

Sentencing Council meeting:
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1. ISSUE

1.1 This is the second substantive paper on the overarching guideline: Imposition of community and custodial sentences. The recommendations below cover proposed new sections: deferred sentencing, the five purposes of sentencing, and points of principle on issues affecting specific cohorts of offenders. Consideration of the remaining in-scope sections will be presented at the February/March Council Meeting; namely: *suspended sentence orders, electronic monitoring and the sentencing flow chart*. Similar to the last Imposition paper, most proposals for specific text for the guideline are a draft suggestion hoped to generate debate and feedback, rather than text to be agreed today.

2. RECOMMENDATION

That the Council considers and agrees the new inclusion of references to:

- I. Deferred sentencing
- II. the five purposes of sentencing, including information on rehabilitation preventing crime more generally
- III. points of principle on issues affecting specific cohorts of offenders

I. Deferred sentences

2.1 Deferred sentences allow a sentencer to defer a sentencing decision for up to six months, with the option to attach specific requirements or conditions for the offender to fulfil/abide by in that period. The Sentencing Act 2020 sets out the purpose of a 'deferment order', namely that it is to enable a court, in dealing with the offender, to have regard to -

- (a) the offender's conduct after conviction (including, where appropriate, the offender's making reparation for the offence), or
- (b) any change in the offender's circumstances.

2.2 This is commonly done, and is seen as especially suitable, either for offenders who will have a significant change in circumstances between the date of offending and the (potential) date of sentence (which may mean that their risk of re-offending will or can be

reduced), or for offenders on the custody threshold. As our Council member, Dr Elaine Freer, in her 2022 'Review of Practice' for the Sentencing Academy, states: "*a deferment allows the court to assess whether the defendant is committed to a change in lifestyle to move away from criminality*" (page 5). To be clear, deferred sentencing is not the same as a deferred prosecution agreement, nor is it the same as an adjournment, which does not have a specific limit nor conditions attached (other than any bail conditions).

2.3 There is currently no reference to deferred sentences in any of the sentencing guidelines, but some limited guidance is set out in explanatory materials to the MCSG (**Annex A**). This page is not referred to or linked in any guideline and can only be found through the search function or through the explanatory materials page. This guidance emphasises that deferred sentences will only be appropriate in "*very limited circumstances*".

2.4 Scotland also has the legislative power to defer sentencing "*for a period and on such conditions as the court may determine*" (The Criminal Procedure (Scotland) Act 1995). The Scottish Sentencing Council notes on their website that "*a judge can postpone a sentence, usually for good behaviour, to a later date. If offenders stay out of trouble during that time, the judge will normally give a less severe sentence than if they get into trouble.*" The Scottish government published a high-level guide to the purpose, policy rationale and operation of structured deferred sentences (SDS) in February 2021, which involves a structured intervention managed by justice social work services. Of this, they note that deferring sentence can help prevent offenders becoming further drawn into the justice system and that it provides an "*opportunity for individuals to stabilise their circumstances and assess their motivation and ability to comply with a period of statutory supervision, again potentially reducing the risk of future breach and providing an alternative to short periods of custody.*" In 2020-21, offenders were admonished (i.e. given a warning) in 42 per cent of the 450 SDSs, which alludes to SDSs being given for lower level offending.

2.5 In England and Wales, data on the volume and efficacy of deferred sentencing are very limited, and there is no published research examining their outcomes. It is not possible to isolate and count deferred sentences occurring in the Crown Court. The known volume of deferred sentences in magistrates' courts was around 550 in 2020 and around 450 in 2021, and has been declining since 2011, however, it is not known whether this is accurate.

Requirements

2.6 The Sentencing Act 2020 sets out that the court may impose requirements during a deferment "*as to the offender's conduct*" and specifies examples that these may include requirements as to the residence of the offender, or restorative justice (RJ) requirements. The Act does not limit when a deferment order may be available, but sets out that the

offender must consent, undertake to comply with any requirements, that the order is in the interests of justice and, if the requirement includes RJ, that the participants consent.

2.7 There is no mention of deferred sentencing in the Criminal Procedure Rules or Criminal Practice Directions, nor the Better Case Management (BCM) Handbook. The Equal Treatment Bench Book (ETBB) mentions deferred sentencing, and specifies offender needs that may be addressed during a deferral period, namely addiction or mental health.

