate funding and resourcing for the Probation Service to effectively supervise and manage any increase in these orders. It is clear from consultation responses that this varies by region. One respondent outlined:

> "There is a presumption underlying the revised content that community orders are effectively monitored and managed and that breaches are dealt with robustly. There are many, many instances where that is not the case. Whilst the research shows the benefits of successful community interventions, sentencers more often face the failures. We see many instances where probation have not been able to effectively manage someone in the community and breaches seem to have to be egregious before they are brought back to court. This undermines confidence in that sentencing option as an effective one and reinforces public perception as a community penalty being a soft sentence. The effect of the changes must be that fewer defendants are sent to custody and more are managed in the community by Probation. Given the issues that currently exist, how will that work?" (A magistrate)

Some respondents suggested that sentencers must feel confident in applying the guideline and that there was a risk that sentencers do not apply the guideline as intended due to lack of confidence in the Probation Service to effectively manage community orders.

> "Without a wholesale upgrade, the confidence of sentencers in the viability and effectiveness of community disposals will continue to be severely compromised." (A magistrate)

These areas of concerns have been considered where possible within the final resource assessment. This details the potential impact of the revised guideline, referring to relevant statistics and evidence where possible, including research conducted with sentencers during the consultation period. The Council anticipates there may be some impacts on probation resources as a result of the revised guideline. As the resource assessment sets out, while these impacts would most likely lead to changes in the way that probation resources are required, it is not possible to fully quantify the effects of these impacts.

The Council is aware that the Government has proposed some changes to the approaches the Probation Service takes in respect to the delivery of some community requirements which were announced shortly before the publication of this guideline. While the Council does not anticipate that these changes will affect the estimated impacts set out in the resource assessment, the full scope of the proposed approach is currently unclear. It is therefore possible that there may be some changes to practice that occur as a result of these new approaches rather than the implementation of the revised guideline. The Council will monitor the impact of the guideline where possible to allow us to identify any issues and gain a better understanding of the effect of the guideline in practice.

Finally, there were also some concerns regarding the guideline not being read, understood or applied, especially given its length. The Council has been working with the Judicial College to develop e-learning for magistrates which will be available online shortly after the guideline is published. The Imposition guideline will also be included in training for district judges, Crown Court judges and legal advisers in magistrates' courts throughout this year.

Summary of Responses

There were 150 official responses to this consultation.

Type of respondent	Number of responses
Magistrates	53
Charity or non-governmental organisation	40
Members of the public	22
Academics	9
Judges	7
Medical professionals and organisations	6
Government or governmental bodies	4
Legal professionals or organisations	4
Prosecutor, police or Police and Crime Commissioner	3
Parliamentary	2

Reading this guideline and general comments

Reading this guideline

Readers will note a new introductory section to the revised guideline that was not in the draft guideline which was consulted on. This section introduces the Imposition guideline and sets out how sentencers should read it and use it alongside offence-specific guidelines. The addition of this guidance was suggested by the Sentencing Academy during the consultation, who said:

"Greater clarity is needed regarding the relationship between the offence-specific guidelines and the Imposition guideline. For some other generic guidelines, such as the sentence reductions for a guilty plea, the relationship is clear. A court turns to the guilty plea guideline in the event that the offender pleaded guilty, and only after completing the first three steps of the offence-specific guideline. The Imposition guideline is relevant in an even wider range of cases. But when should a court consult it? In our view a court should review this guideline before beginning the process of working through the offence-specific guideline." (The Sentencing Academy)

The Sentencing Academy also suggested that the guideline would benefit from a "preliminary paragraph which states the purpose of such a guideline" for better public awareness and understanding, and that this sentence could explain how this guideline complements the offence-specific guidelines. The Justice Committee echoed these suggestions. The Council thought this was an important suggestion and agreed the guideline should set out at the beginning what the purpose of this overarching guideline is and how sentencers should use it. The Council is clear that the Imposition guideline should be used **throughout** the sentencing process, beginning with when a guilty plea is entered or finding of guilt is made, right up to the imposition of the sentence.

The introductory paragraphs to this guideline set this out and are clear that this guideline provides general guidance only, as no fully comprehensive guide to sentencing could ever be possible. Each sentence should always be decided on its own facts and merits.

Order of the guideline

The draft guideline consulted on included revised sections in the following order:

1. Thresholds
2. Pre-Sentence Reports
3. Purposes and Effectiveness of Sentencing
4. Imposition of Community Orders

5. Requirements
6. Community Order Levels
7. Imposition of Custodial sentences
8. Suspended Sentence orders

The most common suggestion from both individuals and organisations for a change in the chronological order of the guideline was that the Purposes and Effectiveness of Sentencing section move to Section 1 (with some but fewer suggestions that it should instead sit at Section 2), with the importance of the Purposes of Sentencing introducing the guideline as the main reasoning. This suggestion was made by the Howard League for Penal Reform as well as various individuals, including magistrates, one of whom noted that "the question of what the court is looking to achieve by imposing any sentence is absolutely fundamental to the whole exercise of determining the appropriate sentence."

The Council agreed that the Purposes of sentencing should introduce the guideline for the reasons set out by respondents but given the Purposes and effectiveness of sentencing section in the draft guideline contained a 'step back' step ("The court should 'step back', and review whether the sentence it has preliminarily arrived at fulfils the purposes of sentencing."), it decided to split this section into two sections so that this 'step back' step could be retained later in the guideline.

A number of respondents suggested that the deferred sentencing section should not be a sub section of the Pre-sentence reports section. The Justice Committee suggested that this guidance might more appropriately sit in the Imposition of custodial sentences section or after the Suspended sentence orders section. Further detail about the Council's consideration regarding the location of the deferred sentencing section is set out in the relevant part of this paper, but it was agreed that the section should be moved to end of the guideline as its own section. As readers will also note, it was also agreed that the Requirements section would move to after the Community order levels section. Detail around this decision is also set out in the Requirements part of this paper.

The revised guideline therefore contains sections in the following order:

1. Purposes of sentencing
2. Thresholds
3. Pre-sentence reports (PSRs)
4. Effectiveness of sentencing
5. Imposition of community orders
6. Community order levels
7. Requirements
8. Imposition of custodial sentences
9. Suspended sentence orders
10. Deferment orders

“Offender”

A number of respondents suggested that the guideline should replace the word ‘offender’ with an alternative word, of which a variety were suggested (‘person’, ‘individual’, ‘person being sentenced’, etc.), noting the general move to do this across the criminal justice system. There is a long history of academic and practitioner debate about how to refer to people serving sentences in the criminal justice system. As far back as 1997, Howard Becker highlighted the negative impact of labelling individuals which can be detrimental to rehabilitation and complicates an individual’s integration into the community (Outsiders: studies in the sociology of deviance, New York: Free Press). The term “service user” is now commonly used by the Ministry of Justice.

Revolving Doors (charity), based on responses from those with lived experience in their two lived experience forum events, stated:

> “The word ‘person’ could replace the word ‘offender’ throughout the guidelines with no negative consequences. The use of the word ‘offender’ throughout the guidelines serves to label the person receiving the sentence according to their criminality and likely causes the sentencer to concentrate on punishment rather than other sentencing alternatives.” (Revolving Doors)

While the Council understood the suggestions made by respondents on this issue, it concluded that the Imposition guideline should be consistent with language used in legislation (particularly the Sentencing Act 2020) and in other sentencing guidelines. The Council also thought that the word ‘offender’ remained appropriate to describe a person who had been convicted of an offence, and did not wish to weaken public confidence in this respect. As such, it has generally retained the word offender throughout the guideline.

Victims

A number of responses suggested that the guideline should reference the impact on, and needs of, victims, more. Some individuals, including some magistrates, suggested that information on the consideration of victims should be contained in a separate section, and some suggested that victims should be mentioned across various sections of the guideline. There was no direct reference to victims of offending in the draft guideline but the assessment of harm in most guidelines will be by explicit reference to the harm caused to the victim or victims. The Council sets out on its website that the impact on the victim is an important consideration in determining the offender’s sentence and that the guidelines always take into account the impact on the victim.

Respondents who suggested additional text that referred to victims mostly proposed this was included in the Purposes and Effectiveness of sentencing section. The Council agrees that Purposes of sentencing is the most suitable place for a reference to victims and therefore added that a restriction on liberty will sometimes be necessary to safeguard

victims and/or the public. It also decided to make reference to safeguarding of the victim (and/or the public) under the question ‘Can the sentence be suspended?’ in the Imposition of custodial orders section, and indicates that the Probation Service can assist in assessing whether or not an offender can be safely managed in the community.

Legislation

The Howard League for Penal Reform suggested that the legislative framework around thresholds (namely, s.230(2) of the Sentencing Act 2020) should be quoted regularly throughout the guidelines. The Council agreed with this suggestion to highlight where guidance that is included in the guideline is enshrined in legislation and so has included reference to legislation where appropriate.

Ethnicity

Some respondents suggested the inclusion of considerations for sentencing offenders from an ethnic minority background in various sections or throughout the guideline. The Council considered and discussed these suggestions at length. It is important to note that ethnicity data relating to offenders is often incomplete and it is therefore extremely difficult to draw sufficiently robust conclusions that could inform the content of the guideline. The experiences and needs of offenders from different ethnic minority backgrounds will not be the same, and in fact can be quite different, so drawing any conclusions from this non-homogeneous cohort of offenders is almost impossible. In particular, data on female offenders from an ethnic minority background should be treated with caution because it is often based on very small numbers. However, the Council has taken into account available data where relevant and has set out these considerations in the relevant sections of the paper.

Purposes of Sentencing

The Council consulted on a new section on Purposes and effectiveness of sentencing which included the purposes of sentencing that are set out in legislation as well as a 'step back' step and reference to research of the efficacy of different sentencing options.

There were various suggestions to change the order in which the purposes of sentencing are set out in the draft guideline. The Transition to Adulthood Alliance (alliance encompassing leading criminal justice, youth and health organisations) suggested that the Council should highlight the importance of rehabilitation as a "critical priority for sentencers to consider as a means of reducing crime". Other respondents wanted to see rehabilitation come first or "have more weight" in the list of purposes of sentencing. There were also some calls to provide more guidance against each of the purposes of sentencing.

As suggested in the consultation paper, the order in which the purposes were presented in the draft guideline are the same order they are presented in legislation (section 57 of the Sentencing Act) and the same order they are presented in the General guideline. The Council does not believe there is any good reason to change this order given, as set out in the draft guideline, the weighting each purpose should be given will vary from case to case. Regarding this weighting, Professor Sir Anthony Bottoms suggested the addition of information on how to weigh each purpose of sentencing for a particular case:

> "The Council's proposal to introduce a new section in the Draft Guideline on 'Purposes and Effectiveness of Sentencing' is welcome, and it is certainly right that within this section the statutory 'five purposes of sentencing' should be set out. However, in my view there would be merit in adding a further statement, immediately below the five purposes, saying something like: 'In reflecting on how the purposes of sentencing are to be applied in a particular case, courts are encouraged where possible to tailor the sentence to the individual offender and their circumstances, and to use the full breadth of options available to them'. The Council will recognise this text, because it is based (with minor amendments) on what is said in the Background section of the Consultation Paper (p.5). In my view, these policy suggestions in the Consultation Paper are very valuable, but – unless I have missed something – they have not been specifically mentioned in the Draft Revised Guideline. It would therefore be appropriate to include them somewhere in that Guideline, and the 'Purposes and Effectiveness' section seems to be a good place for this." (Professor Sir Anthony Bottoms)

The guideline already contains guidance outlining that courts should tailor community orders for each offender according to their specific circumstances (in the Requirements section). The Council does not believe it is necessary to reiterate this point in the Purposes of sentencing section especially given the line 'the weighting each purpose should be given will vary from case to case' is already included, so it has not added anything further.

Thresholds

The Council consulted on a new section on Thresholds which brought together existing guidance across the previous Imposition guideline together with some new guidance. The intention was for the revised guideline to be clearer on when and in what circumstances courts should consider that a case has passed the threshold for a community order or a custodial sentence by bringing together all the relevant guidance into one place, and structuring this guidance into two halves; one which sets out guidance on the community order threshold, and one which sets out guidance on the custodial sentence threshold.

Respondents submitted varying views about the content of the Thresholds section, however most expressed positive views about the previously separate information being brought together in one section.

The Magistrates' Association stated that the section would benefit from a "definitive definition" of thresholds, but the Council considered this addition unnecessary. The Senior District Judge of England and Wales (Chief Magistrate) expressed concern that it must be made clear that the guideline does not create "any legitimate expectations of sentence type/composition" nor "bind any future sentencing court". Further respondents made this same point at different parts of the guideline. As such, the Council decided to change the word 'determine' to 'indicate' in the first sentence of the Thresholds section.

A Crown Court judge suggested that the line in the Thresholds section of the draft guideline: "Prison must only be a punishment for the most serious offences" establishes a principle that does not exist in legislation and is not appropriate as a test in the guideline given whether an offence carries a potential custodial sentence is set by Parliament. This line was a revised line based on the sentence in the previous guideline: "The clear intention of the threshold test is to reserve prison as a punishment for the most serious offences". The Council agreed, however, that it was not its intention to create a new principle in the guideline. As such, it agreed with the suggestion to remove it.

Previous convictions

Many respondents provided views on the way in which previous convictions were presented in the draft guideline. Many of these were positive and multiple respondents, including the Law Society, welcomed the line that limited the instances in which courts should pass the custodial threshold on the basis of previous convictions alone. Hodge Jones and Allen (solicitors) stated:

"Whilst conducting hearings in the Magistrates' Court, it is repeatedly observed that relevant previous convictions are often used to justify immediate custodial sentences in cases where the offence itself would not warrant custody, particularly in shoplifting cases. This is especially concerning because the category of Defendants likely to be impacted by this tend to be extremely vulnerable, including by way of mental health issues, addiction, past trauma, financial destitution and more. These sentences exhibit greater weight attributed to the punitive purpose of the criminal justice system, with little to no consideration to rehabilitation or deterrence of future offending behaviour. The proposed section on thresholds is therefore welcome." (Hodge Jones and Allen)

A high proportion of respondents commenting on this section, including the Justice Committee, the Magistrates' Association, Advance (charity), Birth Companions (charity), LandWorks (charity), Prison Reform Trust, the Probation Service, Revolving Doors and Transition to Adulthood Alliance, offered strong support of the line "Numerous and frequent previous convictions might indicate an underlying problem that could be better addressed through a community order." This line already existed in the expanded explanation of the aggravating factor of Previous convictions in all relevant offence specific guidelines and the General guideline.

There were also numerous proposals from respondents for additional lines regarding previous convictions in this section, some of which the Council agreed with, and therefore concluded it was useful to bring together all guidance regarding previous convictions under its own sub heading within the Thresholds section.

The Senior District Judge of England and Wales (Chief Magistrate) suggested that "previous convictions for breach should feature with greater prominence at this stage of the guideline." They set out concerns that the lines in the draft guideline did not align with the breach guideline where the starting point for wilful and persistent breach is a custodial sentence, and suggested that it may be helpful to signpost the user to the fact that breach is distinct and has its own guideline. The Council did not think this was a necessary addition, especially given there are also potential issues of totality where new offences are being dealt with alongside a breach.

The Probation Service suggested some amendments to the sentence "Relevant previous convictions will be an aggravating factor increasing the seriousness of the offence…" in line with section 65 of the Sentencing Act 2020. This section highlights that the court must treat each relevant previous conviction as an aggravating factor, rather than previous convictions more generally. The Probation Service also suggested the guidance alluded to the fact that previous convictions will only affect the length rather than type of sentence, whereas the next line allows for exceptions, and suggested amendments to resolve this conflict. The Council agreed, and both amended these lines and combined them.

Revolving Doors highlighted that previous convictions were often used to push sentences over the custodial threshold but sometimes little regard was given to the "lack of support that the person standing in the dock had received after those convictions."

Other respondents including the Law Society, the Sentencing Academy, the Probation Service and some academics suggested that the line in the draft guideline "Great caution must be exercised before the existence of relevant previous convictions…" was difficult to understand. The Council agreed and replaced this line with "The existence of one or more relevant previous convictions should not generally be used as the sole basis to justify the case passing the custody threshold."

There were suggestions from some respondents that the guideline should provide examples of where it would be appropriate or inappropriate for relevant previous convictions to be the sole basis for a case crossing the custody threshold, but the Council did not consider that it would be possible to provide helpful examples.