2.8 The Adult Court Bench Book and the pronouncement card sets out text on 'deferment of sentence' for magistrates' courts. The example requirements given in the Adult Court Bench Book are "*a requirement as to residence (for the whole or part of the deferment period) and to make appropriate reparation*" (page 17). The Crown Court Compendium (Part II: Sentencing) also sets out text on deferred sentencing for Crown Courts, with examples of requirements including "*residence in a particular place and the making of reparation*" and that the court "*may also impose conditions of residence and co-operation with the person appointed to supervise...*" It states "*the circumstances in which such an order will be appropriate are relatively rare*" (pages 2-8). Roberts, Freer and Bild in 'The Use of Deferred Sentencing in England and Wales (A Review of Law, Guidance and Research)' gave drug or alcohol treatment as examples of commonly imposed requirements (p. iv).

2.9 The explanatory materials on deferred sentencing states that the deferment conditions could be "*specific requirements as set out in the provisions for community sentences, restorative justice activities (Sentencing Code, s.3) or requirements that are drawn more widely.*" If the Council considered it beneficial to align with other court guidance and what is common in practice, this list could be amended.

2.10 The court has the same sentencing options after deferment as it would have done had it passed sentence on the day that it made the deferment order (Section 11, Sentencing Act 2020) and will state both the sentence an offender will receive if deferral conditions are complied with (i.e. a less severe sentence), and the sentence they would receive if deferral conditions are not complied with (i.e. a more severe sentence). Where the defendant has complied with the conditions, they have a legitimate expectation of receiving the lesser sentence (Attorney General's References Nos 36 and 38 of 1998 (R v Dean L and Jones) [1999] 2 Cr App R(S) 7).

Sentence length

2.11 Case law has refined the application of deferred sentences over the years. The Court of Appeal confirmed in Attorney-General's Reference 101 of 2006 (R v P) [2006] EWCA Crim 3335 that it is inappropriate to defer a sentence if an immediate custodial sentence is inevitable regardless of the conditions of the deferment. In Davis [2020] EWCA Crim 1701,

the court stated “*deferral is really there for cases where a community order is at least a realistic possibility if the judge were to pass sentence on that day.*’ We can therefore assume that deferred sentences are most appropriate for those on the ‘cusp’ of custody, or between a community sentence and another disposal (whether more or less punitive), and that it is inappropriate to defer sentences if an immediate custodial sentence is inevitable. This principle is also backed up by the Crown Court Compendium (Part II).

2.12 Deferring sentence has in the past been used to ‘test’ an offender’s suitability for suspension of a custodial sentence. A deferred sentence may be a good trial for sentencers unsure about whether a suspended sentence will be duly complied with by the offender, without having to go through breach and resentence, particularly if that offender’s circumstances may be volatile or changing. Should the offender be on the cusp of custody, this limited period of time may prove whether they are suitable for a suspended sentence. This deferment period may also be a suitable ‘test’ for the offender’s suitability for a particular requirement which could then be attached to a suspended sentence order.

2.13 As such, Council could decide to specify that deferred sentences are appropriate for sentences which have a realistic possibility of a sentence up to 24 months custody (i.e. are possible to be suspended). The more severe sentence, if conditions of deferment are not complied with, could be over this threshold, but the less severe sentence, if conditions of deferment are complied with, could then be a suspended sentence order.

Benefits of referencing deferred sentencing in the imposition guideline

2.14 The Ministry of Justice’s Sentencing White Paper ‘A Smarter Approach to Sentencing’ in September 2020 included a section on Deferred Sentencing, which set out the commitment of the government to encourage courts to use existing legislation on deferred sentencing and services such as Liaison and Diversion to divert vulnerable offenders away from the justice system. The White Paper referenced women, in particular, whom “*are likely to benefit from referral to a woman’s centre*” and noted, in reference to the commitment to increase the use of deferred sentencing, that:

The majority of women sentenced to custody receive sentences of less than 12 months, often for persistent low-level offences, and there is a higher prevalence of reported needs among women in custody, including around substance misuse, trauma and mental health. (page 52).

2.15 Julian Roberts in his article ‘A fresh look at deferred sentencing’ agreed with the notion that a wide range of offenders (including vulnerable female offenders) may benefit from the opportunity to demonstrate sufficient progress towards desistance to justify a noncustodial sentence, but outlined that frequent deferring of sentences may have the

potential to create disparities (page 4). Julian Roberts together with Elaine Freer and Jonathan Bild wrote about the need to revisit the current guidance in their combined paper, questioning the intention of guidance, rather than the information in a guideline (a question/issue relevant more widely than just deferred sentencing).

Proposal

2.16 The first question is whether the Council would be comfortable with a small increase in the numbers of deferred sentences. If Council were content with this, Freer, Bild and Roberts set out in their July paper: *“One way of attracting further attention to the deferral provision would be to issue a guideline for courts contemplating deferral. In the alternate, the Council could introduce reference to deferral into its imposition guideline which provides guidance on the use of the principal disposals.”*

2.17 In the July meeting, members of the Council cautioned that it was essential to agree on the purpose and scope of deferred sentencing. The purpose of the recommendation put forward below, therefore, is to ensure all sentencers are aware of this option, particularly in relation to defendants who may benefit from a deferral of sentencing. A possible impact of this may be that the number of deferred sentences for appropriate defendants increase.

2.18 In the last meeting, Council agreed to an updated chronological structure of the guideline, starting with a new section on thresholds, then a section on pre-sentence reports, moving onto imposition of community orders. It is proposed therefore that the imposition guideline begins with a short reference to deferred sentencing, either before or after the (new) section on thresholds. This is proposed as the consideration of a deferral would happen prior to a consideration of sentencing options, however another option is for this to go elsewhere in the guideline. In either case, this could read:

Note: Deferred Sentences

The court may consider whether it would be appropriate, beneficial and in the interests of justice for sentencing to be deferred for up to six months and may attach conditions to that deferment. If the offender complies with these conditions, a different sentence will be justified at the end of the deferment period. As such, deferred sentencing may be appropriate for sentences which have a realistic possibility of a sentence of up to 24 months custody.

If deferring the sentence is a consideration, please see the Deferred Sentencing Guideline/expanded explanation here ([link](#)).

2.19 Should the council agree to the inclusion of reference to deferred sentences in the Imposition Guideline, there is a presumption that the number of deferred sentences will increase. Probation consider this to be a positive increase, noting cases in which

requirements have been identified post-sentence as not being suitable for the offender, and have as such been breached and/or had to go back to the court to be resentenced. The Probation central court team consider a deferment period, particularly when requirements overseen by probation are imposed (such as a Rehabilitation Activity Requirement (RAR)), a useful 'trial' to understand whether a particular offender will engage with the type of sentence and its requirements ultimately imposed.

Question 1: Does the Council wish to make reference to deferred sentencing in the imposition guideline?

Question 2: Does the Council have any feedback on where this would be most appropriate to be in the guideline?

Question 3: Does the Council wish to make any amendments to the text at para 2.18?

Question 4: Does the Council wish to link this reference to further information on deferred sentencing, either the explanatory material on deferred sentencing, or to a new guideline on deferred sentencing?

2.20 Should Council agree to the link to the explanatory materials in the imposition guideline, it would be beneficial to review this text. Julian Roberts in his 2021 article states "*It is unclear why the Sentencing Council took such a restricted view of the ambit of deferred sentencing*", noting in particular the line "*Deferred sentences will be appropriate only in very limited circumstances*".

2.21 Recent academic commentary has suggested that courts might benefit from greater guidance on deferred sentencing regarding the kinds of offenders for whom deferral is appropriate (such as specific profiles of individuals or factors indicating when deferring may be appropriate or inappropriate) or guidance that addresses key procedural aspects of the decision, such as the kind of requirements pertinent to deferral, or advice regarding the question of how to amend a sentence if an offender duly complies with a deferment period and its requirements or conditions. The Sentencing Guidelines Council guideline used to read "*if the offender complies with the requirements, a different sentence will be justified at the end of the deferment period*"... *this could be a community sentence instead of a custodial sentence, or a fine instead of a community sentence*', so this information may be logical for inclusion again. It may also be worth the guidance being updated re case law, such as when a sentence is deferred, the defendant is no longer on bail (Mizan [2020] EWCA Crim 1553).