A common view from respondents about previous convictions was that the number of previous convictions was equal in importance to (or less important than) the pattern of offending and the gaps between offending. Professor Sir Anthony Bottoms set out that in relation to relevant previous convictions, it is clear from section 65 of the Sentencing Act that both the nature and the timing of all previous offence(s) are to be considered when assessing relevance. The Howard League for Penal Reform also suggested clarification as to how this guidance will interact with section 65 of the Sentencing Act 2020, regarding imperatives versus discretion of the court on how to apply any previous convictions. Various magistrates also made this point.

The expanded explanation of the aggravating factor of Previous convictions already covers most of these points, and contains guidance on gaps between offending; number 8 states: "The aggravating effect of relevant previous convictions reduces with the passage of time; older convictions are of less relevance to the offender's culpability for the current offence and less likely to be predictive of future offending". The Council therefore did not consider any additions to the guideline necessary as a result of these suggestions.

Some magistrates were concerned about the guideline outlining that 'Great caution must be exercised before the existence of relevant previous convictions is used as the sole basis to justify the case passing the custody threshold', pointing out a familiar problem of dealing with repeat low-level offenders (typically shoplifters) who already owe fines and are unsuitable for a community order for various reasons, which leaves the court with only discharge or custody as options. Magistrates questioned the Council on what courts should do when faced with an individual who has already been subject to numerous community orders in the past but who continues to offend. The Law Society echoed this same point in relation to custodial sentences, noting that "it might also be worth adding that repeated custodial sentences for past offences should not mean that custody is

appropriate for the present offence (repeated custodial sentences may suggest that custody has not been effective in preventing reoffending)."

Related to this, Professor Sir Anthony Bottoms set out that the academics Ashworth and Kelly "persuasively argue that there is an important difference between (i) a person with serious previous convictions who has been taking significant steps to turn his life around but has now encountered difficult circumstances, leading to a relapse; and (ii) a person who has continued to commit offences and has shown little interest in rehabilitation."

The Council considers that the revised Imposition guideline will provide sentencers with better information on the broad range of community options available. This will enable courts to consider the 14 requirements available (and the different lengths of an order) to determine the most suitable sentence for an offender (including, for example, relevant ancillary orders). This may be particularly useful when sentencing an individual with previous convictions.

Other suggestions were made in relation to the paragraph beginning 'Numerous and frequent previous convictions might indicate an underlying problem…' in the draft guideline. Centre for Women's Justice (charitable organisation) suggested that as far back as the Corston report in 2007, "it has been evident that the cycle of repeat offending for women and low level offending has frequently been linked to domestic abuse suffered" and suggested that domestic abuse is included as an example of an underlying problem alongside addiction.

The Law Society and Transition to Adulthood Alliance suggested highlighting additional caution for repeat offending committed by young adults in line with the expanded explanation drop down for the mitigating factor of age and lack of maturity and the sub section on young adult offenders in the draft guideline. The Transition to Adulthood Alliance set out that many young people who offend stop committing crime in their late teens and early twenties and therefore a young adult's previous convictions may not be indicative of a tendency for further offending.

The Council agreed with both of these suggestions and has added "experience of domestic abuse" as examples of underlying problems that could be addressed more effectively through a community order with relevant requirements, setting out that this may be particularly true for young adults (aged typically 18-25).

Finally, the Sentencing Academy suggested that this section include a link to the expanded explanation drop down of the aggravating factor of Previous convictions which the Council agreed with.

Pre-sentence reports

The Council consulted on a unified and comprehensive section on Pre-sentence reports (PSRs) in the draft guideline. The new section brought together all guidance on PSRs from the previous guideline and included significantly more guidance on other issues related to PSRs, including new information on giving the Probation Service the preliminary level of harm and culpability it has found for the offence, adjournments for PSRs and PSRs being committed to or sent for trial at the Crown Court. The Council received considerable feedback on this section in the consultation.

Requesting a PSR

The majority of responses to this section were positive. Notably, the Probation Service response set out that they "welcome more comprehensive guidance to encourage courts to obtain and consider pre-sentence reports" and welcomed the reference to the 'Before Plea Protocol', suggesting a minor amendment from 'defence solicitor' to 'defence legal representative', in line with the protocol wording to avoid the suggestion that the protocol is not open to other legal representatives such as direct access barristers. The Probation Service also suggested that the first part of the PSR section is given a sub heading of 'Requesting a PSR'. The Council agreed with both of these suggestions.

The draft guideline set out that PSRs are necessary in all cases that would benefit from an assessment of various factors, and that they may be unnecessary if a discharge or fine is the most likely sentencing outcome. Many respondents suggested additional examples for when a PSR is necessary or may be considered unnecessary, and different respondents made suggestions to make the guidance on PSRs either more or less limiting.

Some respondents suggested that for serious offences with the only realistic outcome of a custodial sentence of some length, a PSR should be considered unnecessary. The Criminal Sub-Committee of His Majesty's Council of Circuit Judges made this suggestion in line with the Criminal Practice Directions which states that a magistrates' court should request a PSR on committal to Crown Court if "there may be a realistic alternative to a custodial sentence", which the Council noted only applies to PSRs on committal to Crown Court.

A Crown Court judge submitted that in their experience there are many cases in the Crown Court where defence counsel and the judge agree that a PSR is unnecessary, and their opinion is that the draft guideline does not allow enough discretion for judges to decide to not order PSRs, in particular for cases with offenders who "will inevitably receive a sentence of more than two years custody." The judge also suggests that when one looks at Court of Appeal decisions on appeals against sentence, the line "No PSR was sought in the Crown Court and we agree that one is not necessary now" appears time and again. In research conducted with sentencers during the consultation period, some sentencers also

queried the value of requesting PSRs for cases where an offender is bound to receive a lengthy custodial sentence, although one sentencer pointed out that a PSR may be very useful to the Parole Board in these cases and wondered why there was no mention of this in the guideline.

On the other hand, the Sentencing Academy suggested that the words "only if" were added to the sentence: "A pre-sentence report may be unnecessary **only if** a discharge or fine is the most likely sentencing outcome."

Other respondents made suggestions for additional factors to add to when a PSR may be unnecessary, for example the Legal Committee of HM Council of District Judges (Magistrates' Courts) suggested "where an offender is already subject to a community order or suspended custodial sentence and the Probation Service are able to give information about the offender's progress as well as his risks and behaviours".

The Council considered these suggestions but agreed that it did not wish to unnecessarily limit sentencers' discretion to order a PSR when a longer custodial sentence is the most likely outcome, and did not wish to set a default length for a custodial sentence to reduce the need for a PSR. The Council also agreed with the potential value of a PSR for a parole hearing, as well as for sentence or release planning.

Further, the guidance in the Criminal Practice Directions referred to by respondents applies specifically to PSRs being requested on committal rather than PSRs being requested more generally. The Council felt that there could be many additional factors that may be relevant, but whether a PSR is unnecessary often came down to the individual offender and their specific circumstances. The Council therefore decided against the suggestions for additions and instead to amend the line to "A pre-sentence report may be unnecessary if the court considers that it has enough information about the offence and the offender" as they felt this was key, and that courts could use their discretion for each individual offender to decide whether or not they felt they had enough information to proceed to sentence.

Some respondents including the Law Society also suggested guidance setting out that if a case falls within one of the mandatory minimum sentence provisions, exceptional circumstances may exist that make a PSR necessary, but the Council did not think this addition was necessary as this circumstance would be covered by the guidance setting out that a PSR is necessary in all cases that would benefit from an assessment of e.g. the nature and causes of the offender's behaviour and/or the offender's personal circumstances.

PSR Cohorts

The section on PSR cohorts is one of the sections that garnered the most engagement across the responses. There were strong opinions from all sides about this section, and many individual respondents, including some magistrates, did not believe there should be

cohort list at all, mostly citing reasoning around the idea that the list is biased and conflicts with equality in sentencing. Some respondents seemed to mistake the purpose of the list and thought that the cohorts listed would be exempt from the “full range of punishment” and would get a “get out of jail free card”, which is not the case. The Centre for Justice Innovation suggested that instead of a list of cohorts, the guideline should simply state that a PSR must be produced for every person where the court is considering a community or custodial sentence, unless there are limited and specific reasons why not. The Council disagreed with making this mandatory as there will be some circumstances in which a PSR is not necessary, as above, if the court considers that they have enough information about the offender and the offence to proceed to sentence.

Some respondents, including magistrates and judges, suggested a PSR being requested for every offender that falls into a cohort on the list is not realistic considering the Probation Service’s resource limitations and the backlogs currently facing courts. The Council felt that, where there are limited court and/or Probation resources, the inclusion of a list of cohorts for whom a PSR “will normally be considered necessary” may help courts prioritise requests for PSRs for those with the most complex needs. The cohorts list therefore ensures that the court can make a more informed decision on cases where the risks and needs may be more complex and ensures that those risks and needs are identified early before the sentence is imposed to aid sentence management, whether in the community or prison. The list is intended to ensure courts think again before determining that a PSR is unnecessary for an individual from one of the cohorts listed, allowing for time to consider that an individual may have more complex needs that are not immediately apparent to the court before a PSR and which can be identified and explored within one.

While responses varied, with strong views both for and against the list, overall, a much higher number of respondents supported retaining the list. Similarly, sentencers in research conducted during the consultation period also found the list helpful and comprehensive, and it was described as a "positive inclusion" and "best practice".

A number of respondents suggested the line introducing the list of cohorts should be strengthened, with the Law Society suggesting “A PSR should **always** be considered if…”, and the Sentencing Academy suggesting “A PSR **is necessary** if…”. Another respondent suggested using the word ‘important’ introduces a different qualifying element in addition to ‘necessary’ which appears in the paragraph before. Professor Sir Anthony Bottoms suggested the language “A PSR will normally be considered necessary” would align with section 30 of the Sentencing Act 2020 and would still allow the sentencer the element of discretion.” The Council agreed with this reasoning and suggestion. The line that appears after the list of cohorts regarding PSRs ‘This is a non-exhaustive list and a PSR can still be necessary if the individual does not fall into one of these cohorts’ has also been changed in line with this amendment, from ‘mandatory or particularly important’ to ‘necessary.’

There were a considerable number of respondents suggesting that PSRs were made mandatory for women “owing to the widespread experience of trauma and multiple unmet

needs of this cohort" (some members of the Corston Independent Funders' Coalition), including from Medact (charity), the Lullaby Trust (charity), Level Up (community), Women in Prison (charity), the Royal College of Obstetricians & Gynaecologists, Maternal Mental Health Alliance and more, with many referring to the Farmer Review for Women. The Council agreed however, that the guideline has to operate within the legislative framework and that there may be circumstances in which a PSR is considered unnecessary for a female offender.

There were a considerable number of suggestions for new cohorts to add to the list of cohorts in the PSR section.

These included care-leavers or those who are care experienced suggested by many respondents, including British Association Perinatal Medicine, No Births Behind Bars (campaign group), Prison Reform Trust, Clinks, the Probation Institute, the Centre for Women's Justice (charitable organisation), The Transition to Adulthood Alliance, Level Up, Support Not Separation (coalition of organisations and individuals), a group of consultant psychiatrists, professors of psychiatry and academic psychologists, academics and individuals. Some of these respondents referenced data on the considerable number of women in prison who have experienced the care system as a child and the inquest into Aisha Cleary's death at HMP Bronzefield which was found to be a result of intersecting failures between both the care and prison system. While the Council does not disagree that PSRs may normally be considered necessary for those who are care experienced, they concluded that the cohort for young adult offenders (typically 18-25 years) would already capture recent care leavers and other cohorts (such as 'those with mental ill health' or 'at risk of a custodial sentence of less than two years', which was subsequently agreed to be expanded to include 'at risk of first custodial sentence') would capture those care-leavers for whom a PSR may be necessary.

Other suggestions for additional cohorts included those at risk of becoming homeless (Restore Support Network, charity); experiencing high levels of poverty and/or housing (The Transition to Adulthood Alliance); at risk of and history of suicide and self-harm (The Samaritans); part of the travelling community (an academic); of previous good character (a Crown Court judge); an older person or over 50 years of age with complex and multiple care needs (Restore Support Network); elderly (Progressing Prisoners Maintaining Innocence (PPMI)); those with a socio-economic disadvantage (London Criminal Courts Solicitors' Association); recently bereaved (Transition to Adulthood Alliance) and at risk of a custodial sentence of more than 2 years **and** has not previously received an immediate custodial sentence, and those who commit sexual and domestic abuse offences (Justice Committee). The Council agreed with many of the comprehensive justifications provided for the addition of some of these cohorts but ultimately concluded that most of those falling in these cohorts would already be captured by existing cohorts. The Council did, however, agree to expand some of the existing cohorts to be more comprehensive:

- ‘pregnant’ to ‘pregnant or post-natal’ with a drop down of the expanded explanation for the existing mitigating factor Pregnancy, childbirth and post-natal care suggested by including Level Up, Birth Companions, Women in Prison, the Royal College of Obstetricians & Gynaecologists, the Maternal Mental Health Alliance, the Prison Team at Leigh Day (solicitors), the National Women’s Justice Coalition (alliance of 26 women's organisations), members of the Corston Independent Funders’ Coalition (group of independent funders working together to enable women's access to justice) and others;
- ‘at risk of a custodial sentence of 2 years or less’ to ‘at risk of first custodial sentence and/or at risk of a custodial sentence of 2 years or less (after taking into account any reduction for guilty plea)’, the latter reference to guilty plea suggested by the Probation Service and the Justice Committee;
- ‘has any drug or alcohol addiction issues’ to ‘has or may have any addiction issues’ to cover suggestions made by the Legal Committee of HM Council of District Judges (Magistrates’ Courts) and The Howard League for Penal Reform to include other types of addiction such as gambling;
- ‘has a learning disability or mental disorder’ to ‘has or may have a serious chronic medical condition or physical disability, or mental ill health, learning disabilities (including developmental disorders and neurodiverse conditions) or brain injury/damage’ to take into account a variety of suggestions from the Probation Institute, The Magistrates’ Association, an academic and Forward Trust (national charitable organisation), among others, and to align wording with the overarching guideline on Sentencing offenders with mental disorders, developmental disorders, or neurological impairments;
- Based on suggestions from the Lord Bishop of Gloucester, Women in Prison, Appeal – Women’s Justice Initiative (charitable company), the Centre for Women’s Justice, Revolving Doors, the Justice and Society Research Centre at the Institute of Criminology, University of Cambridge and others: ‘the court considers there to be a risk that the offender may have been the victim of domestic abuse, trafficking, modern slavery, or been subject to coercion, intimidation or exploitation’, to: ‘the court considers that the offender is, or there is a risk that they may have been, a victim of:
    - domestic abuse, physical or sexual abuse, violent or threatening behaviour, coercive or controlling behaviour, economic, psychological, emotional or any other abuse
    - modern slavery or trafficking, or
    - coercion, grooming, intimidation or exploitation.’

Some respondents expressed concern that for multiple cohorts on the list, it will be difficult for the court to either identify or confirm their membership without particular assessments or confirmations by professionals in those fields. The Council felt that if there is a

possibility that someone is a member of one of the listed cohorts, this will be enough to suggest that a PSR may be necessary, and so has included “has or may have” before relevant cohorts of offenders.

The Council agreed with many respondents (including the Prison Reform Trust, the Law Society, The Transition to Adulthood Alliance, Level Up, the Justice Committee and others) that it was important to emphasize that the list of cohorts for whom a PSR will normally be considered necessary is non-exhaustive and a PSR can still be necessary if the individual does not fall into one of these cohorts, so this line now appears in bold.

There were also suggestions from respondents for the removal of cohorts. This included: at risk of a custodial sentence of 2 years or less (a magistrate); female offenders (a Crown Court judge); and those from an ethnic minority, cultural minority, and/or faith minority community (some individuals and an MP).

Regarding female offenders, the Council is aware that female offenders have been a matter of considerable public and parliamentary debate for many years. The Justice Committee placed particular importance on PSRs for women in its report on Women in Prison published in 2022; the Council committed in its Strategic Objectives 2021-2026 to consider whether separate guidance is needed for female offenders (or young adults); and an open letter written by Level Up to the Lord Chancellor and Lord Chief Justice outlined the particular impact a custodial sentence can have on pregnant women and requested the Council work towards a guideline on risks and factors to be taken into account when sentencing a pregnant women. The Council’s Effectiveness of Sentencing Options on Reoffending literature review also set out the myriad of issues for sentencing female offenders which a PSR can help to address. As such, the Council did not agree with the suggestion to remove female offenders from the cohorts list.

Regarding ethnicity, the Imposition guideline review of trend analysis published in 2023 found no clear evidence of differential impacts on the Imposition guideline for different demographic groups. However, it highlighted that the proportion of black offenders receiving a community order continues to be lower than white offenders, even after the implementation of the guideline. One possible interpretation of this gap between the proportion of community orders is that the Imposition guideline had a greater impact for white offenders than for black offenders, in relation to the increase in proportion of community orders. While the trend analysis alone is not evidence of a disparity due to the guideline, the Council believes that the revised guideline may be able to contribute to addressing this observed imbalance by emphasising that the court should request a PSR for offenders from an ethnic minority background to ensure it has sufficient information about the offence and the offender before sentencing. An HM Inspectorate of Probation thematic on race equality in probation placed considerable importance on quality PSRs for black, Asian and ethnic minority offenders. The Council therefore disagreed with the justifications given for removing this cohort from the list of cohorts, and also disagreed with the justification given for removing ‘those at risk of a custodial sentence of 2 years or less’.

Multiple respondents suggested reference to intersectionality across the cohorts in this section (including Advance, the Howard League for Penal Reform, the Probation Institute, the Magistrates' Association, some members of the Corston Independent Funders' Coalition and some individuals and sentencers) however the Council did not think this reference was necessary considering an individual need only to fall into one of the cohorts for the guideline to consider that a PSR will normally be necessary for that offender. It has however added reference to the fact that some offenders may fall into multiple cohorts by adding "(or more)" within the introductory sentence immediately before the list of cohorts.

Finally, the Law Society proposed that the line advising magistrates to consult their legal advisors before deciding to sentence to a custodial sentence without a PSR should include a community order as well. The Council agreed given this guidance would be in line with sections 230 and 204 of the Sentencing Act.

Indication to the Probation Service

A number of respondents pointed out that the guidance "the court retains its power of committal for sentence to the Crown Court" is only applicable for magistrates' courts, so the Council added "if applicable" to this line.

A considerable number of respondents supported the guidance recommending that the court indicates to the Probation Service the preliminary level of harm and culpability it has found for the offence when ordering the PSR, or particular requirements they would like the individual assessed for. The Magistrates' Association stated they "long supported the reintroduction of the practice of courts giving initial indications to Probation" and suggested the pronouncements were amended to ensure benches can do this in a consistent way without tying the hands of the sentencing bench. Individual respondents including magistrates said this new line was "sensible", "pragmatic", "very helpful" and "makes sense", with multiple magistrates saying this was already current practice for them or in their court. One magistrate noted:

> "Although all option reports are asked for the outcome is rarely custody, so it's a good idea to give an indication to enable report writer to focus on that rather can going through and reporting on a variety of options." (A magistrate)

Another magistrate outlined that this indication will be useful particularly when the PSR is seen by a separate sentencing bench. However, other respondents expressed concerns about this guidance 'tying the hands' of a separate sentencing bench, which the Council had previously taken into account. One academic cited a Sentencing Academy study (Pre-Sentence Reports: A review of policy, practice and research, Sentencing Academy) which suggests that there is already a high concordance rate between suggestions of PSRs and sentences passed by the courts, which the author suggests indicates that PSR writers are trying to anticipate sentencers' decisions rather than assisting them in making appropriate decisions. The academic outlined in her response that the indication provision in the draft

guideline might further encourage this tendency, thus undermining the value of PSRs and the professionalism of the Probation Service.

Other respondents were concerned that the guidance asking courts to indicate a preliminary level of harm and culpability was inappropriate, citing that it could be prejudicial, that it could risk the court influencing the Probation Service and 'closing the mind' of the Probation author, that it could lead the court to unintentionally disregard the findings of the PSR and because the PSR itself can necessarily influence the culpability assessment (the Centre for Women's Justice giving the specific example of a female offender convicted of possession with intent to supply drugs but is a victim of domestic abuse and coercion, for example.).

One suggestion made was that the guidance indicating the court should specify the preliminary level of harm and culpability could apply only to Crown Courts, but the Council felt that this may cause confusion. The Prison Reform Trust suggested additional lines that set out that "An indication of a preliminary level of harm and culpability should not predetermine the final level of harm and culpability decided by the court".

As set out in the consultation paper, the intention of this line in the draft guideline was to encourage courts to provide better information to the Probation Service so they can assess the offender's suitability only for the range of possible sentences and requirements that the court may impose, rather than any that are not likely to be imposed, but without 'tying the hands' of the sentencing bench. This was considered most useful for magistrates' courts in particular. As the majority of respondents who responded about this line were in favour of it, and the Council considered this guidance helpful particularly for magistrates' courts, it decided to retain the principle of the line but made amendments to make it clearer that this was not the final determination of harm and culpability for the offence and that this view is only for the purposes of the PSR:

> Subject to the above, the court may indicate to the Probation Service a provisional view as to the level of harm and culpability which appears to be involved in the offence for the purposes of the PSR.

The final paragraph under this heading encouraging courts to 'indicate to Probation any specific requirements they should consider the offender's suitability for' was supported by the majority of respondents. Some magistrate respondents stated that they already did this at their courts, and some stated that they had been told they were not allowed to do this at their courts, although magistrates from both sides agreed with the principle in the guideline.

Adjournments

The Council decided to split up the information under the heading in the draft guideline ‘Adjournments and on committal’ given these are separate topics. Regarding adjournments, consultation respondents suggested some additions and amendments.

Anawim - Birmingham’s Centre for Women (charity) detailed the difficulties of women with multiple unmet needs doing their PSR in court because of anxiety, and/or a feeling of a lack of safety either due to distrust in authority figures or being accompanied by a male friend, family member or partner who may have their own agenda. For some of the same reasons, the Prison Reform Trust, Women in Prison, members of the Corston Independent Funders’ Coalition and other respondents suggested that the guideline should include a presumption in favour of an adjournment for the preparation of a full PSR whenever the person being sentenced has dependent children. Multiple respondents suggested that the guideline should encourage an adjournment as default for all female offenders, with the most common reason given that the court environment could be overwhelming and often limited women’s ability to discuss personal matters that may be pertinent for their PSR. The Council agreed but considered that any offender with complex needs (such as a neurodiverse condition) may also find the court environment overwhelming and so would also benefit from a different environment to discuss personal matters. It therefore decided to add the below line to the PSR section rather than limiting it to female offenders.

> Offenders with more complex needs or who may find the court environment overwhelming for whatever reason may benefit from an adjournment for a pre-sentence report to facilitate a more appropriate environment to discuss personal matters.

Some respondents submitted positive feedback about the reference to ‘quality’ reports under this heading. Research conducted with sentencers during the consultation period found that an adjournment was seen as "an investment in the long run if it meant a report had not been rushed and time had been allowed to address important issues".

Professor Peter Hungerford-Welch suggested the inclusion of a line setting out that any adjournment should be for the shortest time necessary for the Probation Service to deliver a quality report so as to reduce delay for both the offender and the victim. The Council agreed that this is the correct approach, but did not wish to overcomplicate the guideline, and considered that there will be a number of reasons for longer adjournments that could result from a number of the involved stakeholders.

On committal and sending

Within the text that now sits under the new heading of ‘On committal and sending’, there was widespread support for the line ‘Where a case is being committed to the Crown Court, a PSR should be requested on committal to allow Probation as much time as possible to

prepare a quality report, minimise any delay and reduce the risk of the need to adjourn at the first hearing', with magistrate respondents noting "this makes much more sense", and that "direction on this matter would be very useful".

Some respondents suggested that the guideline should be amended to align with the guidance in the Better Case Management (BCM) Revival Handbook on 'Ordering a PSR in the magistrates' court on committal for sentence' to guarantee clarity for courts, and some suggested there was a misalignment between the draft guideline and the Criminal Practice Directions. There is currently, however, different guidance for magistrates to order a PSR on committal to Crown Court set out in the BCM Revival Handbook and Criminal Practice Directions respectively. The BCM Revival Handbook sets out that (page 12):

> Unless there is already in existence a recent PSR (not normally more than 6 months old) which is adequate to the new case, the Magistrates' Court will generally order a PSR when committing for sentence where:
>
> - The defendant is of previous good character, or young (under 18, or under 21 and of previous good character or with no previous prison sentence), or otherwise vulnerable, OR
> - The defendant has caring responsibilities, OR
> - The sentence that might be appropriate in the Crown Court, before credit for plea, is likely to be 3 years or less such that the Crown Court will need to consider a suspended or community sentence, OR
> - The defendant has committed a sexual offence (including indecent images) or domestic violence offence
> - The sentencing court will have to consider whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences (dangerousness).

The Criminal Practice Directions set outs out (page 89):

> Where:
>
> a. a magistrates' court is considering committal for sentence; or
>
> b. the defendant has indicated an intention to plead guilty in a matter to be sent to the Crown Court,
>
> the magistrates' court should request a pre-sentence report for the Crown Court if:
>
> i. there may be a realistic alternative to a custodial sentence; or
>
> ii. ii. the defendant may satisfy the dangerous offender criteria; or iii. there is some other appropriate reason for doing so.

Given this potential conflict, the Council decided on balance that the guideline should set out a broader view on PSRs on committal to the Crown Court, as requesting a PSR on committal allows for the report to be available on first appearance, reducing the need for adjournments, and gives the Probation Service more time to gather necessary information. This in turn gives the Probation Service increased capacity for on the day or oral reports

for cases not captured at magistrates' courts' and encourages proactivity rather than reactivity in report writing. Reports done in advance of the first appearance at the Crown Court mean that there is a greater chance that the sentencing judge is made aware of any influential circumstances the offender may not have previously disclosed, such as caring responsibilities or vulnerabilities on one hand, or risks such as domestic abuse concerns on the other hand, that may influence the type of sentence.

Finally, the Probation Service noted the absence of a reference to cases sent for trial and set out that this will be important where the defendant has indicated a guilty plea to all offences, which the Council has resolved.

Effectiveness of sentencing

The Council consulted on a new section on Purposes and effectiveness of sentencing which set out the statutory purposes of sentencing as well as findings from important sentencing research. As mentioned above, based on suggestions from respondents to move the Purposes and effectiveness of sentencing to the beginning of the guideline, the Council decided to split this section into two so that the Purposes of sentencing section introduces the guideline, and the Effectiveness of sentencing section is presented at section 4 of the guideline.

In the draft guideline, this section began with the line:

> **The court should 'step back', and review whether the sentence it has preliminarily arrived at fulfils the purposes of sentencing**.

There was a lot of support for this line, for example from Professor Sir Anthony Bottoms who stated:

> "The question being asked here ('does the sentence fulfil the purposes of sentencing?') is different from that mentioned in my earlier report ('is custody inevitable?'), but it has the merit of being more comprehensive, so I have no difficulty in supporting it. Much more importantly, both questions invite sentencers, at a late stage of their decision-making, to step back from their initial thinking and to consider whether they have fully considered the relevant issues. I believe that this is a very valuable element in any decision-making process, so I wholeheartedly support the Council's proposal." (Professor Sir Anthony Bottoms)

The Council made some minor revisions to this line based on suggestions made by some organisations and academics.

A considerable number of respondents welcomed the guidance that the court should ensure that a rehabilitative sentence has been fully considered and the reference to research in this section, many of whom called for even greater emphasis on this research. The Law Society, for example, stated that "The explicit warning that a community sentence may be more effective in preventing reoffending than a short custodial sentence is a message that cannot be repeated too often." Similar views were expressed in research conducted with sentencers during the consultation period; sentencers agreed with the push towards rehabilitation for low-level repeat offenders, though several noted they would like further detail about the evidence referenced.

Landworks suggested it may be useful to include an explicit statement that makes the point that the evidence of the relative ineffectiveness of short custodial sentences in

reducing reoffending should not lead to a ratcheting up of custodial sentence lengths. The Council did not think this addition was necessary.

The Criminal Sub-Committee of His Majesty's Council of Circuit Judges made suggestions for amendments to the paragraph in the draft guideline 'The effectiveness of a sentence will be based on the individual offender…', to make it clearer. Open Justice Initiative (program within the Open Society Foundations) suggested that this line should include reference to the lower chance of recovery from addiction and mental health conditions within prison as compared to the community given earlier in the guideline it is noted that previous convictions may indicate an underlying problem that could be addressed more effectively in the community. The Council agreed with all of these suggestions and made amendments to this line which now reads:

> The suitability and effectiveness of a sentence will depend upon the circumstances of the individual offender. Courts should consider the potential effectiveness of recovery from addiction in the community with a relevant requirement as compared to in custody.

Sentencing young adult offenders

There were a considerable number of comments and suggestions for the sub section on young adult offenders. There was, generally, a lot of support for the inclusion of this sub section in the guideline. There was also support given to this sub section from sentencers involved in research conducted during the consultation as they suggested that this cohort of offenders may be currently overlooked and that it was a "good reminder of how to approach those on the cusp of maturity".

Some respondents did not agree with the general age of the cohort being around 18-25 years, with some suggesting that an 18 year old and a 25 year old are very different. However, the majority of respondents agreed with this age range, referencing a considerable amount of research and evidence in this space.

Transition to Adulthood Alliance, the Howard League for Penal Reform and other respondents suggested re-emphasising the importance of a PSR for this cohort by putting the line stating that the court should ask the Probation Service for a PSR when considering a custodial or community sentence for a young adult at the beginning of the sub section. The Council agreed in principle, but did not agree that the word ‘normally’ should be changed to ‘always’, as there will be circumstances in which a PSR will be considered unnecessary (for example, when an offender has a recent and relevant PSR already).

The Law Society and the Probation Service identified that the text in the young adult offenders drop down in the draft guideline reflects the expanded explanation drop down for the mitigating factor of age and lack of maturity, but suggested that it omitted some key points. They suggested instead that the text should simply include a link to the drop down for age and/or lack of maturity so all of this guidance is included. The Council’s intention with the text in the draft guideline was indeed to provide a more succinct version of the information in the drop down. It did not, however, intend to omit any important points, so it agreed with the suggestion to replace the text in the draft guideline with a link to the full expanded explanation drop down for age and lack of maturity.

There were numerous suggestions for additional topics related to the sentencing of young adult offenders for this section.

The Transition to Adulthood Alliance set out that they would like to see reference to the evidence noted in the Council’s Effectiveness of Sentencing Options literature review regarding the efficacy of deterrence for young people in the criminal justice system. They suggested that the guideline remind sentencers that the youth justice system has a principal aim of preventing offending and that this should also be the priority for young adults who are in a ‘formative phase of their life’ given the understanding of neurological development at this age. The Transition to Adulthood Alliance also suggested making reference to immaturity resulting from atypical brain development.

The Law Society suggested this section would benefit from making reference to how adverse childhood experiences affect more than just development, that young adulthood is a key period of desistance and that there is a higher prevalence of neurodevelopmental disorders among this cohort.

Transition to Adulthood Alliance, Clinks and other respondents pointed out that the Imposition consultation paper referenced 'adultification' but the draft guideline did not, which they would like to be remedied "given the increasing evidence and recognition that this issue has on racially minoritised children and young adults". Advance referred to an HMI Probation Academic Insights report (2022/ 06) which highlights how Black and mixed heritage girls disproportionately receive biased treatment which ignore their rights as children, resulting in unnecessary criminalisation. The Prison Reform Trust also referenced this issue and asked for the guideline to make explicit reference to the risks of adultification, which they identified was referenced in the Council's Effectiveness of Sentencing Options literature review. Support Not Separation set out:

> "We are pleased to see concern of the 'adultification' of children and we urge the Council to acknowledge, in line with the evidence, that Black children are at particular risk of this. While our submission focuses on pregnant women and mothers, we recognise that all Black children and young people, including boys, are viewed as more adult-like and 'less innocent' than white children, which means they are vulnerable to increased punishment and decreased protection. Ministry of Justice data has found Black girls are almost twice as likely to be arrested as white girls." (Support not Separation)

There were some calls for the inclusion of reference to 'intersectionality' in this sub section (and other sub sections of the guideline, as outlined above).

Advance suggested the guideline should encourage sentencers to also consider other factors which intersect with age and may have an impact on an individual's behaviour and experiences, including gender and ethnicity, particularly for young women who are black or from other minoritised communities. Similarly, Birth Companions and the Prison Reform Trust suggested that sentencers should recognise the accumulated disadvantage faced by pregnant or postnatal girls. Some members of the Corston Independent Funders' Coalition referenced Transition to Adulthood Alliance's submission and recommended that this section should explicitly reference "the need to prioritise an intersectional approach so that young women's intersecting identities – including race, ethnicity, faith, sexual orientation, and gender identity – and how these can compound disadvantage and can lead to barriers in engagement". They, and Birth Companions, submitted that it is essential that sentencers recognise the accumulated disadvantage faced by pregnant or postnatal girls and women who are 18-25 years, from minoritised communities and/or care experienced.