2.22 There are therefore a number of specifications that could be made either in the proposed text within the imposition guideline, or in an amendment of the guidance (or new guideline for deferred sentencing). This could be, for example, determining specific requirements or conditions that may be most pertinent when deferring sentence, bringing together the various court documents and legislation, such as the below:

[Existing line in the explanatory materials] The court may impose any conditions during the period of deferment that it considers appropriate. **The type of requirement/s imposed during a period of deferment should be dependent on the offender’s individual needs and circumstances. Requirements may include residence requirements, restorative justice (RJ) requirements, drug or alcohol addiction or mental health treatment requirements or a requirement to make appropriate reparation.**

2.23 Freer, Bild and Roberts make the case for deferred sentences being particularly important for young adults, noting the “*growing consensus in many jurisdictions that when sentencing young adults, courts should make an additional effort to restrict the use of custody as a sanction.*” They note that deferred sentencing “*offers an additional means of sparing a young adult imprisonment and also encouraging (and rewarding) their attempts to address the causes of their offending during the period of deferment...[and] a sensible and responsive mechanism that enables the young person to show that they can follow a law-abiding life*”, referencing the high proportion of young adults in custody (page 20).

2.24 The different treatment of young adults (18-25 years) was discussed as part of the Equality and Diversity paper in the October Meeting, concluding that this cohort should continue to be considered as part of the expanded explanations evaluation as to whether a separate overarching guideline is necessary, and be considered as part of the imposition project. Highlighting the benefit of deferred sentencing in particular for young adults may be one way in which this cohort is better dealt with in the imposition guideline.

2.25 While different cohorts of offenders are being considered in reference to encouraging PSRs for particular cohorts, should Council wish to include reference to deferred sentencing and for that reference to include specific cohorts, both female offenders and young adults (due to comments listed above, e.g. whose personal and professional lives have a higher possibility of changing rapidly) would be a welcome addition by commentators.

2.26 Therefore, another specification could be a line similar to the below:

Deferring sentencing may be particularly appropriate for young adults (18-25 years of age) and female offenders.

2.27 Judicial continuity is worth mentioning in this discussion. Some Council members may have a similar view of the purpose of guideline as in the discussion on PSRs in the last

meeting: that the guidelines should state what should happen rather than take into account operational complexities. However, it is worth noting some of the practical realities of the court, in particular the magistrates court, in relation to deferred sentencing. While it is not in legislation, a deferred sentence almost always returns to the same sentencer after the deferment period. Whether this is practicable in magistrates' courts is a matter for discussion, and should Council agree to include reference to deferred sentencing at the beginning of the imposition guideline, further discussion in a later meeting can consider how practical considerations in the magistrates' court should be reflected.

Question 5: Does the Council wish to update the paragraph in the imposition guideline or the current explanatory material on deferred sentencing with any of the above considerations, or indeed develop a guideline on deferred sentencing?

II. The five purposes of sentencing, including information on rehabilitation preventing crime more generally

Purposes of Sentencing

2.28 Currently, the five purposes of sentencing are not listed in the imposition guideline, though the first line of the guideline under 'General Principles' section references them (without direct mention of the reduction of crime/deterrence or the protection of the public):

Community orders can fulfil all of the purposes of sentencing. In particular, they can have the effect of restricting the offender's liberty while providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities.

2.29 In the same section, there is a specific reference to the purpose of punishment, though specifically in reference to the imposition of particular requirements rather than overall sentence, reflecting section 208 of the Sentencing Code:

Save in exceptional circumstances at least one requirement must be imposed for the purpose of punishment and/or a fine imposed in addition to the community order. It is a matter for the court to decide which requirements amount to a punishment in each case.

2.30 The purpose of punishment is also referenced in the Community order levels section, though again in reference to the imposition of requirements rather than overall sentence:

At least one requirement MUST be imposed for the purpose of punishment and/or a fine imposed in addition to the community order unless there are exceptional circumstances which relate to the offence or the offender that would make it unjust in all the circumstances to do so.

2.31 The overarching general guideline however does currently list the five purposes of sentencing in Step 1 (Reaching a provisional sentence). This text can be seen below:

The court should consider which of the five purposes of sentencing (below) it is seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence.