The Royal College of Obstetricians & Gynaecologists and the Maternal Mental Health Alliance also set out the importance of inherent multiple disadvantage faced by young mothers, and both referenced ethnic minority communities and those with care experience.

Women in Prison and an academic submitted similar concerns and suggestions. The Magistrates' Association suggested the guideline reference the particular issues young adults who are care leavers face for this section.

The Law Society set out that "while the important point about the intersectional issues that arise for women from minoritised backgrounds is included, the disproportionate number of young adults from minoritised backgrounds is not noted." The Council had a detailed discussion about the suggestions on intersectionality and accumulated disadvantage and the corresponding reasoning put forward by respondents but was concerned that this was not a word that was widely understood and may overcomplicate the guidance. The Council agreed on the following line, intending for it to address the principle of the suggestions regarding intersectionality by acknowledging that many young adults (and female offenders) have multiple disadvantages and/or needs:

> Some young adult offenders have multiple disadvantages or needs which can increase the complexity of their circumstances that will need to be taken into consideration during sentencing.

The Transition to Adulthood Alliance outlined that the Howard League have produced sentencing principles for young adults (2019) based on published evidence and research with young adults, and called for more detailed information on young adults in this section. HM Inspectorate of Prisons referenced their thematic report Outcomes for young adults in custody published in January 2021 which called for a national strategy to meet the needs of young adult prisoners in making suggestions for this section. Professor Sir Anthony Bottoms outlined considerable research on the topic of young adult offending and concluded by suggesting three matters for focus; (i) that young adulthood is, for many, an important period of social transition (between adolescence and full adulthood); (ii) that it is a time when many who have offended in adolescence take stock, and try to change; (iii) that although attempts to change are very common, for more persistent offenders desistance is usually gradual, involving some fresh offences, and dealing well with these offences can present special challenges for sentencers.

The Council considered all these suggestions very carefully and is grateful for the comprehensive suggestions to this section. It has developed new text for the Young adult offenders sub section, with the link to the existing guidance in the expanded explanation drop down for age and lack of maturity. This guidance is also now more consistent with the way in which information is presented in the female offender sub section.

The council compared 2021 census data for young adults (aged 18 to 24) with the corresponding age categories within the Ministry of Justice's Court Proceedings Database (one of the key piece of evidence used by the Council and used in the Ministry of Justice's Criminal Justice Statistics publication). While this suggested that black young adult offenders who were sentenced between 2019 and 2023 were over-represented compared to the proportion in the wider population, this was not clear for all other ethnic minority

groups. However, there do appear to be some differences for young adults from some ethnic minority backgrounds in sentence outcomes both overall and when broken down to broad offence groups. For offences with higher volumes (for example, drug offences, possession of weapon offences and violence against the person), a higher proportion of offenders from ethnic minority backgrounds receive immediate custodial sentences than white offenders of the same age. As such, the Council agreed to adding a line setting out that the disadvantages young adult offenders face in the criminal justice system may be compounded for young adult offenders from an ethnic minority background, with reference to the disparity in sentence outcomes for some offences for offenders from some ethnic minority backgrounds.

Sentencing female offenders

The female offenders section had the most detailed consultation responses out of all sections of the guideline. Similar to the Young adult offenders section, there was, generally, strong support for this sub section, including from sentencers who took part in research conducted during the consultation period, who described this sub section as "extremely useful", "long overdue" and a "welcome introduction". There were a broad range of suggestions for amendments, however generally most respondents suggested different amendments to reach the same result.

Many suggestions specifically related to pregnant offenders and mothers. The Council decided to separate the guidance on female offenders and on mothers with dependent children, pregnant and post-natal offenders so courts sentencing women who are not pregnant or postnatal do not have to read through guidance that is not relevant to that offender.

One reservation from the Magistrates' Association was that the alternative suitable community provisions for women are limited and so "it may be difficult where the custody threshold has been passed to create a community order which provides sufficient restriction on an offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime". The Council appreciates this concern but considers this matter outside the remit of the guideline.

Most other reservations about the sub section on female offenders were to do with the suggestion that male offenders also experience many of the same issues and disadvantages that the draft guideline outlined that women experience. An MP outlined that issues mentioned in this sub section (such as substance abuse and mental health) also apply to men as well as women and referred to Parliamentary Answers that set out that male offenders also have these issues. The issues outlined in this sub section are based on extensive research and evidence on the unique disadvantages that women in the criminal justice system face. Research shows that with the exception of 'financial issues', female offenders disproportionately suffer from all issues referred to in the female offenders sub section, so the Council did not agree with making any amendments as a result of these comments.

Similar to the young adult offenders sub section, various respondents suggested that the female offenders sub section begins with the line on PSRs. The Council agreed with this suggestion.

Many respondents also called for the guidance to state that PSRs are mandatory for all women, or that adjournments are either a presumption or mandatory for all women. The Prison Reform Trust outlined that:

> "For women, standard PSRs prepared in advance will be especially important. A standard PSR should be the presumption rather than oral on the day reports. Written reports can be completed in advance. This means the woman is more likely to feel comfortable disclosing private but relevant information about her case - for example caring responsibilities." (Prison Reform Trust)

The Council did not agree that it was appropriate to mandate that all women should have a PSR, or a particular type of PSR, or an adjournment. The Council believes that the guidance in the PSR section already captures all those for whom a PSR, or adjournment for a PSR, will be necessary. The guidance is clear that the court must request and consider a PSR unless it considers that it is unnecessary, and that it may be unnecessary if the court considers that it has enough information about the offence and the offender. If the court does not consider it has sufficient information about the offence and the offender, it must order a PSR. Further, the guidance under the sub heading 'Adjournments' now states that "Offenders with more complex needs or who may find the court environment overwhelming for whatever reason may benefit from an adjournment for a pre-sentence report to facilitate a more appropriate environment to discuss personal matters". This will include all relevant female offenders in this situation.

One Small Thing (charity) suggested the guideline should highlight the direct causal links between financial issues and the experience of domestic abuse rather than just referencing them, as they say that a women's involvement in the justice system is often as the direct result of domestic abuse or coercive control. Women in Prison made a similar suggestion, "that the guidance contains a clearer reference to domestic abuse as a potential contributing factor, not just a background factor, in offending", and Appeal – Women's Justice Initiative also made this suggestion; outlining that "the sentence as drafted does not make the link that we see time and time again in our clients' criminal histories: that the offending itself is, in large part if not entirely, due to an abusive partner's actions…". The Council did not disagree with these points but was concerned about the suggested use of the term 'caused by', as this could be misunderstood. The Council considered that the term 'linked to' used in the draft guideline covered all situations, whether the offending was caused by, driven by, or related to the various issues set out in this paragraph in the guideline, so opted not to change this word.

Appeal – Women's Justice Initiative also suggested explicit reference to "experience of trauma as a mental health issue that can contribute to culpability". A similar suggestion was made by Centre for Women's Justice. Women in Prison suggested the addition of reference of being a victim of domestic abuse, giving a range of examples in which domestic abuse is linked to offending. The Council took these suggestions on board and the guideline now makes reference to trauma and being a victim of domestic abuse in relevant lines.

HM Inspectorate of Prisons requested explicit reference to self-harm, setting out that in the 12 months to September 2023, the rate of self-harm increased 38 per cent in female establishments and is now ten times higher in female establishments as compared with male establishments, referencing the official Safety in Custody Statistics. The Council appreciated this suggestion and agreed to include self-harm in the line referencing suicide.

There were some calls for the inclusion of reference to intersectionality in this sub section (and other sub sections, as outlined above). The Council had a detailed debate about this suggestion and the corresponding reasoning put forward by respondents but was concerned that this was not a word that was widely understood and may overcomplicate the guidance. The Council eventually agreed on the following line, agreeing that it addressed a key principle of the suggestions regarding intersectionality by acknowledging that many women (and young adults) have multiple disadvantages and/or needs:

> Some female offenders have multiple disadvantages or needs which can increase the complexity of their circumstances that will need to be taken into consideration during sentencing.

The draft guideline included a line that stated "Women (typically aged 45 to 55) may suffer from the symptoms of perimenopause or menopause, which can affect their mood, mental health and behaviour." There was some support for the inclusion of this line, with some suggestions for other female health conditions to be considered for inclusion (such as endometriosis or PCOS), or for more guidance on how it may impact the selection of sentence. However, other respondents strongly disagreed with its inclusion, mostly noting the lack of evidence of a link with criminality (as the consultation paper outlined). The North London Bench Consultation Committee said:

> "This section takes a very didactic tone and states as facts what is often debatable, giving no clear justification (cf. section on ethnic minority offenders). The inclusion of menopause is very controversial and the draft itself admits that there is very little research in existence – then what is the reason for including it? Why should females aged outside the narrow NHS range be excluded from consideration by this guidance? It seems very simplistic and shortsighted." (North London Bench Consultation Committee)

One individual respondent also said:

> "I would be very cautious about over emphasising the issue of menopause / perimenopause in the absence of evidence of any link to offending. It is not reasonable to expect judges to have an informed opinion on this. A defendant can always produce medical evidence from their GP if they feel it relevant. (There is also the issue of the male menopause - or andropause- which is also recognised by the NHS)." (Individual respondent)

The Council considered the variety of views on this issue and ultimately agreed not to include reference to menopause in the revised guideline given there is currently no clear evidence on the link between menopause and female offending. While the Council recognises the significance of menopause, where there have been significant mental health changes as a result of menopause then these would be captured in mitigation in the same way that any other medical issues would be. Further, the Council agreed that the Equal Treatment Bench Book already covers what courts should know about menopause sufficiently (page 119).

In relation to the line highlighting the small number of women's prisons, the Howard League for Penal Reform, Women in Prison and some members of the Corston Independent Funders' Coalition highlighted a particularly problematic and distinct set of issues that Welsh women face given there are no women's prisons in Wales at all. The Council recognised this concern however did not think reference to this was necessary, and that the important thing is for courts to be encouraged to think about where the nearest prison is and consider how far an offender may be housed away from their home if they were given a custodial sentence. The Council believes the line on there being only a small number of women's prisons captures this sufficiently.

Multiple respondents made suggestions for the paragraph on women from an ethnic minority background. The Transition to Adulthood Alliance outlined that "the current wording recognises that women from an ethnic minority background have distinct needs but does not explain what these distinct needs are or how these needs result in poorer outcomes and experiences of discrimination." Level Up, consultant psychiatrists, professors of psychiatry and academic psychologists, Prison Reform Trust and Support Not Separation all welcomed the paragraph on women from an ethnic minority background but were concerned that without a statement of what these needs are, this consideration is too imprecise to be effective.

Hibiscus Initiatives (national voluntary sector organisation) and the Transition to Adulthood Alliance referenced research by Independent Monitoring Boards and the Criminal Justice Alliance which found that racially minoritised women in prison often experienced discrimination from staff and other prisoners, as well as indirect discrimination and unfair treatment and that the experience of black women was particularly bad, with almost half rating their treatment in prison as poor or very poor. This included lack of access to products required for black women, access to single cells and lack of cultural understanding. Women who did not speak English as a first language also struggled to access relevant services in prison due to the lack of interpreting services.

Some members of the Corston Independent Funders' Coalition stressed the importance of addressing racism and inequality in how resources are allocated, referencing a variety of sources: written evidence from Women in Prison to the Justice Committee, an official statistics published by the Ministry of Justice on women and the criminal justice system, a jointly published Action plan (Hibiscus Initiatives, Muslim Women in Prison, Zahid Mubarek

Trust, Agenda Alliance, Criminal Justice Alliance and Women in Prison) and a HM Inspectorate of Probation report on Race equality in probation: the experiences of Black, Asian and minority ethnic probation service users and staff.

The Council discussed the best approach for a paragraph on women from a minority ethnic background at length. In the Council's report 'Equality and diversity in the work of the Sentencing Council', intersectionality was only explored for robbery offences as the largest sample (and was still small), and no difference in the length of custodial sentence or the probability of receiving a custodial sentence between men and women of different ethnic groups and no difference in sentencing outcomes for offenders of different ethnic groups was found.

It is clear that the distinct needs and issues faced by women from an ethnic minority background span the entire justice process and cannot be captured comprehensively in a single paragraph. However, the consultation responses clearly show the importance of the acknowledgement of these distinct issues in the guideline. The Council therefore agreed to set out that the disadvantages female offenders face in the criminal justice system may be compounded for female offenders from an ethnic minority background. The Council also decided to summarise the issues set out in 'Ethnic minority women and the criminal justice system' (paragraphs 156-157, page 171) in the Equal Treatment Bench Book. The Council considers all these pertinent issues to be referenced in the guideline. The Council intends for this paragraph to ensure that courts understand that female offenders from an ethnic minority background have distinct needs and experiences that should be considered by courts before the imposition of a sentence.

Sentencing mothers with dependent children, pregnant and post-natal offenders

The majority of the guidance in the new Sentencing mothers with dependent children, pregnant and post-natal offenders sub section sat in the Female offenders sub-section in the draft guideline.

Similar to the sub section on female offenders, many respondents called for the guidance to state that PSRs are mandatory, or that adjournments are either a presumption or mandatory for all pregnant and post-natal offenders. Birth Companions suggested “It is vital that no pregnant woman or mother of children under the age of two is sentenced without a detailed pre-sentence report, allowing the impact of any sentence on her and her infant to be taken into full consideration when weighing up options. This should be reiterated in this section.” Level Up, Consultant psychiatrists, professors of psychiatry and academic psychologists, Women in Prison, Birthrights (charity), and the British Psychological Society suggested inclusion of the following line:

> It is critical that a pre-sentence report is obtained before sentencing a pregnant woman or mother to ensure that a sentence is compatible with a woman’s support needs and childcare responsibilities, and so she can access routine healthcare and maternity appointments.

As with female offenders, the Council did not agree that it was appropriate to mandate that all pregnant and post-natal women should have a PSR or an adjournment for a PSR, and agreed that the guidance set out in the PSR section already captures all those for whom a PSR or adjournment for a PSR will be necessary. However, the Council agreed to include reference to a women’s support needs and childcare responsibilities and the ability to access routine healthcare and maternity appointments in this section as suggested by respondents.

Level Up, consultant psychiatrists, professors of psychiatry and academic psychologists and other respondents strongly suggested that the default position for sentencers should be that custodial sentences are disproportionate when it comes to sentencing pregnant and postnatal women, and that there should therefore be a duty on the sentencer to give specific reasons and justify their sentencing decision in the light of this evidence. The Council believes that while in many cases custodial sentences will be disproportionate for mothers with dependent children, pregnant and post-natal offenders due to the impact of that sentence on the child, there will be cases in which a custodial sentence is necessary and unavoidable. It did not therefore agree with this suggestion.

The Prison Reform Trust and other respondents suggested the term 'sole carers' was used in the same context as 'primary carers', which the Council accepted.

The Association of Clinical Psychologists, the Royal College of Obstetricians & Gynaecologists and others made a number of suggestions to ensure the guideline includes clear reference to the risk of the mother as well as the unborn child. The latter stated:

> "Where pregnancy is mentioned throughout the guidelines the focus is on the unborn child as opposed to the mother; whilst we agree it is important to outline risk to the unborn child, there is also significant and separate risk to women throughout pregnancy, birth and into the postnatal period that must be given due attention here to enable comprehensive consideration of risk to child and mother. As such, focus should be given to the woman across pregnancy, birth and the postnatal period up to 24 months after birth – as per the HMPPS policy framework." (Royal College of Obstetricians & Gynaecologists)

Birth Companions made a similar suggestion, noting that "There are clearly evidenced risks to women in the postnatal period, from conditions such as sepsis, thrombosis and thromboembolism, to acute mental health risks which are linked to high numbers of deaths due to drug and alcohol use or suicide", and The Howard League for Penal Reform and the Maternal Mental Health Alliance made similar suggestions. The Council agreed and made necessary revisions to this section with this in mind.

Birth Companions suggested a link to the expanded explanation for the mitigating factor on Pregnancy, childbirth and post-natal care, and the British Psychological Society suggested various amendments, including mentioning both the physical and mental health of both the mother and child. The National Women's Justice Coalition and the Probation Service made a number of similar suggestions. Various respondents, including consultant psychiatrists, professors of psychiatry and academic psychologists, Support Not Separation, Birthrights and the British Psychological Society all highlighted the importance of including a line on prison being a high risk environment for pregnant women. The Royal College of Obstetricians & Gynaecologists outlined that "where the guidelines outline the risks of pregnancy whilst in custody, it must be clear that NHS England deems all pregnancies in prison as inherently high risk." Finally, the Prison Team at Leigh Day set out the inherent operational constraints of the prison regime that pose additional risks to pregnant and post-natal prisoners and their unborn or newly born children, suggesting reference to this as "judges are not necessarily apprised of this information, giving rise to potential for inconsistency and making it unclear the extent to which those factors have been accounted for".

The Council agreed with the majority of suggestions stemming from this comprehensive feedback and made amendments to the text in the bullet points accordingly.

Level Up, consultant psychiatrists, professors of psychiatry and academic psychologists, Support Not Separation, and echoed by the Justice Committee, suggested the guideline set out a principle established in the case R v Bassaragh [2024] EWCA Crim 20, in which the impact of custody on the pregnant offender was taken into account in the decision to suspend a sentence despite her having been convicted of a firearms offence that carries a statutory minimum sentence of five years. The Council agreed that pregnancy and the postnatal period may, though would not always, contribute to 'exceptional circumstances' that could justify not imposing the statutory minimum sentence in line with the decision in Bassaragh. It therefore agreed to include a line on this in this sub section.

Since the consultation period, case law on mothers with dependent children has shown sentences being reduced due to the impact the mother's sentence would have had on their dependent children. The case of R v Byrne [2024] saw a mother's sentence significantly shortened to prevent infant separation, with the Court of Appeal declaring the welfare of the child trumped all, and the case of R v Byron [2024] saw a pregnant woman's sentence overturned, with the court declaring that "it is inappropriate to pass comment on how or why a female defendant has become pregnant. Whether a pregnancy is planned or not can be of no concern to a sentencing judge whose focus must be on the risks to mother and baby of pregnancy and birth in custody". The Council decided this was an important principle and has included it in the guideline.

Finally, a number of respondents recommended the guideline make reference to Mother and Baby Units (MBU). A Crown Court judge suggested the guidance include that the court make enquiries on the availability of mother and child facilities at the relevant prison as that may well have a fundamental effect on duration of sentence, referring to R v Cheeseman [2020] EWCA Crim 794. Mother and baby units are already referred to in the expanded explanation for the mitigating factor on Pregnancy, childbirth and post-natal care with the following line: "Access to a place in a prison Mother & Baby Unit (MBU) is not automatic and when available, the court may wish to enquire for how long the place will be available." The Council has since learned however that it is not necessarily appropriate or realistic for courts to ask about the length of a stay at an MBU as this will be based on many factors and determined by a decisions board chaired by an independent chair with the final decision lying with the prison Governor. Instead, the Council agreed it was important that the guidance set out that Courts should be aware that access to a place in a prison Mother & Baby Unit (MBU) is not automatic. Even if a place is available, the duration of the placement cannot be guaranteed. The expanded explanation for the mitigating factor on Pregnancy, childbirth and post-natal care will be updated accordingly.

In line with suggestions made to reference the disadvantages faced by women from an ethnic minority background, the Council also discussed the inclusion of the disadvantages and issues faced by pregnant and post-natal women from an ethnic minority background.

While there were calls by many respondents to give ethnicity a higher profile across the guideline, Prison Reform Trust, Support Not Separation and consultant psychiatrists,

professors of psychiatry and academic psychologists outlined the importance of racial disparities in relation to the risks of pregnancy being included in the guideline:

> "There are important racial disparities in relation to the risks of pregnancy and the postnatal period. Sentencers need to be made aware of these disparities so that the sentencing of pregnant women is not indirectly discriminatory. Black women are four times as likely to die in pregnancy and childbirth; Asian and mixed-race women twice as likely. Research shows that women from Black, ethnic minority and lower socio-economic groups suffer from greater risks to their postnatal health. Those risks include gestational diabetes mellitus, pre-eclampsia, pregnancy induced hypertension and peripartum psychiatric illness. Sentencers should not be left to sentence pregnant women from these groups in ignorance of, or without regard to, such facts. Sentencers should also consider that the family impact of custodial sentencing is particularly acute for Black mothers, as more than half of Black African and Black Caribbean families in the UK are headed by a lone parent, compared with less than a quarter of white families and just over a tenth of Asian families. This is likely to increase the risk of Black children being taken into care if their mother is imprisoned." (Prison Reform Trust, Support Not Separation and consultant psychiatrists, professors of psychiatry and academic psychologists)

The Prison Team at Leigh Day also outlined some of these issues, as well as that women from an ethnic minority background are amongst those at greater risk of physical and psychiatric conditions, including gestational diabetes and peripartum psychiatric illness.

The Council considered a broad array of research in regard to pregnant and post-natal women from an ethnic minority background and a variety of options for this paragraph. Consequently, it agreed that evidence is clear that women from an ethnic minority background suffer from greater risks during pregnancy, childbirth and to their postnatal health than white women, so this was agreed to be included in the guideline.

Imposition of community orders

The Council proposed some minor amendments and additions to the Imposition of community orders section in the draft guideline as compared to the previous guideline.

The Howard League for Penal Reform proposed that "an introductory sentence on the nature and efficacy of community orders be included", suggesting that this might mirror the recent finding of the Justice and Home Affairs Committee that "rigorous community sentences could constitute a sound alternative to custody…". The Council agreed to move certain lines on how community orders can both restrict liberty and provide punishment in the community to earlier in this section, immediately after the first sentence, to highlight this important principle.

The Legal Committee of HM Council of District Judges (Magistrates' Courts) set out that the Imposition of community orders section in the draft guideline did not include the statutory test that is outlined in the Thresholds section, and as such there is a risk that sentencers may overlook that community orders can only be imposed for imprisonable offences. The Senior District Judge of England and Wales (Chief Magistrate) made this same point, stating that "it might seem obvious to experienced sentencers but given that the guideline could be read by anyone, regardless of any technical knowledge and that this section comes after the earlier questions posed by the guideline at part 1, the mistake could be made." The Council therefore agreed to include the same lines setting out the statutory test as in the Thresholds section to reduce any risk of confusion.

Fines as an alternative to a community order

The draft guideline outlines that, when considering a community order, a fine can be imposed on an offender in two scenarios:

1) as an alternative to a community order
2) as an alternative to a requirement for the purpose of punishment.

The previous and the draft guideline did not set out, however, how the court should determine the level of fine in either of these scenarios. Suggestions were made by various judges, magistrates and organisations for more guidance on the imposition of fines given they can be imposed in these two distinct scenarios which the Council agreed with.

There is considerable information about fines in the Council's supplementary information on Approach to Fines. In this supplementary information, under Section 2. Fine bands and maximum fines, it states "In some cases fine bands D – F may be used even where the community or custody threshold have been passed." Further, though it is not written in any guidelines or information in this way, the following fine bands align with the three levels of community orders in offence specific guideline starting point and range tables:

Band F fine - is equivalent to - a high level community order
Band E fine - is equivalent to – a medium level community order
Band D fine - is equivalent to - a low level community order

Given this information is already in offence specific guidelines, the Council agreed it would be beneficial to set this out clearly in the Imposition guideline.

Further, many respondents to the consultation highlighted the importance of the court considering the economic viability of a fine for some offenders, particularly in relation to the option for courts to use fines as an alternative to a requirement for the purpose of punishment. The Centre for Justice Innovation suggested that imposing a fine on someone who is of low means, living in poverty and has little chance of paying it, can be considered to meet the threshold of being “unjust”. An academic and the Prison Reform Trust outlined the link between poverty and criminal punishment, noting that many people that come in front of the courts will be in receipt of benefits or have financial difficulties and that this may be linked to their offending behaviour. They suggest that the implications of a fine, especially on these offenders, should be highlighted in the guidance. Similarly, a magistrate highlighted that imposing fines on people with no money is not effective, and another magistrate outlined that the imposition of a fine does nothing to address the offending behaviour and would be insignificant to those who are on a low income or who have existing fines already. Both suggested that it was important that the court considered someone's ability to pay and that sometimes a financial burden can increase the propensity to crime by increasing the perceived need for additional income. Other academics and Anawim - Birmingham’s Centre for Women held similar views regarding fines and were particularly concerned about the impact on fines on female offenders.

The Council agreed with these concerns and has included guidance for courts to consider the financial situation of the offender before imposing a fine. For the reasons outlined by respondents, the Council agrees it is important that a fine is not imposed on an offender without sufficient means to pay. The Council therefore added the following text in the Imposition of community orders section:

> If, in all the circumstances of the case, a fine can achieve the purposes of sentencing, it may be imposed as an alternative to a community order. Generally:
>
> - a Band D fine may be a suitable alternative to a low level community order
> - a Band E fine may be a suitable alternative to a medium level community order, and
> - a Band F fine may be a suitable alternative to a high level community order.
>
> Before imposing a fine, the court should consider the financial situation of the offender and ensure that the imposition of a fine is proportionate to their financial circumstances (sections 124 and 125 of the Sentencing Code). It is important that a fine is not imposed on an offender without sufficient means to pay.

Determining the length of a community order and Time remanded in custody or on qualifying curfew before imposing a community order

Within the Determining the length of a community order drop down, the Law Society suggested that it would be useful to include that the community order should be long enough to be effective, as well as being no longer than commensurate with the seriousness of the offence, particularly for rehabilitative requirements. The Council did not consider this to be a necessary addition, especially considering the Probation Service usually suggest the length of the order based on the recommended requirements.

There were a variety of opinions about the drop down 'Time remanded in custody or on qualifying curfew before imposing a community order', many suggesting the text was confusing. One magistrate stated: "I took a couple of reads to understand the second drop down regarding the consideration of "time served" - only then to feel that the guideline is explaining what I feel I do already (i.e. appropriately "deducting" "time served" from the punitive element of a community order being made)". Another magistrate said: "it is not entirely clear whether the guideline is saying that the court "should" take account of such pre-sentence restrictions on the offender's liberty, or whether it is entirely up to the court's discretion." Finally, the Senior District Judge of England and Wales (Chief Magistrate) suggested there was a distinction between time remanded in custody and time on qualifying curfew that needed to be detailed.

The Transition to Adulthood Alliance welcomed the clarification that time spent in custody or on a curfew may reduce the punitive element of a community order or make it unjust to impose a requirement for the purposes of punishment, but said it could be made stronger and suggested alternative wording. The Magistrates' Association suggested including information on the length of the curfew that qualifies to reduce custody time, so that sentencers have this information to hand rather than having to look elsewhere for this information. The qualifying curfew length is set out in sections 325 and 326 of the Sentencing Act, which requires the person granted bail to remain at one or more specified places for a total of not less than 9 hours in any given day.

Finally, Unlock (charity) outlined that ongoing ancillary orders can stop community orders from becoming spent, suggesting that sentencers should consider how ancillary orders might interact with the ability of the community order to become spent. The Council considered this more of a training issue, and not in the remit of the guideline to resolve.

The Council made a number of amendments to this section based on this feedback and is grateful for the suggestions made by respondents.

Community order levels

The Council consulted on a Community order levels section with an amended levels table which sought to encourage sentencers to have greater flexibility in imposing the most suitable sentences, removing requirements for the purpose of rehabilitation from the levels table and instead guiding courts that any requirements being imposed for the purpose of rehabilitation should be aligned with and determined by the offender's needs. In line with this, the Council consulted on the requirements and corresponding ranges of those requirements in the levels table being applicable only for requirements being imposed for the purpose of punishment.

In the draft guideline, the Requirements section sat before the Community order levels section. Some consultation respondents suggested these should be reordered. The Senior District Judge of England and Wales (Chief Magistrate) made this proposal, for example, "since the basic assessment of seriousness into low medium or high level sentence then informs the type of and or number of requirements ordered."

Moving the Community order levels section before the Requirements section also means that the text under each of the sections is easier to read when looking at levels table itself and not cut up by a long list of requirement drop downs. Further, as requirements are applicable to both community orders and suspended sentence orders, the Council felt that the Requirements section can logically sit between the sections on community orders and custodial sentences, so agreed to reorder these sections.

There were a number of comments on themes across both the Requirements and Community order levels sections that could be applied to both. As such, the Council agreed to restructure the text across these two sections so, in so far as possible, guidance was streamlined and not duplicated. The majority of text under the Community order levels section was moved to the Requirements section, and some lines were considered to be a duplication of guidance in other sections of the guideline so were removed.

Under the Community orders levels section, the Council agreed to retain just the guidance that was relevant to the levels table itself, including that the table offers non-exhaustive examples of the ranges of requirements imposed for the purpose of punishment that might be appropriate in each level of community order, and that any requirement/s imposed for the purpose of rehabilitation should be determined by and aligned with the offender's needs.

The Council consulted on removing reference to the number of requirements "that will be appropriate" in each level of a community order in the levels table as it believes that the seriousness of the offence and the needs of an offender are not necessarily aligned; at its most stark, an offender who commits a low level crime may have high rehabilitative needs, and an offender that commits a high level crime may have low rehabilitative needs. This

aligns with the new approach to rehabilitative requirements in the guideline, that they should be determined by, and align with, the offender's needs, rather than the seriousness of the offence. Many respondents supported the removal of this reference in favour of greater flexibility and discretion of the court to impose the number of requirements that are most suitable to the offender.

However, the Society of Labour Lawyers - Criminal Law Group suggested that a single requirement should remain the norm for low level community orders, noting that "if there are 2 suitable requirements it is all too easy to adopt them both and make the order doubly likely to be breached." They say that making one requirement the norm would not preclude more requirements being imposed but would make it clear that moderation would be required if there are two or more requirements in that level. A legal professional made the same suggestion and proposed that it will be essential to retain some distinction with low level community orders to continue the assumption they remain a single requirement. She noted that a low level community order is only just above a fine in severity, and the guideline allowing more requirements could result in disproportionality in the level of seriousness and may result in more breaches. The Howard League for Penal Reform and the Prison Reform Trust put forward a similar view.

The Council understood these concerns, but believed it was important that courts had discretion both to consider requirements for the purpose of punishment and rehabilitation and be able to impose each depending on the circumstances of the offence. However, it agreed that it is important the guideline does not inadvertently risk overloading orders with disproportionately onerous requirements. The Council therefore decided to make it clear in the table that the ranges for requirements for the purpose of punishment apply only if **one** requirement is being imposed on an order. The levels table now states:

> When imposing more than one requirement, the court should moderate the intensity, volume or length of the requirements to ensure they are not disproportionate to the level of the order.

The Council intends that this addition mitigates against courts disproportionately overloading orders with requirements, particularly on low level community orders.

The Legal Committee of HM Council of District Judges (Magistrates' Courts) suggested three helpful amendments to the levels table. First, that instead of "Offences that obviously fall within a sentence of a community order" in the medium community order, the table could specify instead that medium level includes offences 'where the custody threshold has not been passed' in line with the other categorisation of Low (only just cross the community threshold) and High (only just below the custody threshold) for consistency. They suggest that this will still achieve the aim of flexibility. The Council agreed with this suggestion and has included an addition to this line to include 'where the community order threshold has been passed' to set this comfortably between the low and high descriptions.

The second suggestion from the Legal Committee of HM Council of District Judges is that reference to exclusion requirement ranges is consistent across the three levels, namely adding "lasting in the region of" instead of "for" in the current guideline. The Council agreed with this suggestion and has updated this language.

The third suggestion from the Legal Committee of HM Council of District Judges is that the Alcohol Abstinence and Monitoring requirement (AAMR) is included as an example in the levels table. They set out that its omission may mean that sentencers do not consider it as a requirement that can be imposed for the purpose of punishment. They suggest that its inclusion would offer suitable guidance as to the number of days which should be imposed for a low, medium and high range sentence. While the Council did not disagree on this point, it thought that it was applicable to more requirements than just the AAMR. In line with the line in the guideline that 'It is a matter for the court to decide which requirements amount to a punishment in each case', a requirement imposed for the purpose of punishment could also include a programme requirement, a residence requirement and a foreign travel prohibition requirement. As the ranges for these requirements will depend on the individual offender and region in which they are being sentenced, the Council did not think it would be helpful to include a suggested range. Further, in research conducted with sentencers during the consultation period, sentencers agreed that the new drop down list of requirements will make it easier for courts to use the full range of requirements available, particularly those that are currently less commonly imposed. The Council therefore agreed that, even though these are not used as examples in the levels table, the requirements drop downs will limit the risk of these being forgotten as options.

Text in the levels section in the draft guideline set out that that "courts should consider any relevant circumstances of the offender, including their needs and risks" and provided a list of bullet points which considered what circumstances of the offender may affect the requirements to be imposed. The Senior District Judge of England and Wales (Chief Magistrate) noted that this text is not statutory language and that:

> "It is not entirely clear what is meant by assessment in the second bullet point. Is that assessment of suitability for a particular requirement (in which case, presumably this will have already been considered by probation and factored into their recommendations), or assessment of performance, in which case that is a matter for the breach guideline if satisfactory completion is called into question – it would not be relevant at this stage." (Senior District Judge of England and Wales (Chief Magistrate)

The Council agreed with the Senior District Judge about these bullet points and considered that the principle from which they were developed – that courts should impose community orders flexibly for each offender according to their specific circumstances, including consideration of their risks and need – is now dealt with suitably elsewhere in the guideline. The Council therefore agreed to remove these lines from the revised guideline.