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

2.32 Academic commentary and criminal justice organisations have previously called for greater direction from the Council about the purposes of sentencing. Transform Justice, for example, set out in a 2020 paper (The Sentencing Council and criminal justice: leading role or bit part player?) by Rob Allan, that:

*“The Council’s guideline on overarching principles rightly points out that courts need to consider which of the five statutory purposes they are seeking to achieve through the sentence that is imposed, **but offers no guidance about how courts should set about choosing the purpose in a particular case. Prioritising reform, rehabilitation and reparation will in most cases lead to a more effective sentence than simply choosing punishment.**” (page 11)*

2.33 In the same paper they say:

“In the majority of cases the reduction of crime and protection of the public are best achieved through reform and rehabilitation rather than punishment.” (page 10)

2.34 In response to the Council’s consultation: What next for the Sentencing Council? In September 2020, the Prison Reform Trust set out a similar view; that rehabilitation is important for reoffending, making reference to guideline development:

“The CJA 2003 states that the process of sentencing involves a balance of five purposes, only two of which (the reduction of crime (including its reduction by deterrence) and the reform and rehabilitation of offenders) are relevant to reoffending. However, the Council should be transparent about what purposes it chooses to prioritise and the evidence, including on reoffending, that goes into informing its deliberations.” (page 12).

2.35 We can assume that the general guideline applies mostly where no offence specific guideline exists, and that in reality sentencers do not always open the general guideline when they sentence. Initial data from the first phase survey of the user testing project alludes to this being the case (with a key theme in the reasoning being ‘familiarity’ with the guideline). This does however need to be triangulated by the ongoing second qualitative phase of the user testing project. We can assume that the imposition guideline is more generally, widely and practically considered and applied, as it is designed to be read alongside offence specific guidelines, rather than standalone.

2.36 It was argued by Anthony Bottoms in his 2017 paper ‘A Report on Research to Advise on how the Sentencing Council can best Exercise its Statutory Functions’ that inclusion of the purposes of sentencing in offence specific guidelines would improve public awareness. This was noted before there were individual web pages in a dedicated area of the website however, so public awareness may be better addressed through the public facing website pages. They could however be referenced in imposition.

2.37 The terminology used in section 57 of the Sentencing Code is that the “court must have regard to the following purposes of sentencing”. The line in the general guideline does not exactly align with the legislation, as it asks courts to consider which of the five purposes of sentencing it is seeking to achieve, rather than having regard to them generally. It would be helpful to have a Council discussion on whether it is correct to ask sentencers to consider which purpose/s of sentencing that the sentence (and/or package of requirements) is expected to fulfil. Given their overlap, in the majority of cases, sentencers should and will be aiming to achieving multiple, or all, of the five. It can also be assumed that the majority of sentencers are already aware of the requirement to have regard to the purposes of sentencing and what these are.

2.38 The text proposed below for the imposition guideline is therefore more aligned with that in the Sentencing Code, as below. Council may wish to consider an amendment to this text in the general guideline at a later date.

The court must have regard to the five purposes of sentencing when determining sentence. These are, in no particular order:

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

Question 6: Does the Council wish to include the five purposes of sentencing in the imposition guideline?

Question 7: Does the Council wish to make any amendments to the proposed text?

2.39 As was suggested by members in the discussion on Effectiveness, the inclusion of these purposes may provide an opportunity for the Council to say something about these purposes, over and above simply listing them. It was suggested by several members of the Council in the conversation on effectiveness in the October meeting that this inclusion may offer the opportunity for Council to reflect the findings in the Effectiveness review, by referencing rehabilitation and its role in reducing reoffending and preventing crime.

2.40 There is a wealth of research in this area, and while the Guideline mentions rehabilitation in questioning whether it is unavoidable that a sentence of imprisonment be imposed, it is not set out what impact rehabilitation may have on preventing crime. The findings of the Effectiveness literature review presented to Council in the October meeting highlighted, in short, that short custodial sentences are less effective than other disposals at reducing reoffending, increasing length of sentences is not effective for reducing reoffending for offenders with addiction or mental health issues, sentences served in the community may be more effective at promoting positive outcomes, and more.

2.41 The imposition guideline could mention *effectiveness* in two different ambits: effectiveness of the overall sentence type discussed above, and/or effectiveness of individual requirements according to the individual offender's circumstances. Discussion on the latter will be reserved for a future meeting when the list of requirements is considered. For the former, no academic body or individual have so far suggested *how* the Council might refer to effectiveness, and therefore, there are a number of options for how to proceed.