Requirements

The Council consulted on new guidance in drop downs against each of the 14 requirements that can be imposed on a community order or suspended sentence order.

As set out above, there were a number of comments across both the Requirements and Community order levels sections that had similar themes which could be applied to the guidance in both. As such, the Council agreed to restructure the text across these two sections so, in so far as possible, guidance was streamlined and not duplicated.

As the Requirements section now sits between the Imposition of community orders and Imposition of custodial sentences sections, the Council decided to include a line that sets out both that community orders **must** consist of one or more requirements and that suspended sentence orders **may** contain one or more requirements.

The Council decided to split up guidance in the Requirements section into sub-headings to make it easier to read. These are: Suitability; Requirements imposed for the purpose of punishment and rehabilitation; Effectiveness of requirements and the List of requirements.

Suitability

Under Suitability, the Council agreed with the proposals made by Transition to Adulthood Alliance to reference age as an example when considering the needs and rehabilitation of the offender and to include education and training as an example when considering the ability of the offender to comply with a requirement. The Transition to Adulthood Alliance made this suggestion as they outlined that young adults may be more likely to be in education or training than in work, which they say can also impact on their financial circumstances to pay for travel to and from appointments or programmes. The Council did not however agree with Transition to Adulthood Alliance's suggestion for reference to gender specific, developmentally appropriate and/or culturally competent services as an example when considering availability of the appropriate requirements in the local area as they did not believe this was a necessary addition.

The Probation Institute outlined that it is important for guidance to set out that any requirements need to be both realistic and achievable, stating "the requirements should not be so onerous that the offender is bound to be in breach of them", noting that this may be particularly important for women. The Council agreed with the principle and added reference to requirements needing to be "realistic to fulfil" in the paragraph on considerations when imposing two or more requirements.

The Oxfordshire Bench Leadership outlined that the guideline does not seem to mention that sentencers should take into account the offender's working hours in relation to curfew and suggested this should be made explicit in the guideline. They suggested that

"sentencers will not want to make an offender unemployable and should also consider that a lesser number of hours imposed on an offender working long days is as onerous as a greater number on an unemployed offender." The Council appreciated this point and agreed to make reference to working hours in line with the guidance that any requirements imposed should not conflict or interfere with an offender's attendance at work or educational establishments.

Finally, Birth Companions and other respondents suggested the inclusion of 'being pregnant or post-natal' in the list that the guidance suggests that any requirements imposed should not conflict with. The Council did not take up this suggestion as they felt that guidance for courts around the approach to sentencing those who are pregnant or post-natal is now sufficient elsewhere in the guideline.

Requirements imposed for the purpose of punishment or rehabilitation

A considerable number of respondents were very supportive of the new prominence of the line "It is a matter for the court to decide which requirements amount to a punishment in each case." Some magistrate respondents outlined their experience of this legal requirement causing some confusion. The Magistrates' Association said that this is a helpful clarification as there have been conflicting instructions previously as to whether a court can make this decision (although this line was already in the previous Imposition guideline, just not as prominently as in the draft guideline where it is in bold).

The Law Society and Professor Peter Hungerford-Welch suggested that it would be helpful for the guideline to indicate which requirements are likely in most cases to satisfy the need for a requirement to be imposed for the purpose of punishment, or to say that any requirement can be imposed for the purpose of punishment.

Further, the Sentencing Academy highlighted that the provision has been variably interpreted. As they set out, "for some, it means that a requirement must be imposed solely for punishment. Yet a requirement may serve dual purposes: it may punish the offender and promote rehabilitation." They suggest that the guideline could clarify this by noting that a single requirement may fulfil the requirement being imposed for the purpose of punishment but can also fulfil the purpose of rehabilitation. This suggestion was echoed by others.

The Justices' Legal Advisers and Court Officers' Service (formerly the Justices' Clerks' Society) (JCS) said, "This is an area that sometimes causes difficulty, because a requirement that might be considered to amount to punishment is different, we say, to a requirement imposed for the purpose of punishment." They suggested "a redraft of this phrase closer to that definition may help to avoid the situation whereby, say, an offender is sentenced to requirements that were plainly imposed for the purpose of rehabilitation but

that a sentencer believes might have some punitive effect, thereby choosing NOT to impose any (other) requirement intended for the purpose of punishment."

The Centre for Justice Innovation argued strongly that all requirements impose punishments depending on the individual circumstances of the offender and outlined the punitiveness of community orders with requirements. The Howard League also suggested removing "misleading statements in the guidance about 'punitive requirements', which may risk some benches 'doubling up' with a second requirement, stating that "the guidance should emphasise that community orders such as Rehabilitation Activity Requirement (RAR) days still involve punishment and restriction by requiring attendance and participation, and encompass multiple purposes of sentencing. Without clarification, the 'doubling up' of requirements may result in unfair overload for vulnerable people who need rehabilitative and treatment-based activities."

However, the Council noted that it was held in R. v Gregson [2020] EWCA Crim 1529 that a RAR and an Alcohol Treatment Requirement (ATR) are not imposed for the purpose of punishment and that a community order would be unlawful if it did not include a punitive requirement where there had been a failure either to impose a fine or to find that there were exceptional circumstances under section 208(11) of the Sentencing Act. Subsequently, in Att.-Gen's Reference (R. v Singh) [2021] EWCA Crim 1426, it was said that Parliament clearly intended by s.208(10) that there must be an additional requirement that will punish an offender, such as an unpaid work requirement or a curfew requirement; and a rehabilitation activity requirement was not for the purpose of punishment, but rehabilitation. Further, in appropriate cases, PSR authors should specifically address the question of whether there are exceptional circumstances under s.208(11) to justify not imposing a requirement for the purposes of punishment.

While this had previously been considered by the Council, the principle outlined in case law that RARs and ATRs cannot be imposed for the purpose of punishment was not included in the draft guideline. The Council agreed that the guideline must reflect the relevant case law but did not wish to provide guidance on ATRs that was not consistent with guidance on other treatment requirements such as Mental Health Treatment Requirements (MHTRs) and Drug Rehabilitation Requirements (DRRs). It therefore agreed to include guidance setting out that:

> **It is a matter for the court to decide which requirements amount to a punishment in each case.** Any requirement can be imposed for the purpose of punishment depending on the individual offender, though normally rehabilitation activity requirements (RARs) and treatment requirements should not be. One requirement can fulfil multiple purposes of sentencing.

This line does not entirely remove the possibility of RARs and treatment requirements being imposed for the purpose of punishment on offenders for whom this would be

appropriate in their individual circumstances, but in line with case law, sets out that these would not normally constitute requirements for the purpose of punishment.

The line "One requirement can fulfil multiple purposes of sentencing" also resolves the problem that the Howard League for Penal Reform and a legal professional suggested existed in the draft guideline, that if the court wished to include a rehabilitative requirement as well as a requirement for the purpose of punishment, the obligation to impose a requirement for the purposes of punishment "arguably… increases a low level community order into a medium level community order, by potentially doubling the requirements".

The final line in this section in the draft guideline was: 'Any requirement(s) imposed for the purpose of rehabilitation should be determined by, and align with, the offender's needs'. A considerable number of respondents were strongly supportive of this line, with some caveats that this should not mean that orders are 'overloaded' with requirements which were also considered earlier in this paper. In research conducted with sentencers during the consultation period, all sentencers agreed with this line. Some sentencers thought it went without saying, others thought it was an important inclusion because it reminds all parties in court of the importance of the rehabilitative elements of a sentence. In the consultation responses about this line, one magistrate respondent outlined:

> "This is really helpful, too often we see people who have committed an offence which falls into a low CO category, but presents with complex health and social issues, but we aren't able to provide a comprehensive sentence which would address the underlying issues as it would be deemed to be up tariffing. Even though we know the additional one (or two) requirements may prevent further offending". (A magistrate)

Fines as an alternative to a requirement for the purpose of punishment

As referred to in the Imposition of community orders section, the previous guideline did not provide any guidance on the imposition fines and the Council agreed to add guidance in the Imposition of community orders section which set out the proposed band levels of fines in accordance with low, medium and high levels of a community order.

In addition to the ability for fines to be imposed as an alternative to a community order, the Sentencing Act sets out that a court does not need to impose a requirement for the purpose of punishment if it also imposes a fine (or if there are exceptional circumstances relating to the offence or to the offender which would make it unjust in all the circumstances for the court to do so.) As such, the Council has ensured this is clear:

> A fine may be imposed in lieu of a requirement for the purpose of punishment unless there are exceptional circumstances which relate to the offence or the offender that would make it unjust in all the circumstances to impose a fine.

The Council also felt it was important to reiterate the guidance to courts that is contained in the Imposition of community orders section to consider the financial situation of the offender before imposing a fine, so has included this same text.

So that the imposition of a fine for the different purposes (as an alternative to a community order, or as an alternative to a requirement for the purpose of punishment) are distinct, the Council agreed to set out in this section that generally, a fine imposed in lieu of a requirement for the purposes of punishment should be in the range of a Band A to Band C fine, and provides a link to the Approach to fines supplementary information.

Effectiveness of Requirements

There were also a variety of suggestions for the text in the Requirements section that the Council has moved under a sub-heading of Effectiveness of requirements. Professor Peter Hungerford-Welch set out:

> "There is some basis for saying that courts are being insufficiently 'creative' in their use of community order requirements (there may be a lack of awareness that some requirements are available). Parliament has provided a 'pick and mix' menu of possible requirements that can be combined in a way that is tailored to the needs of the individual offender. However, whilst it is right that courts should be encouraged to consider appropriate combinations of requirements, it is important to ensure that they do not impose an excessive number of requirements on an offender (thereby increasing the risk of breach). The court should always consider the ability of the offender to comply with the combination of requirements that is being considered. So the message needs to be: consider a combination of requirements but make sure the overall 'package' is not excessive." (Professor Peter Hungerford-Welch)

This point was also made by the Law Society, LandWorks and the Howard League for Penal Reform, the latter who suggested amendments to the text to avoid it encouraging the overloading of community orders with requirements to avoid potential subsequent breaches and re-sentencing to custody.

The Council understands this is an important concern. It agreed to reiterate the caution to courts about overloading orders under the Suitability sub heading ("The court must ensure that where two or more requirements are included, they are compatible with one another, not excessive when taken together and realistic for the individual to fulfil") in the Effectiveness of requirements sub heading with the line:

> Courts should tailor community orders for each offender according to their specific circumstances, and ensure the final package of requirements imposed is not excessive, either in the number of requirements or in the length or volume of those requirements. An excessive package of requirements is less

likely to be successfully completed and risks the offender returning to court in breach.

Humankind (charity) and other respondents made the point that in regard to some requirements such as MHTRs, ATRs and DRRs, some offenders suffer from systemic issues, such as homelessness, that are beyond the scope of the requirement to address but can significantly impact the success of that requirement being fulfilled, resulting in a “barrier to engagement” and breaches. The Council agreed with this point and has included reference to it in the guidance under the Effectiveness of requirements heading.

List of requirements

The proposed list of requirements in the draft guideline with more comprehensive information against each requirement than in the previous guideline was wholly supported by respondents. Sentencers who took part in research during the consultation were also very positive about the requirements table. They thought it was comprehensive, “excellent and very detailed” with one describing it as “my favourite change” and another saying that they had “never had a handy list of what the requirements are that I could impose”. There were some suggestions for minor amendments for most requirements which the Council has largely taken up.

The draft guideline had information on requirements presented in two ways: drop downs under the Requirements section, and a table at the end of the guideline with a link to a downloadable and printable version of the table. Almost all respondents who commented on the table of requirements at the end of the draft guideline either said that it did not make sense at the end or caused confusion, with some wondering whether it was the same information as in the drop downs. Similarly, sentencers who took part in research during consultation noted some confusion about the overlap between this section and the printable table at the end. There was a clear preference for the information on requirements to all sit within the relevant section, though the Council has retained the link to a downloadable and printable table of requirements, now presented in landscape rather than portrait based on some feedback from a Crown Court judge suggesting the text in the narrow columns was difficult to read. This link now appears directly above the first requirement drop down.

List of Requirements

The following requirements are available on both a community order and a suspended sentence order:

Requirements table (download/open pdf) (opens in new tab as a PDF)

Unpaid work

Unpaid work

The Transition to Adulthood Alliance suggested the addition of 'helping to make reparation for the harm caused by their offending' to this requirement, outlining that "Unpaid work is a primary way in which people can make amends to their communities and to victims of crime, and so meet the purpose of reparation". The Council did not disagree with this however felt it was important to keep the information against each of the requirements as objective and factual as possible so did not include this line.

The Magistrates' Association noted that at the time of consultation, up to 30% of unpaid work hours can be used for education, training or employment (ETE) which they suggest is more than a small proportion. The Council agreed to removing the term 'small' from this line which also means that any operational changes to this proportion in the future would not require a guideline amendment.

A magistrate suggested the line that the court must consider whether the offender is in employment alludes to the guidance suggesting that the employment itself renders an unpaid requirement unsuitable when this was not the Council's intention. The Council accepted the proposed changes to this line (with a small amendment) to make it clear that the hours an offender works will be relevant to whether an unpaid work requirement is suitable rather than the existence of the employment itself.

Finally, the Probation Service suggested clarifying guidance on imposing an unpaid work requirement on an offender with an existing unpaid work requirement in another order, which the Council thought was an appropriate clarification and has added.

Rehabilitation Activity Requirement (RARs)

The Oxfordshire Bench Leadership suggested that it is misleading to refer to RARs using the term 'days' in the guideline, when one can be completed, for example, within a five minute phone call. They suggested that the use of the term 'days' may damage public and sentencer confidence and implies a more onerous sentence than is actually being imposed. It is a legislative requirement for the court to specify the number of 'days' for a RAR, however, the Council has made some changes to the text in this drop down to try to make the wording sound less like each RAR given will be a full day of activity. This includes replacing the line "The court will specify the maximum number of rehabilitative days the offender must complete" with "The court will specify the maximum number of days on which the offender may be instructed to participate in rehabilitative activities".

The Magistrates' Association and some individual magistrates suggested the line "A rehabilitation activity requirement should be imposed when the offender has rehabilitative needs that cannot be addressed by other requirements" was not the reality in many magistrates' courts and that it suggested RARs were some kind of 'fall-back' provision which is not the case, which the Council appreciated. The Council also agreed with the

Magistrates' Association that RARs are and can be used to underpin (voluntary) attendance at drug or alcohol rehabilitation centres.

Advance suggested that the Council include guidance around the flexibility to amend the RAR days post-sentencing to enable longer term work with women around all their needs. It would not be appropriate for the Council to include any guidance on post-sentence amendments to the sentence in its guidelines so it did not accept this suggestion.

Programme Requirement

A Crown Court judge suggested that the use of the phrase "criminogenic needs" in this drop down is unhelpful and may lead to misunderstandings. The Council appreciated that this word may be too vague and has replaced this with "which may lead people to reoffend".

The Oxfordshire Bench Leadership suggested that they are advised by their local Probation staff that accredited programme requirements generally necessitate a minimum order length to account for pre-work and post-work of the programme as well as the programme itself, suggesting there is a significantly lower chance of success without the appropriate length of order to allow this to happen. The Council appreciated this point and has included lines to ensure that courts impose orders for a sufficient length of time to minimise any risk the programme requirement is not successfully completed due to time constraints.

Curfew

The Legal Committee of HM Council of District Judges suggested that the differences between the length of term of the curfew pre and post 2022 would be better expressed as a table to avoid confusion. The Council agreed and has restructured this information into a table.

An academic suggested a number of small amendments to this section including "the offender's ability to care for them" in regard to dependents and that the timings of school and other activities for children should be referenced. The Council agreed with the reference to the offender's ability to care for any dependent children but not with the timings of school or activities for children given there will be a multitude of other commitments offenders have that are not referenced in this section.

The Centre for Justice Innovation suggested that it is important to acknowledge that curfew requirements need to be agile to an offender's employment circumstances, noting that "there is some evidence that the extent to which employment is taken into account in curfew decisions is variable, with particular problems caused when people work non-standard hours or when they are required to work away from home." They highlight the importance of curfew requirements to be imposed in a way that enables people to find and stay in employment, which is essential to their rehabilitation and desistance from

reoffending and suggest the guideline makes reference to this. The Council agreed and has included “and any impact on an offender’s attendance at work or educational establishment” in this drop down to account for this. The guideline also includes reference to “an offender’s attendance at work or educational establishment (particularly when imposing curfew hours)” under the Suitability heading in the Requirements section and notes in the levels table that “the court may vary the number of hours on different days if appropriate according to the circumstances of the offender.”