2.42 One option is that should the Purposes of sentencing are agreed to be added to the guideline, a line underneath the list of purposes could urge courts to consider the research on the relative effectiveness of different sentencing options on reducing reoffending. This could look like something like the below:

<p>The purpose 'reform and rehabilitation of offenders' in particular can contribute towards the other purposes 'protection of the public' and the 'reduction of crime'. Research shows that in some circumstances, sentences prioritising rehabilitation may be more effective at reducing the risk of reoffending compared to that of a short custodial sentence.</p>

2.43 If the Council wanted to say more, or was minded to be more specific on what the effectiveness research concludes, a new Explanatory Materials page (or similar) could be developed that would be linked in this section (for example, titled something like: 'Effectiveness of Sentencing Options in Reducing Reoffending'). If Council wishes to develop

a separate page, this could be drawn up for consideration at a later date. The text in the imposition guideline could read something like the below:

Sentencers should consider the research on the relative effectiveness ([link to explanatory materials](#)) of potential sentencing options on reducing reoffending when considering a suitable sentence.

2.44 Another option is for the Council to say more about each individual purpose, not just reform and rehabilitation as suggested in the last discussion on Effectiveness. A line on each of the purposes can be drawn up at a later date with the support of a working group.

Question 8: Does the Council wish to either a) include a line underneath the purposes of sentencing on the effectiveness of rehabilitation; b) say more via a link to a new Explanatory materials on the topic (to be developed), or c) say more about each of the purpose of sentencing (to be developed)?

Extra step or “step back”

2.45 Bottoms in his 2017 article states that guidelines are mainly ‘censure based’, (punishment is imposed in order to censure inappropriate behaviour), and that it *“is recommended that, while maintaining the primary focus on censure, appropriate attention is also given to consequentialist purposes [deterrence and rehabilitation].”* He sets out in some detail considerations around how the Council should reflect rehabilitation issues (research on the relative efficiencies of short custodial sentences v community disposals), concluding in suggesting an extra step in offence-specific guidelines as to whether custody is unavoidable – mirroring similar questions already set out in the imposition guideline.

2.46 An “extra step” has been discussed by Council for different reasons over the last few years. In the ‘What Next for the Sentencing Council?’ consultation in relation to highlighting to sentencers the purposes of sentencing, it was suggested that there could be a “step back” step after aggravation and mitigation to consider whether the sentence arrived at would serve the purposes of sentencing and/or would be “effective” for the offender. Something similar exists in the health and safety guidelines.

2.47 Most recently, an ‘extra step’ was discussed in relation to the Equality and Diversity paper and the Effectiveness literature review in the October and November meetings. The former suggested that an extra step could allow sentencers to *“review the sentence they have arrived at with mitigating factors and the offender’s personal circumstances in mind”*, due to a finding that upward factors had a stronger affect than downward factors and that mitigating factors might not have a sufficient impact on sentencing outcomes because they are considered only at Step 2.

2.48 With this in mind, it is proposed that in addition to the new section on Purposes of Sentencing, a line or 'step' is added asking sentencers to 'step back'. This was suggested by some members in the October meeting. This could be after the Imposition of Community Orders section and again after the Imposition of Custodial orders section. This could read something like the below. It would be grateful to have Council's feedback on what elements of this line are necessary and what elements are not.

Review of the Proposed Sentence

The court should 'step back', and review whether the sentence it has preliminarily arrived at fulfils at least one of the purposes of sentencing, and where relevant, rehabilitation in particular, which research shows may be more effective at reducing the risk of reoffending compared to that of a short custodial sentence.

Question 9: Does the Council agree to include some text referring to reviewing the proposed sentence with rehabilitation in mind? What feedback does the Council have on the above draft text?

III. Points of principle on issues affecting specific cohorts of offenders

Equal Treatment Bench book (ETBB)

2.49 The imposition guideline does not currently include any specific information on, or points of principle about, sentencing specific cohorts of people. It was considered necessary in the scoping discussion of this guideline to review this. There are a number of proposals for Council to consider and these are all shown in the same paragraph at the end of this section.