The Oxfordshire Bench Leadership noted that the requirement for safeguarding checks frequently rules out curfew as an option because of delays with local authority or police checks that are not completed before the PSR is due, or the unwillingness or unavailability of the homeowner. A magistrate also cited concerns with this requirement, noting that any PSR requested to be done on the same day will not have these checks done. The Council believes that it is important that safeguarding and domestic abuse enquiries are carried out prior to the imposition of curfew so that the sentence does not put anyone at risk so has retained the text outlining the need for safeguarding and domestic abuse enquiries to be carried out for a curfew requirement in this drop down.

Exclusion requirement

An individual magistrate suggested that it may be useful to include examples of when the exclusion requirement may be suitable, however the Council felt that providing any examples may inadvertently exclude other situations in which an exclusion requirement may be appropriate and wished to leave it to the discretion of the court as to when to impose an exclusion requirement.

Advance outlined that exclusion requirements “must be implemented understanding the barriers which women might face and should not set them up to fail”, suggesting that the court should consider the need of the woman to travel through a prohibited area to access important places (such as access to children should they not be with her or to attend health appointments or work). The Council agreed with this statement though considered it to be more widely applicable to all offenders, and so added a line to encourage courts to consider the offender’s need to travel through a proposed exclusion zone.

Residence requirement

Advance outlined their concern that the lack of appropriate HMPPS accommodation may lead to women being given residence requirements that are unsuitable or harmful. They recommended that the guideline encourages sentencers to consider this when deciding on a residence requirement. The Council believes that that the line “The court is encouraged to engage with the Probation Service to understand what type of HMPPS provided temporary accommodation is available in their region to support these orders” is sufficient and that the Probation Service will be able to recommend whether the HMPPS accommodation is suitable or not.

Advance also highlighted concerns that a risk of domestic abuse may be missed when issuing residence requirements and suggested including the paragraph in other relevant requirements regarding safeguarding and domestic abuse enquiries being made under the residence requirement as well. The Council agreed with this suggestion and has added this paragraph to this drop down.

Mental health treatment requirements (MHTRs) and Drug rehabilitation treatment requirements (DRRs), Alcohol Treatment Requirements (ATRs) and Alcohol abstinence and monitoring requirements (AAMRs)

Some magistrates suggested that the guideline should specify that a treatment provider should provide approval for an offender before it is imposed on them to reduce the number of people sentenced who are not approved post-sentence due to eligibility issues. However, the Council wished to maintain the condition set out in legislation: that the court is satisfied that treatment arrangements have been or can be made. The Council believes it would not be helpful to create a new rule in the guideline that a treatment provider must have given prior approval before a treatment requirement can be imposed, particularly as providers and their conditions vary across regions and this may limit the imposition of treatment requirements in some areas.

Schedule 9 of the Sentencing Act states that the court must specify in the order: the period or periods for the treatment and the place the treatment will be provided or the registered medical practitioner (or other relevant person depending on whether it's MHTR, ATR or DRR) by whom or under whose direction it is to be provided. The Council has added some guidance to all three of the treatment drop downs in line with these legislative provisions.

An academic indicated the importance of the distinction between ATRs and AAMRs; most notably that AAMRs are aimed at non-dependent drinkers and were introduced to allow courts to impose a punitive requirement that an offender must abstain from alcohol for a fixed period; and ATRs are aimed at those with alcohol dependence. The academic recommended the guideline include why it is important that an ATR and AAMR cannot be imposed together, and similarly why an individual suitable for an ATR will not be suitable for an AAMR, and vice versa. She suggested that this is because a total ban on alcohol under an AAMR may be too onerous and potentially dangerous for an offender who is dependent on alcohol, and similarly, an ATR will not be suitable for an individual who is not dependent on alcohol.

The Council appreciated this response and has made changes to the relevant drop downs accordingly, noting, for example, that "An ATR cannot be imposed alongside an alcohol abstinence and monitoring requirement (AAMR) as an ATR will be unsuitable for an offender who is not dependent on alcohol" in the ATR drop down.

Electronic Monitoring

A magistrate suggested that they were not aware of the electronic whereabouts monitoring requirement (only the electronic compliance monitoring requirement) and so these should be separated into two drop downs. Given these are individual requirements with different purposes and considerations, the Council agreed and has separated this information.

The Magistrates' Association suggested that it would be helpful to add the more commonly used term for electronic monitoring requirements, as 'electronic whereabouts monitoring requirement' is not a widely used term, and that reference to "GPS tags" and/or "tagged curfew" would be simpler. Some individual respondents made this same point, so the Council has made these changes, adding 'GPS tags' in parentheses in the Electronic whereabouts monitoring requirement heading.

Imposition of custodial sentences

Generally, views on the Imposition of custodial sentences section were positive. There was some concern mostly from sentencers that the guidance encouraged community orders over custodial sentences too strongly, and that the proposals seemed “political”, some suggesting that they have been brought in in an effort to tackle the prison population crisis. A number of magistrates outlined that the imposition of a custodial sentence was already “always a last resort, opted for only if no other disposal is possible”, and that “a custodial sentence is only awarded after considerable deliberation by a bench”.

As set out in the consultation paper, the Imposition review started in July 2022, far before current prison capacity concerns. The review started as a result of changes to legislation, new case law and case management guidance, further evidence about the experiences of individual offender groups in the criminal justice system and recent sentencing research, alongside a variety of both general and practitioner feedback. This sentencing research includes the Council’s own report on The Effectiveness of Sentencing Options on Reoffending in September 2022 which suggests, amongst other things, that short custodial sentences are less effective than other disposals at reducing reoffending; increasing lengths of sentences is not effective for reducing reoffending for offenders with addiction or mental health issues; and sentences served in the community may be more effective at promoting positive outcomes than sentences served in custody.

In research conducted with sentencers during the consultation period, the questions in the Imposition of custodial orders section were described as “extremely helpful” and “very valuable”. However, one group of magistrates suggested that the focus should be on when **to** impose community orders, rather than when **not** to impose custody, and one said it would be helpful to know in which cases an offender should be sent to prison, rather than in which cases they should not be. However, the Council agreed the guideline does provide sufficient guidance on when **to** impose community orders and did not consider it appropriate to detail specific cases in which an offender should not sent to prison as this may limit courts discretion.

The Howard League for Penal Reform suggested that the first sentence of the Imposition of custodial sentences in the draft version should be strengthened by reiterating the legislative framework (s.230(2) of the Sentencing Act 2020). The Probation Institute echoed this, setting out that they “strongly urge the Sentencing Council to cite the law and make it a recurring theme throughout the guideline, that the court MUST consider whether a fine or a community order can be ‘justified’ before actually taking the step to impose the custodial period set out in the guideline”. The Council has added references to the legislation where relevant throughout the guideline and has replaced the first line in this section in the draft guideline with the line from the Thresholds section.

An academic suggested that the first paragraph in this section in the draft version of the guideline was confusing as the introductory line outlined that, having decided that a custodial sentence can only be considered where the court is satisfied that no other sentence is suitable, the court must go back to considering whether it's unavoidable. She suggested alternative wording for both the introductory line and the paragraph. The Council appreciated the principle of the suggestion but rather than amend the wording, considered that the concern could be resolved by moving the introductory line to below the first question "Is it unavoidable that a custodial sentence be imposed?" rather than before it. This asks the court whether a custodial sentence is unavoidable and then reiterates the principle that a custodial sentence must not be imposed unless the offence was so serious that neither a fine alone nor a community sentence can be justified. The Council has also added reference to the custody threshold in the introductory line in this section.

The draft guideline contained three questions in the Imposition of custodial sentences section, reduced from four questions in the previous guideline (the first question being dealt with in the Thresholds section). There were almost no concerns about this new structure from consultation respondents. Several respondents, however, suggested that the first question 'Is it unavoidable that a custodial sentence be imposed' was not the right question to ask. One magistrate respondent outlined that they did not think this question was appropriate and instead the line should read "Is it appropriate and necessary in all the circumstances that a custodial sentence is imposed"? Another magistrate respondent suggested instead, "Are you sure that a custodial sentence is the only just sentence?", suggesting that this would emphasise that the decision always lies with the sentencer.

The questions that were consulted on had general support in consultation responses and the Council therefore agreed to retain them. The Council did however make several changes to the bullet points under each of the questions in this section as a result of consultation responses.

Under 'Is it unavoidable that a custodial sentence be imposed?', the Senior District Judge suggested that the bullet points on dependants and pregnancy and personal mitigation respectively created imbalance by giving too much weight to these considerations. On the other hand, there were many suggestions for more detail to these same two paragraphs, particularly that on dependants and pregnancy, for example from Bhatt Murphy Solicitors who suggested an amendment to the line on pregnancy:

> "A custodial sentence will become disproportionate to achieving the purposes of sentencing where there would be an impact on an offender's pregnancy or dependent children. Courts should make every effort to avoid an offender spending pregnancy, birth or the postnatal period (up to 24 months after birth) in prison and, where relevant, consider pregnancy and the postnatal period as contributing to 'exceptional circumstances' strongly gravitating against imprisonment." (Suggestion from Bhatt Murphy Solicitors)

The Council felt it was important to make the guidance under these questions as succinct as possible. As the bullet point on pregnancy concerned whether a custodial sentence becomes disproportionate to achieving the purposes of sentencing where there would be an impact on dependants, the Council decided to move this line to be another example of the considerations around whether a community sentence can achieve the purposes of sentencing, rather than a separate point outlined in a separate bullet point. It also decided to move the rest of the guidance to the drop down on mothers with dependent children, pregnant and post-natal offenders within the Effectiveness section.

The Legal Committee of HM Council of District Judges (Magistrates' Courts) suggested that the adverb 'highly' was not appropriate in the context of describing how punitive a community order may be. The Council agreed and removed this word. The line now reads: 'Community orders are often punitive'.

Finally, the Magistrates' Association suggested that clarification on what is referred to as "significant adverse consequences" of breach would be welcome, including whether this would include custody. The Council intended for this line to refer to custody, so replaced this term with the word custody.

Under the next question 'What is the shortest term commensurate with the seriousness of the offence?', there were also a number of amendments proposed by consultation respondents that the Council accepted.

The Probation Service suggested the line about desistence in the first paragraph was not clear, so the Council amended this to "Any custodial sentence may disrupt factors which can discourage further offending, such as employment, education or accommodation, and may affect support networks by interfering with relationships with friends and family". The Howard League for Penal Reform proposed adding further clarification to the line on the inefficacy of short sentences to avoid unintended consequences, for example, the imposition of longer sentences. Several other respondents also suggested including that the imposition of a longer custodial sentence should not be used as an alternative to avoid the imposition of a shorter custodial sentence. The Council has added a line which makes it clear that the guidance encourages courts to consider a community order in lieu of a custodial sentence but did not think it was necessary that the guidance asks courts not to impose a longer custodial sentence instead.

The Prison Reform Trust suggested that, as 6 months' custody was the maximum custodial sentence available at the magistrates' court (at the time of consultation), the guidance under 'What is the shortest term commensurate with the seriousness of the offence?' undermines the work of the magistrates' court. They suggested a line that sets out the reality that sometimes a short custodial sentence is unavoidable. The Council agreed with this, so agreed to add this clarification to this section.

Finally, the Oxfordshire Bench Leadership outlined that there seems to be no consideration of the impact of post sentence supervision when considering custody in the

guideline, which they say, “on the one hand, adds the benefit of the equivalent of a year’s Community Sentence with a Supervision requirement but, on the other, extends the sentence by a full year, making it much more onerous than might first appear.” This section of the guideline does make reference to post sentence supervision in the last bullet point and the Council agreed that any more detail on the post sentence supervision would not make any difference to the court’s considerations nor benefit the sentencing decision, so did not make any additions on this point.

Under the question ‘Can the sentence be suspended?’, Unlock suggested adding a reference to the fact that suspended sentence orders are treated in line with any other custodial sentence for criminal records purposes. The Council appreciated that the consequences of criminal records can make a suspended sentence order more ‘punitive’ than some people may appreciate, but considered that an explanation of the implications of sentences for criminal records purposes was outside the scope of the guideline. The key point that a suspended sentence order was a custodial sentence is clearly made in the guideline.

Table of Factors

The Council consulted on revisions to the table of factors that indicate when it may or may not be appropriate to suspend a sentence. Most respondents who commented on the proposed reversal in order of the columns – such that the list of factors indicating that it may be appropriate to suspend would now come first (on the left) - agreed with this change. In the research conducted alongside consultation, participants were also generally positive about this change to the layout.

A Circuit Judge submitted that, at the time of consultation, two Court of Appeal judgments criticised sentencers for not referring to each suspension factor, suggesting that the Council offers guidance as to whether the court needs to refer specifically to each factor or should instead bear them all in mind. The Council did not include the line that appears before the table of factors in the previous guideline which asks courts to ‘weigh the factors’ in its draft guideline. On the basis of these concerns, it was agreed that an amended line is added to the revised guideline, asking courts to ‘weigh the relevant factors’ when considering whether it is possible to suspend the sentence, specifying that it will only be relevant factors (which will be dependent on the circumstances of the offender and the offence) which will need to be weighed.

The Oxford Bench Leadership suggested the addition of ‘in the community’ to the factor of ‘Realistic prospect of rehabilitation’ as the guideline also refers to the prospect of an offender being rehabilitated in custody. The Council agreed, as rehabilitation in the community is distinct in that it requires an offender independently to attend appointments with the Probation Service, which should be taken into consideration when sentencing.

The Oxford Bench Leadership also suggested the factor ‘Offender presents a risk/danger to the public’ may inadvertently risk leaving out cases of domestic abuse where there may be a very specific danger to a single individual. The Council is clear that this factor refers to the offender presenting a risk or danger to any person so has amended this factor to ‘Offender presents a risk to any person’ to improve clarity.

Birth Companions, consultant psychiatrists, professors of psychiatry and academic psychologists, Level Up, the Prison Reform Trust, Support Not Separation, the Probation Institute, the British Psychological Society and some individuals suggested the reference to either dependent children and/or pregnancy and the post-natal period in the factor ‘Immediate custody will result in significant harmful impact upon others’, which the Council agreed with and amended accordingly.

The factor ‘History of poor compliance with court orders AND Unlikely to comply with court orders in the future’ had conflicting feedback. The Probation Service, the Probation Institute and some individuals proposed removing ‘history of poor compliance with court orders’ from this factor suggesting that the key issue is whether or not there will be compliance with the order if imposed, with one academic stating “previous poor compliance may have more to do with the fact that an order was inappropriate for the offender in that the offender was not able to comply, due to, for example, to disability/mental ill health/pregnancy, or domestic circumstances.” Advance made a similar suggestion particularly with women in mind, stating “A women’s previous poor compliance with court orders should be regarded minimally when deciding whether they should receive a suspended sentence especially if they have not previously been offered specialist women’s support.” Some magistrates held the opposite view, suggesting that the addition of ‘AND unlikely to comply in the future’ in the draft guideline is “highly subjective, there is no further guidance on how this could be assessed and it seems only to have been included as a further steer away from custodial sentences.” Another magistrate set out that:

> “A propensity to ignore court orders should continue to be an aggravating factor, it contradicts the approach to bail as this is also considered yet there is no proposal to remove it from the Bail Act. A better approach would be that the court should consider whether the factors contributing to previous behaviour are still present, if so then previous compliance should still be a consideration.” (A magistrate)

The Senior District Judge of England and Wales (Chief Magistrate) stated:

> “Whilst it is of course poor sentencing practice, given the breadth of sentencing options available to simply treat a previous conviction as a basis to cross a higher sentencing threshold than that imposed previously, it is often true that non-compliance with earlier sentences is a valuable indicator to the court when assessing what compliance can be expected now.” (Senior District Judge of England and Wales (Chief Magistrate)

The Council considered this feedback carefully and agreed that, while ‘Unlikely to comply with court orders in the future’ would likely include a consideration of previous history of non-compliance, retaining both ‘History of poor compliance with court orders AND Unlikely to comply with court orders in the future’ ensures that both are taken into consideration.

Finally, the Legal Committee of HM Council of District Judges (Magistrates’ Courts) suggested that the factor ‘Offender does not present high risk of reoffending or harm’ risks confusion when compared to the factor on the other side of the table “The offender presents a risk/danger to the public” as courts may find both columns applying simultaneously. The Council considered this but agreed that as the table includes “factors indicating that it **may or may not be** appropriate”, there will naturally be some overlap and the court must weigh the individual circumstances of the offence and the offender in their determination as to which factors will be used to make a decision on suspension.