2.50 At the October meeting, Council agreed to include reference to specific cohorts in the PSR section for whom PSRs may be particularly important. While the specific cohorts and the terminology have not yet been agreed, the example cohorts and framing were based on what cohorts are already suggested that a PSR would be particularly important in the expanded explanations for the purpose of bringing these cohorts together. After applying feedback, the draft list (to be considered at a later date) for the PSR section is below:

A pre-sentence report may be particularly important if the offender is:

- *female*
- *a young adult (18-25 years)*
- *a primary carer (see expanded explanation on primary carers which outlines impact of custodial sentences on dependants)*
- *from a minority ethnic background*
- *from a cultural background (whether social class, ethnicity or other) unfamiliar to the judge*
- *has disclosed they are transgender*

- *has any drug or alcohol addiction issues*
- *has a learning disability or mental disorder*
- *Or: 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.*

2.51 Out of the list above, points of principle for sentencing may be most appropriate for **female offenders, young adults, primary carers and offenders from a minority ethnic background**. Arguably, PSRs are a more pertinent consideration for specific cohorts of people than a particular sentencing approach is. For example, 'points of principle' for offenders with drug or alcohol issues would be difficult to develop, but it is clear how this cohort of people would benefit from a PSR assessing suitability for treatment requirements. In any case, most of these cohorts of offenders would be 'caught' by the reference and link to the ETBB at the top of every guideline:

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.

2.52 The first proposal for Council to consider is reiterating this line within the Imposition Guideline, by adding the line "*The [Equal Treatment Bench Book](#) (link) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system.*" This can be seen at the end of this section with all the proposed changes below and Council may wish to consider the whole paragraph at once.

Current overarching guidelines

2.53 As Council is aware, there is currently an overarching guideline on one of the above-mentioned cohorts: offenders with mental disorders, developmental disorders or neurological impairments. There is, however, no reference or direct link to this in the Imposition Guideline. The overarching guidelines can only be found via the Overarching Guidelines header from the menu on the left or in certain droppables.

2.54 Initial results from the unpublished survey in phase 1 of the user testing project indicated that just under 46 per cent respondents said that they 'accessed and applied' the sentencing offenders with mental disorders guideline in most or every case where it was relevant to the case. These results are still being analysed and need to be triangulated with the phase 2 qualitative research, it can be concluded that it would at least not be unhelpful to direct sentencers to these within the imposition guideline.

2.55 It is recommended, therefore, that the imposition guideline both refers and provides a direct link to this overarching guideline to ensure these can be easily navigated to when sentencing offenders with mental disorders, developmental disorders or neurological impairments. This would be within a paragraph that refers to sentencing different cohorts of people, which can be seen at the end of this section.

2.56 The Council could also decide to refer and link to other overarching guidelines, such as the Domestic Abuse guideline, but this is considered not relevant to points of principle on issues affecting sentencing particular cohorts (as the domestic abuse guideline is of particular relevance for offences committed in a domestic context).

Female offenders

2.57 The Expanded Explanations, across various categories, give sentencing considerations for some cohorts of offenders; specifically: **young adults, carers, old/infirm offenders, neurodiverse offenders, physical disabled offenders**. It is notable that there is no reference in any of the expanded explanations specifically on **female offenders**, only related references such as 'sole or primary carers'. In November 2021, the Council made a commitment in its response to the ten-year consultation to "*Consider whether separate guidance is needed for female offenders or young adults by conducting an evaluation of the relevant expanded explanations*" after responses to the consultation most frequently called for a guideline or guidance for sentencing female offenders.

2.58 Since this commitment was made, the Justice Select Committee in their report 'Women in Prison' in July 2022 directly recommended the Sentencing Council consider whether an overarching guideline or guidance for sentencing female offenders is required, and it has been called for by various organisations over the years.

2.59 It is worth the Council focusing their attention to the section of the Sentencing Council's Effectiveness literature review that comprehensively sets out the myriad of issues for sentencing female offenders, which can be seen at **Annex B**. Further, the Effectiveness review set out reoffending data: females are least likely to reoffend when cautioned (12.1 per cent) and most likely to reoffend when given custody (56.1 per cent).

2.60 While the expanded explanation review is starting in the new year, it is recommended that before this concludes, the Council already considers some lines referring specifically to sentencing female offenders in the same paragraph as the issues outlined above. An example of this, together with the above proposals, is provided below and it would be useful to hear Council's views on this draft text below.