Suspended sentence orders

The Council consulted on a new section on Suspended sentence orders with a sub heading on Requirements on a suspended sentence order, and two drop downs on Determining operational and supervision periods of a Suspended Sentence Order and Time remanded in custody or on qualifying curfew before imposing a suspended sentence order.

The Legal Committee of HM Council of District Judges (Magistrates' Courts) suggested some amendments to make the text clearer and a judge highlighted some differences between the applicability of the principles set out in this section for offenders aged 21 and over and offenders aged between 18-20, as well as a clarification regarding the aggregate term. The Council agreed with this feedback and made amendments accordingly.

The Prison Reform Trust, the Magistrates Association, Open Justice Initiative, various charities and many other respondents welcomed the inclusion of the line that outlines that requirements imposed as part of a suspended sentence order are more likely to be predominantly rehabilitative in purpose. On the other hand, some magistrates questioned the assertion that the imposition of a suspended sentence order is both a punishment and a deterrent.

Legislation is clear that a suspended sentence is a custodial sentence which comes with the consequences of a custodial sentence, such as a criminal record. Further, a recent Court of Appeal case (R v Wells, [2024] EWCA Crim 263) underlined the principle that the imposition of a suspended sentence, even without requirements, is punishment:

> "For the avoidance of any doubt, we unequivocally reject the view of the judge that a suspended sentence of imprisonment would be no punishment at all for the applicant because he is unlikely to offend again and is not eligible for additional community-based requirements." (R v Wells, [2024])

The Council agreed therefore that it was important the guideline highlights this and agreed on a new line based on the legislation and recent case law on this matter:

> A suspended sentence order is a custodial sentence; as such, the imposition of a suspended sentence order is itself a punishment, with or without requirements.

This line does not preclude the court from imposing an additional requirement for the purpose of punishment on a suspended sentence order if it was considered necessary. The Magistrates Association and other respondents suggested that it may be helpful to have an indication as to the level and range for a requirement on a suspended sentence

order so that it is clear how requirements should be differentiated compared to requirements on a community order. The guideline is now clear that any requirement(s) imposed for the purpose of rehabilitation should be determined by, and align with, the offender's needs. However, the Council agreed that guidance would be helpful to support sentencers make the determination on the level and range of any requirements imposed for the purpose of **additional punishment** on a suspended sentence order, so sentences do not end up excessively punitive or disproportionate to the seriousness of the offending. The Council agreed to add the following line to provide guidance when the court wishes to impose an additional requirement for the purpose of punishment on a suspended sentence order:

> The court should moderate the intensity, volume or length of any requirement imposed for the purpose of additional punishment so it is not disproportionate to the seriousness of the offending.

Determining operational and supervision periods of a Suspended Sentence Order

There were differing opinions from respondents about the value of including information on operational and supervision periods of a suspended sentence order. A magistrate suggested that this information is well understood by legal advisers who then advise the bench, and as such "emphasising the operational/supervisory period achieves little in my view as they are managed outside of the courts and so has little control over them… [they are] more of an issue for probation." Another magistrate expressed confusion with both drop downs, saying they were not clear.

The Legal Committee of HM Council of District Judges (Magistrates' Courts) suggested that it is misleading to say the operational and supervision periods are the periods '…..during which the offender will be liable to go to custody…if they commit another offence', stating that "since the offender will also be liable to go to custody after the period is over, if they offended during that period." The Probation Service suggested it would be helpful to highlight that the supervision period may not be longer than the operational period. The Council agreed to make amendments based on both these suggestions.

Deferment orders

The Council consulted on a new sub section on deferred sentencing within the Pre-sentence report section. This contained some information in the main body of the guideline, with further information contained in a drop down.

A considerable number of respondents welcomed the inclusion of guidance on deferred sentencing in the draft guideline, including the Durham Police and Crime Commissioner, the National Police Chiefs Counsel and others. A number of magistrates expressed the view that they had either not heard of, or never used deferred sentencing, with others noting that it rarely happens (as the Council was aware), but that the "drop down will be very helpful"; it is "a useful reminder that it's an available option". Similar views were expressed in the research conducted with sentencers during the consultation.

The Crime Free Community Desistance Programme (offered jointly by West Midlands Police, the Probation Service, Staffordshire and other partnership agencies) runs an intensive rehabilitation programme targeting prolific, non-violent adult residential burglary offenders who are given a deferred sentence and an intensive community sentence plan tailored to their individual needs. The Programme gave considerable positive feedback on the inclusion of guidance on deferring sentences in the guideline.

One legal professional suggested that the terminology mirrors the wording of the legislation (sections 3-8 of the Sentencing Act 2020), using 'deferment order' instead of 'deferred sentences', which the Council accepted.

In the draft guideline, the guidance on deferring sentences sat within the PSR section. The Justice Committee suggested that this guidance might more appropriately sit in the Imposition of custodial sentences section or after the Suspended sentence orders section. A court makes a decision to defer before the determination of a sentence and therefore this section could logically sit before the Imposition of community or custodial sentences sections. However, the guidance sets out that when deferring a sentence, the court should specify what type of sentence will be imposed if the offender complies with all the requirements and/or conditions attached, and what type of sentence will be imposed if the offender does not comply with all the requirements and/or conditions attached. The court may therefore need to consider the full Imposition guideline before setting these potential sentences out. Further, as the Council does not intend for the number of deferment orders to increase due to its inclusion in the guideline and as many respondents suggested that instances in which deferring sentences can happen will be rare, the Council decided to move this information to the end of the guideline in its own section.

It was clear from some of the responses that the guidance was not as clear as it could be, with some respondents expressing confusion as to when and how a deferment order could

be passed. The Council therefore decided to amend the first paragraph to make it clearer what a deferment order does and to outline some of the legislative requirements.

A number of respondents expressed concern about the conflict of principles regarding the utilisation of deferred sentencing, specifically the two phrases “deferred sentencing will be appropriate only in very limited circumstances” and “deferring sentence can be a valuable tool”. Professor Peter Hungerford-Welch suggested:

> “…The best approach may be to begin by highlighting the potential value of deferring sentence, and then to highlight the statutory restrictions that apply (and the possible adverse consequences on the offender – and victim – of having the question of sentence undecided for an additional period).” (Professor Peter Hungerford-Welch)

The Legal Committee of HM Council of District Judges outlined that whilst the Council stated in the consultation paper that it is not necessarily intending to influence the use of deferred sentencing, the language in the revised guideline indicates that the court should only defer when considering whether it would result in the possibility of a non-custodial sentence (rather than a custodial sentence if sentenced on the day), and may give the impression that you can only defer to consider a community order as an alternative to custody. To address these concerns, the Council decided to retain the structure and much of the original text from the supplementary information which is already available to magistrates with some minor amendments, replacing the version in the draft guideline.

The Justice Committee supported the submission made by the Sentencing Academy that “there is greater scope for the use of [deferred sentences] than at present” and therefore the use of the word “very” is overly restrictive.” Similarly, the Centre for Justice Innovation stated that there is significant evidence to suggest that deferred sentencing should be used much more commonly than it currently is. However, the Council did not agree that the guideline should aim to increase the number of deferment orders, as it remains the case that they are only appropriate in limited circumstances. It did not therefore make any changes to the text as a result of these proposals.

Humankind indicated that sometimes people are in circumstances which will make it impossible to engage with a sentence, which leads to breaches. They suggest this should be considered in relation to deferred sentencing, giving an example that sometimes services have cause to defer mental health treatment requirements (MHTRs) to allow someone to gain stability first (such as accommodation or employment) but are then faced with the issue of the community order running out of time by the time they are stable enough to engage. However, the Council did not agree with this approach and therefore did not make any changes as a result of this proposal.

Finally, there were a number of suggestions for additional cohorts of offenders for whom the guidance sets out that a deferment order may be particularly appropriate. The draft guideline included the examples of young adults (18-25 years of age) or those who are in

transitional life circumstances. The inclusion of young adults was supported by many, including the National Police Chiefs Counsel. Regarding other suggestions, bringing some of these together, the Justice Committee outlined that it would be helpful to clarify:

> "…by way of a non-exhaustive list examples of what the Council means by 'those who are in transitional life circumstances' (examples that we have noted from the submissions, and generally support as being profiles for whom a deferred sentence may be appropriate, include: pregnant and post-natal women; those with dependent children thus allowing harm to them to be minimised to allow time for arrangements to be made; those in need of treatment for addiction or mental health problems)." (Justice Committee)

Open Justice Initiative pointed out that the Equal Treatment Bench Book already acknowledges that offenders suffering from addiction or mental health conditions may be better able to address their needs during a deferral period. This link was also made the Sentencing Academy and others. The Centre for Justice Innovation suggested that deferment may be appropriate where victims and the offender consent to participate in restorative justice conferencing. The Transition to Adulthood Alliance also mentioned restorative justice in relation to deferring sentencing, referring to the government's White Paper 'A Smarter Approach to Sentencing' (2020) which expressed an intention to encourage the use of deferred sentences to divert more "vulnerable" groups away from further involvement in the criminal justice system and provide "opportunities for restorative justice to be deployed".

The Council considered these recommendations but was concerned that giving any further examples of cohorts would inadvertently exclude other cohorts. The Council felt it was important to allow the court complete discretion to consider whether a deferment order was appropriate or not for a particular offender and their individual circumstances. As such, it retained the example of young adults who will generally more commonly be in transitional life circumstances owing to their age, and 'those who are in transitional life circumstances', leaving all other examples open to the court to interpret based on an offender's individual circumstances.

Flowchart

There were various comments made by respondents on the flow chart. Many respondents correctly identified a spelling error. Some respondents indicated how valuable the flowchart was in going through the guideline, that it was a “useful tool” and “helpful aide”. On the other hand, some respondents indicated the flow chart was not necessary, or not helpful and that “an interactive toolkit”, or “structured checklist” would be more helpful. A number of sentencers who took part in research conducted during the consultation thought that while it could be useful for others, especially new sentencers, or as an aid in training, they would probably not use it. One legal professional supported by the West Yorkshire Bench suggested an entirely new approach to the guideline which separated out the decision process for the imposition of a custodial sentence and for the imposition of a community sentence. The legal professional outlined that this approach would also have the benefit of generating reasons to announce with the sentencing decision. The Council did not agree with the merits of separating out the decision process for different types of sentences and as such did not agree with this proposed approach.

Some respondents questioned the inclusion of reference to the Band D fine in the flowchart when this was not particularly integral in the guideline, and some questioned the weight given to dependents (though some specifically supported this question).

After all updates had been made to the guideline based on consultation responses, it became clear that the flow chart in the draft guideline no longer properly reflected the chronology of the revised guideline. The Council considered several drafts of the flowchart trying to ensure all integral elements of the guideline were taken into consideration, however this was too complicated to be useful. The Council agreed on a simpler flow chart that closely follows both the chronology and structure of the revised guideline to determine the right type of sentence. As such, the flow chart should not be used as a standalone tool without the rest of the comprehensive and important information in the full guideline. Council has therefore included the following text both in the guideline and on the image of the flowchart itself to make this clear:

> This flow chart is a complementary tool to the Imposition of the community and custodial sentences guideline that support sentencers to determine the right type of sentence. It should NOT be used without the guideline, as it focuses only on the questions pertaining to the type of potential sentence and does not include other pertinent guidance, such as the consideration of the purposes of sentencing, requesting a pre-sentence report, and the effectiveness of sentencing, among others. Please read the full Imposition of the community and custodial sentences guideline before using this flow chart.

Equalities

There are a number of equalities issues already outlined in this paper, in particular, where the guideline provides guidance for specific cohorts of offenders (young adults, females, mothers with dependent children, and pregnant and post-natal offenders, and offenders within those cohorts who are from an ethnic minority background), or the list of cohorts for whom a pre-sentence report will normally be considered necessary. The relevant sections of this paper reference and incorporate feedback from respondents on these and any equalities issues related to them.

The revised guideline aims to ensure that courts are aware of the differences and disparities that exist for and between certain cohorts of offenders and that these, and any intersectional disadvantages, are considered as part of a sentencing decision. Where the guideline has provided guidance for, or referenced, specific cohorts of offenders, this is as a result of clear findings from evidence and research on the differences that exist for these cohorts. This research includes the Council's report on Equality and diversity in the work of the Sentencing Council published in January 2023.

The revised guideline sets out that "The suitability and effectiveness of a sentence will depend upon the circumstances of the individual offender." Applying the revised guideline will ensure that courts tailor sentences for each offender according to their specific circumstances that, where relevant, should take into account the considerations in the revised guideline regarding specific cohorts of offenders.

The revised guideline sets out, as all guidelines do, that "Guideline users should be aware that the Equal Treatment Bench Book covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings".

The revised guideline also references and links to the Equal Treatment Bench Book at four additional points and sets out that that courts should refer to this Bench Book for more guidance on how to ensure fair treatment and avoid disparity of outcomes for different groups.

List of respondents

Advance

Alan Beedie

Alexia Deighton

Alun Eynon-Evans

Anawim - Birmingham's Centre for Women

Andrew McGregor

Andrew Seabrook

Appeal – Women's Justice Initiative

Association of Clinical Psychologists

Benjamyn Damazer

Bhatt Murphy Solicitors

Birth Companions

Birthrights

Borland Property Maintenance

Brian Watt

British Association Perinatal Medicine

British Psychological Society

Centre for Justice Innovation

Centre for Women's Justice

Chris Parry

Chris Townsend

Christopher Clarke

Christopher Davidge

Clinks

Consultant psychiatrists, professors of psychiatry and academic psychologists

Crime Free Programme, West Midlands Police

Criminal Sub-Committee of His Majesty's Council of Circuit Judges

Daniel Meyer

David Edwards

David Murtagh

Dr Carly Lightowlers

Dr Tirion E. Havard and Dr Chris Magill

Durham Police and Crime Commissioner

Faster Fairer Justice

Forward Trust

Gerard Jones

Graham Curry

Hibiscus Initiatives

HM Inspectorate of Prisons

Hodge Jones & Allen

Honor Barner

Humankind

Ian Scott

Janet Carter

John Osmond

John Samuels

John Sharrock

Justice and Home Affairs Committee, House of Lords

Justice and Society Research Centre, Institute of Criminology, University of Cambridge

Justice Committee

Justices' Legal Advisers and Court Officers' Service

Kachun Cheng

Karen Anne Birchall

Katharine Long

Kelly Holdaway

Kristian Weaver

LandWorks

Legal Committee of HM Council of District Judges (Magistrates' Courts)

Level Up

Lois Neal

Lucy McKane

Magistrates' Association

Malcolm Hogarth

Marcus Peters

Margaret A Boyle

Martin Alderman

Maternal Mental Health Alliance

Medact
Mignon French
Ministry of Justice
National Police Chiefs Counsel - Courts portfolio
National Women's Justice Coalition
Neil Coles
Nigel Barnes
No Births Behind Bars
North London Bench Consultation Committee
One Small Thing
Open Justice Initiative
Oxfordshire Bench Leadership
Patricia Critchley
Paul Bartlett
Paul Tabinor
Paul Wassell
Paula Carter
Pete Tanner
Peter Barrand
Peter Collins
Peter Jackson
Peter Malcolm
Peter Reed
Philip Davies MP
PPMI - Progressing Prisoners Maintaining Innocence
Prison Reform Trust
Prison Team, Leigh Day
Probation Institute
Probation Service
Professor Ian Neal
Professor Mandeep K. Dhami
Professor Peter Hungerford-Welch
Qi Chen
Rebecca Crane
Restore Justice

Restore Support Network
Revolving Doors
Richard Buckley
Rona Epstein
Royal College of Obstetricians & Gynaecologists
Samaritans
Senior District Judge of England and Wales (Chief Magistrate)
Sentencing Academy
Shaun Morris-Armitage
Shona Minson
Sir Anthony Bottoms
Society of Labour Lawyers - Criminal Law Group
Some members of the Corston Independent Funders' Coalition
Sonia Case
Stephen Blackhurst
Stephen Bubb
Stuart Pudney
Support Not Separation
Terry Moody
The Howard League for Penal Reform
The Law Society
The London Criminal Courts Solicitors' Association
The Lord Bishop of Gloucester, Rt Rev Rachel Treweek
The Lullaby Trust
The Transition to Adulthood Alliance (T2A)
Timotej Velkavrh Blazevic
Unlock
West Yorkshire Bench
William Ashcroft
Women in Prison
9 other anonymous individual respondents
9 other anonymous judicial respondents

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