2.61 If the expanded explanation review concludes before the Imposition guideline consultation, and concludes that the Council should develop a separate overarching guideline for female offenders (or indeed for young adults), this can then be added as a direct link in the below text in a similar way to the mental disorders' guideline reference, replacing the few suggested lines with a link to this new overarching guideline.

The effectiveness of a sentence will be based on the individual offender. The [Equal Treatment Bench Book](#) (*link*) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. The Council has issued overarching guidelines for consideration in the sentencing of [offenders with mental disorders, developmental disorders or neurological impairments](#) (*link*). Courts should review this guideline if it applies to the case. In addition, courts should be aware that research suggests that female offenders have different criminogenic needs and an immediate custodial sentence may be less effective if it fails to address these needs. There are fewer female prisons than male prisons which may mean that female offenders are at a greater risk of being housed further away from their families and communities. Research also suggests that female offenders are at a greater risk of being homeless and unemployed than men after release. Courts should take this into consideration.

Question 10: Does Council wish to make reference to the Equal Treatment Bench Book within the guideline?

Question 11: Does Council wish to provide a direct link to the overarching guideline on *sentencing offenders with mental disorders* within this guideline?

Question 12: Does the Council wish to provide a link to any other overarching guideline, such as the Domestic Abuse guideline?

Question 13: Does Council wish to include points of principle for sentencing female offenders within this guideline?

Question 14: Does the Council wish to include points of principle for sentencing any other cohort of offenders?

3. EQUALITIES

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

4. IMPACT AND RISKS

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

Current Deferred Sentences Explanatory Materials

Deferred Sentences

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.

Always consult your legal adviser if you are considering deferring a sentence.

The court is empowered to defer passing sentence for up to six months ([Sentencing Code, s.5](#)). The court may impose any conditions during the period of deferment that it considers appropriate. These could be specific requirements as set out in the provisions for community sentences, restorative justice activities ([Sentencing Code, s.3](#)) or requirements that are drawn more widely. The purpose of deferment is to enable the court to have regard to the offender's conduct after conviction or any change in his or her circumstances, including the extent to which the offender has complied with any requirements imposed by the court.

The following conditions must be satisfied before sentence can be deferred ([Sentencing Code, s.5](#)):

1. the offender must consent (and in the case of restorative justice activities the other participants must consent);
2. the offender must undertake to comply with requirements imposed by the court; and
3. the court must be satisfied that deferment is in the interests of justice.

Deferred sentences will be appropriate only in very limited circumstances.

- deferred sentences are likely to be relevant predominantly in a small group of cases close to either the community or custodial sentence threshold where, should the offender be prepared to adapt his behaviour in a way clearly specified by the sentencer, the court may be prepared to impose a lesser sentence;
- sentencers should impose specific and measurable conditions that do not involve a serious restriction on liberty;
- the court should give a clear indication of the type of sentence it would have imposed if it had decided not to defer;
- the court should also ensure that the offender understands the consequences of failure to comply with the court's wishes during the deferment period.

If the offender fails to comply with any requirement imposed in connection with the deferment, or commits another offence, he or she can be brought back to court before the end of the deferment period and the court can proceed to sentence.

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The Effectiveness of Sentencing Options on Reoffending, Sentencing Council, page 56-57

7.4 Females and the impacts of disposals

Research has suggested females have different criminogenic needs. This may have implications for the effectiveness of sentencing and what works to reduce reoffending. Notably, in 2007, the influential Corston Report called particular attention to the plight of vulnerable women caught up in a criminal justice system that was largely designed for men. Accordingly, imprisonment may be a less effective sentence for women if it fails to address their needs.

Additionally, women may experience prison more harshly due to their histories of trauma and feeling greater discord at being distant (both farther away geographically than males due to fewer women's prisons and physically in a personal relationship perspective) from family and children. This different experience may also mean that custodial sentences have different effects based on gender. Concerningly, the negative effects of imprisonment may be amplified for females. Indeed, officials are concerned with the high rate of women committing self-harm in English prisons, with almost 12,000 self-harm incidents recorded in the fiscal year ended 2021. It is also relevant to the general lack of female-oriented treatment programming such that any such services typically offered to females were originally designed for men, despite there being treatment-relevant differences between the genders. A further difference is of relevance, as indicated in an MoJ report. In the two years ending in fiscal 2021, MoJ found that women were more likely than men upon release from custody to be either homeless or rough sleeping and less than half as likely as men to be employed.

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